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Teach Your Citizens Well: Demeaning Government Speech, Equal Protection Animus, and Government's Legitimate Power

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TEACH YOUR CITIZENS WELL: DEMEANING GOVERNMENT SPEECH, EQUAL PROTECTION ANIMUS, AND GOVERNMENT'S LEGITIMATE POWER

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This Essay, written as part of a symposium on Helen Norton's book on government speech, considers the role the Supreme Court's animus doctrine can play in limiting government speech that denigrates minorities. After Part I frames the issue, Parts II and III consider the doctrinal roadblocks and complexities, most notably the disparate impact requirement, that attend equal protection attacks on such speech. As a possible response to those roadblocks and complexities, Part IV traces the history of animus doctrine and explains its current status in equal protection law. It also explains, however, that while animus doctrine can often play a useful role in avoiding obstacles that bedevil other equal protection doctrines, one thing it cannot do is avoid the disparate impact requirement that in the past has doomed equal protection challenges to denigrating government speech.

Part V considers the possibility that animus-style reasoning can nevertheless play a useful role in combatting such speech, by transplanting its insights into an analysis that focuses on government's legitimate powers. Part V observes that any legitimate exercise of government power must stem from government's pursuit of a legitimate interest. Thus, if government is deemed to have acted based on what the animus cases call "a bare . . . desire to harm a politically unpopular group," then it should be understood as having acted beyond the legitimate scope of its power. A powers approach of this sort avoids the problems the Essay earlier identified as impeding an equal protection analysis. It also provides the more conceptual benefit of linking animus doctrine to American constitutional law's nineteenth century antecedents—most notably, that earlier era's focus on the legitimate reach of government's "police power."

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Part VI applies this powers approach, both to cases in which government speech is collateral to a substantive regulatory program, and to cases involving pure government expression, for example, when government expresses the polity's values by displaying particular symbols. Those applications make it clear that a powers approach does not make otherwise-difficult questions easy. But the Essay concludes in Part VII by arguing that, at the very least, a powers approach asks the right questions. Continued work on its proper application will assist in reaching the right answers to those hard questions.

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I. INTRODUCTION

The government's use of its authority to express hateful or demeaning ideas presents a thicket of problems. Clearly, such speech is deeply problematic. The quickest glance at twentieth century history reveals the substantive horrors whose paths were smoothed by government speech demeaning or attacking minorities. From Nazi Germany to Rwanda to many other places in between, history has demonstrated that demeaning government speech seriously threatens societies' ability to live in peace and harmony.[1] Yet a variety of issues cloud the

1. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 304 (1952) (Jackson, J., dissenting) ("Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities."). Despite Justice Jackson's status as a dissenter in *Beauharnais*, he agreed with the majority's proposition that group libel statutes could be constitutionally enacted. *See id.* at 299 ("I agree with the Court that a State has power to bring classes 'of any race, color, creed, or religion' within the protection of its libel laws, if indeed traditional forms do not already accomplish it."). That said, subsequent doctrinal developments—most notably the Court's seminal decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964)—strongly suggest that *Beauharnais*, although never formally overruled, is no longer good law. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-17, at 926–27 (2d ed. 1988).

question of how to conceptualize such speech in a way that allows for meaningful legal limits.

These difficulties arise from the characteristics of government speech itself. At first glance, one might associate government speech, and government's power to engage in speech, with individuals' rights to free speech. After all, that right extends beyond human beings to include associations, such as corporations. Thus, it might seem only a short conceptual step to conclude that, just like other associations, governments as well should be thought of as enjoying free speech rights.[2] But whatever the intuitive logic of that idea, scholars have persuasively argued that the government should not be conceived of as enjoying First Amendment rights.[3]

Despite that conclusion, we are still left with the fact that government speaks, and—just as importantly—has legitimate interests in speaking. That reality, when combined with the presumed lack of a First Amendment shield for government speech,[4] shifts the terrain of the discussion toward questions about the appropriate scope of government speech as both an adjunct to the government's legitimate regulatory powers and in furtherance of the government's legitimate role in expressing the polity's values. It is at this point that the Supreme Court's animus doctrine can play a useful role. Animus doctrine is characterized by its focus on the ultimate legitimacy *vel non* of the government's intent in taking a particular regulatory step or expressing a particular value.[5] Conclusions about illegitimate government intent are usually couched in terms of equal protection law. The same inquiry, however, can assist in determining whether a particular instance of government speech is in fact made in pursuance of the government's legitimate interests, and thus constitutes a legitimate adjunct to its authority, or, by contrast, whether that speech is made in pursuance of illegitimate government purposes and thus is *ultra vires*.

To be sure, this transplantation of the animus idea into government-powers soil does not resolve all the issues. In particular, difficult questions remain in

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2. *But see* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 44 (1983) ("The beguiling symmetry inherent in the notion of treating municipal corporations and states (not to speak of the federal government) as the constitutional equivalents of private corporations has been rejected, albeit ambiguously, by the Supreme Court.").

3. *See, e.g.*, Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 78–79 (2008) ("[W]hile the government does not violate the free speech clause when it prevents private speakers from joining or altering its own speech, most courts and commentators conclude that government generally possesses no First Amendment rights of its own."); *see also* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501–09 (2001); (concluding that government should not be thought of as possessing First Amendment rights to speak); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 42–50 (1983) (noting difficulties with a claim that the government enjoys First Amendment rights). *But see* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1640–41 (2006) (arguing that in some situations public entities should be thought of as holders of First Amendment rights); *see also* Shurtleff v. Boston, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring in the judgment) ("[T]he government-speech doctrine is not based on the view—which we have neither accepted nor rejected—that governmental entities have First Amendment rights."); *id.* at 1599 n.2 (elaborating on the possibility that governments may have First Amendment rights).

4. *But see generally* Fagundes, *supra* note 3; *Shurtleff*, 142 S. Ct. at 1599 & 1599 n.2 (both explained *supra* note 3).

5. *See* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 213 (2019).

situations where government speech can be fairly understood as both sending demeaning messages about particular groups and furthering legitimate government interests in regulation and the expression of public values. Nevertheless, this approach promises at least to clarify the terms of the debate. By suggesting the right questions to ask, this Article hopes to advance progress toward reaching the right answers.

This Article proceeds in seven parts. After Part I's introduction, Part II begins by considering when government speech might be thought of as harming minorities in a legally cognizable way. While this inquiry might seem prone to easy conclusions in favor of finding such harms, equal protection doctrine makes clear that the fact that government speech demeans minorities does not thereby necessarily mean that such speech thereby imposes harm recognized by the Equal Protection Clause.

Part III further complexifies the question of demeaning government speech by considering situations in which such speech could be defended as government recognition and defense of other persons' exercise of their own constitutional rights. This Part will consider, as an example, a government's statements recognizing the rights of religious groups to hold traditional views of sexual morality, even if those views necessarily denigrate sexual minorities. Such statements, if emanating from the government as a matter of its own viewpoints on those issues, likely exceed the legitimate scope of government action. But Part III queries whether government has more of a legitimate interest in making such statements when they take the form of recognizing individuals' rights to hold such views or even enshrining in legislation their right to hold them. Part III considers this question.

Part IV introduces the concept of equal protection animus. Section IV.A sets out the canonical Supreme Court cases that have introduced this idea into the Court's equal protection jurisprudence and explains that idea's ultimate grounding in bad government intent. That grounding provides an encouraging entry point by which courts can interrogate government speech acts that are alleged to rest on illegitimate desires to harm particular minority groups. Section IV.B then explains how the Court's recent reaffirmation of the animus idea in a 2020 case establishes animus as a viable doctrinal concept. That Section concludes by explaining how that 2020 case explicitly imported into animus analysis the evidentiary structure the Court had developed over four decades earlier to evaluate claims that government had engaged in intentional discrimination. In sum, Part IV recounts the history of equal protection animus, explains its current foundation in broader concepts of discriminatory intent, and makes clear that the animus concept remains alive and well and thus available as a doctrinal tool.

To be sure, even a useful tool like animus doctrine nevertheless confronts the problem Part II identified: the problem that even government speech that demeans minorities may nevertheless evade equal protection review if the plaintiff is unable to establish differential harm falling on minority groups. To solve that problem, and more generally to place the government-speech question on a firmer doctrinal foundation, Part V suggests transplanting the insights of animus

analysis into an inquiry about the legitimate scope of governmental power. This suggestion flows from the idea that animus analysis can help us understand when particular instances of government speech lack a legitimate government purpose and are thus *ultra vires*. While in traditional animus cases a conclusion about the lack of a legitimate government interest leads to a finding of an equal protection violation, in the context of government speech such a conclusion can lead instead to a finding that the government simply lacks any legitimate authority to make that speech. In other words, animus analysis can inform an inquiry into the government authority question that is at the heart of the government speech issue. Shifting the analysis to one of government authority allows us to avoid the disparate impact problem Part II identified. As Part V explains, this shift also provides the collateral, but not insubstantial, benefit of connecting modern constitutional law to its earlier antecedents—in particular, the nineteenth century's preoccupation with the scope of legitimate government power, what jurists of that era called "the police power."

These moves, while helpful, do not provide easy answers to all cases of demeaning government speech. Simply put, situations exist in which the government has legitimate reasons for engaging in speech that nevertheless demeans minorities. Part VI considers the hard questions this Article's analysis allows us to confront. It examines separately the related but distinct situations presented when government speaks as an adjunct to engaging in substantive regulation[6] and when it does so for purely expressive reasons.[7] That examination will demonstrate that, in some cases, no easy answers exist to the question of demeaning government speech. Still, as it suggests in its conclusion, this Article aspires to arrange the doctrinal building blocks in the right order so lawyers, judges, and scholars can at least ask the right questions when confronting those difficult issues.

II. THE SURPRISINGLY DIFFICULT CHALLENGE OF PROVING THAT DEMEANING MESSAGES CAUSE DISCRIMINATORY HARM

The most intuitive grounding for a plaintiff's attack on demeaning government speech is, of course, the Equal Protection Clause. It is well-established that that Clause prohibits government action that imposes discriminatory burdens without good reason—indeed, in the case of racial discrimination, without what the Court calls a "compelling" government interest.[8] Theories of equal protection embraced by both liberal and conservative Justices can accommodate expressive harms. For liberals, a theory that reads equal protection as a guarantee against government action subordinating particular groups easily includes a concern

6. *See* discussion *infra* Section VI.A.

7. *See* discussion *infra* Section VI.B.

8. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (finding that a city had failed to show a compelling justification for allocating contracting opportunities on the basis of race).

about government messaging.[9] For conservatives who espouse an anti-classification understanding of equal protection, the very act of classifying based, for example, on race constitutes an equal protection harm, even in the absence of a material burden.[10]

Nevertheless, and to continue using race as an example, claims that racially demeaning expression or messaging violates equal protection have encountered obstacles. At times, those obstacles flow from courts' obtuseness about the nature or origin of the message itself. With regard to the former, the Court in *Pace v. Alabama* had little difficulty upholding the state's Jim Crow anti-miscegenation law, with Justice Field needing less than two pages in the *United States Reports* to explain that the law was constitutional because it imposed the same burdens on Black and white persons.[11] As for the origin of any demeaning message, recall the Court's notorious rejection of the claim in *Plessy v. Ferguson* that the Louisiana train segregation law itself conveyed a message of Blacks' inferiority.[12] One hopes that such obtuseness is no longer a publicly plausible reading of segregative government action;[13] as noted earlier, today, both liberal and conservative Justices can wield theories explaining why such laws cause discriminatory harm.[14] Still, the expressive content of government action related to race often remains a contested issue.[15]

Courts have also questioned whether even concededly demeaning state-imposed messages impose constitutionally cognizable harm if they come unaccompanied by disparate material harm. Consider *Palmer v. Thompson*.[16] In that 1971 case, the Court confronted a claim that the City of Jackson, Mississippi violated

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9. *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004) (referring to laws "that enforce the inferior social status of historically oppressed groups" as those violating equal protection).

10. *See, e.g.*, 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, 506 (1993) (observing that when conservative justices find an equal protection harm in government sorting of voters into districts based on their race, they are finding constitutionally cognizable harm in the message such sorting sends).

11. 106 U.S. 583, 584–85 (1883).

12. *See* 163 U.S. 537, 541–42, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

13. Charles Black's now-canonical refutation of Herbert Wechsler's concern that segregative laws could not be struck down based on neutral principles of law should make it clear that courts can no longer hide behind the veil of neutrality when finding that such laws impose equal burdens on both whites and Blacks (or any other excluded minority). *Compare* Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (expressing that concern), *with* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426–27 (1960) (remarking that only a Court afflicted with "self-induced blindness" could fail to see "the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority").

14. *See supra* notes 9–10 and accompanying text.

15. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) ("[T]he [lower] court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.").

16. 403 U.S. 217 (1971).

equal protection when—in response to a court order mandating that city-owned swimming pools be desegregated—the city simply closed those pools or transferred them to private ownership. The city's hostility to desegregation was clear, even if Justice Black's majority opinion was willing to give at least some credit to the city's explanation that budgetary pressures caused its action.[17] Nevertheless, that hostility was insufficient to make out an equal protection claim because the city's action deprived both white and Black persons of access to the pools.[18]

More recent appellate cases make the point even more starkly. In the 1990s, two federal appellate opinions considered Black persons' equal protection challenges to state decisions to fly either the confederate battle flag or a state flag that incorporated the battle flag's design.[19] Even though the courts in both cases recognized that the Black plaintiffs had suffered offense from the state's expression in flying those flags, they nevertheless ruled against the plaintiffs on the ground that—because white persons were also offended—any such offense was not disparately visited upon the Black plaintiffs or Black persons more generally.[20]

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17. *See id.* at 218–19, 224–25 ("[P]etitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument. On the other hand, the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion."). It may be relevant to note here that in the administrative law context "substantial evidence" is a term of art denoting a requirement that is less demanding than the common understanding of "substantial" might suggest. For example, in a case decided just a month after *Palmer*, the Court explained that "substantial evidence . . . was more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal quotation omitted).

18. *Palmer*, 403 U.S. at 225–26 ("It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. . . . Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. . . . [T]he issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'") (citations omitted).

19. NAACP v. Hunt, 891 F.2d 1555, 1558–59 (11th Cir. 1990) (flying of confederate battle flag at the state capitol); Coleman v. Miller, 117 F.3d 527, 528 (11th Cir. 1997) (flying of state flag that incorporated the confederate battle flag design).

20. *See Hunt*, 891 F.2d at 1562–63 ("[T]here is no unequal application of the state policy; all citizens are exposed to the flag. Citizens of all races are offended by its position."); *Coleman*, 117 F.3d at 530 ("In order to demonstrate disproportionate impact along racial lines, appellant must present specific factual evidence to demonstrate that the Georgia flag presently imposes on African-Americans as a group a measurable burden or denies them an identifiable benefit. . . . After carefully reviewing the record, and drawing all inferences in the light most favorable to appellant, we find no evidence of a similar discriminatory impact imposed by the Georgia flag."). Professor Michael Dorf's analysis of the social meaning of government actions finds it "implausible" that *Hunt* rested on a lack of disparate impact. *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1321 (2011). Still, his discussion refers only to *Hunt*, and omits mention of *Coleman*, which both referred explicitly to the lack of disparate impact and cited *Hunt* as support for that that conclusion. *See Coleman*, 117 F.3d at 530 ("We addressed a similar argument in [*Hunt*], in which a group of African-American plaintiffs challenged the flying of the Confederate flag above the Alabama capitol dome. We concluded that plaintiffs had failed to prove discriminatory impact."); *see also* I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 141 (2004) ("Ultimately, the Eleventh Circuit [in *Coleman*] was able to point to

One might object that the analysis in *Plessy* and *Palmer* has only an indirect relationship to the equal protection rules applicable to government speech, since those two cases involved government expression that was merely collateral to or implicit in substantive regulation (respectively, the operation of private railroads and public swimming pools). But the confederate flag cases from the more modern era involve pure expression—that is, expression whose point lies in the expression itself, rather than expression that emanates either collaterally from government regulatory action or expression that government makes in order to ensure a particular material regulatory result.[21] As such, when the courts in the confederate flag cases insisted that equal protection plaintiffs show a disparate harm, they imposed serious obstacles to minority plaintiffs challenging demeaning expression. Those obstacles are serious exactly because such expression is often offensive to more than the group that is the subject of the demeaning speech. The courts' rejection of these sorts of claims on the ground that the harm is visited on more than the plaintiff group itself raises serious concerns about the viability of standard equal protection analysis as a tool for limiting such problematic expression.

III. GOVERNMENT VALIDATION OF PRIVATE PREJUDICES—OR THE RIGHT TO HOLD THEM

Before considering solutions to this problem, this Part identifies a further complexity that may arise in such cases. Often, government expression that might reasonably be viewed as demeaning arises out of the government's stated desire to promote or validate the right of private groups to hold views that government itself may not be allowed to express directly, or even to act substantively in ways government itself may not. Should such government speech be exempt from any restrictions that might otherwise limit the government's authority to speak in those ways?

An example may help illustrate the problem. Consider religious belief and exercise. While it is presumably inappropriate for government to explicitly align itself with particular religious beliefs, and especially religious beliefs condemning nonbelievers or others (such as sexual minorities) as immoral or damned, it is unquestionably the case that private persons have a constitutional right to hold and express such beliefs. Can government endorse those persons' rights to believe and speak in those ways without tarnishing itself with the taint of having uttered demeaning or discriminatory speech on its own account?[22]

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the plaintiffs' failure to present 'specific factual evidence' to refute the court's assessment that the Confederate flag imposes no disproportionate effect along racial lines."). For another case rejecting a challenge to government display of confederate iconography for similar reasons, see Grayson v. Selma, No. 98-0826-CB-M, 1999 U.S. Dist. LEXIS 1945, at *5 (S.D. Ala. Feb. 10, 1999) ("Under the Eleventh Circuit's rulings, it is clear that Plaintiff cannot set forth a claim for relief—the Confederate iconography offends equally and therefore there can be no disparate impact and no Constitutional violation.").

21. I distinguish these situations later in this Article. *See* discussion *infra* Part VI.

22. *See, e.g.*, 2022 TEXAS REPUBLICAN PARTY PLATFORM, § 207 ("We urge the Texas Legislature to pass religious liberty protections for individuals, businesses, and government officials who believe marriage is

The Supreme Court faced a somewhat analogous question in *Reitman v. Mulkey*.[23] *Reitman* involved the constitutionality of a voter-enacted amendment to the California Constitution that enshrined property owners' rights to dispose of their land as they wished.[24] The amendment was enacted in response (and opposition) to a series of fair housing laws the California Legislature had enacted.[25]

The amendment's effect was to repeal those statutes.[26] But a closely divided Supreme Court concluded that the amendment did more than that.[27] The Court concluded that the law sufficiently involved the state in private discriminatory conduct and encouraged such conduct to the point that the law violated the Fourteenth Amendment.[28] Justice Harlan, dissenting for four Justices, concluded that the amendment merely repealed the legislatively enacted fair housing statutes and placed the state in a position of neutrality toward private discrimination.[29]

To be sure, the analogy between *Reitman* and state endorsement of private discriminatory expression is an imprecise one. Depending on how one views it, Proposition 14 either encouraged or took a neutral position toward discriminatory *conduct*. By contrast, one variant of the situation our hypothetical features involves the State encouraging *expression* that might be thought demeaning or otherwise hostile to a particular group of citizens. Nevertheless, the basic structure of the analogy remains sound. If demeaning or discriminatory government expression is just as unconstitutional as demeaning or discriminatory government conduct, then the same question about the State's responsibility for such expression or conduct arises even when the State "merely" protects or endorses such expression or conduct when it emanates from private parties.

What our hypothetical adds to the *Reitman* problem is the constitutional protection enjoyed by the expression the State endorses. While the Constitution provides some protection to property rights, intensive regulation of private property and economic relationships has been constitutionally unproblematic at least since 1937[30] and arguably throughout much of American constitutional history.[31] By contrast, the Free Speech and Free Exercise Clauses of the First Amendment place in a more protected position the expression that the State seeks to endorse in our hypothetical. That difference thus raises the question whether that

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between one man and one woman. . . . We oppose any criminal or civil penalties against those who oppose non-traditional sexual behavior out of faith, conviction, or belief in traditional values.").

23. 387 U.S. 369 (1967).

24. *Id.* at 370–72.

25. *See id.* at 374.

26. *Id.*

27. *See id.* at 376–77.

28. *See id.* at 373.

29. *See id.* at 387–89 (Harlan, J., dissenting).

30. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 388, 413–14 (1937) (upholding government regulation of wages against a substantive due process challenge).

31. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 125–26 (1876) (upholding regulation of the prices charged by grain silo operators, on the theory that their business was "affected with a public interest"). *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE (1996) (discussing the depth of social and economic regulation in early nineteenth century America).

heightened protection somehow justifies the State in endorsing, if not the substance of the expression, then the right of private persons to engage in it. If it does, then *Reitman*'s invalidation of the State's endorsement of private prejudices in the property rights context might not suffice to invalidate state expression that applauds or defends constitutionally protected private expression the State nevertheless could not make on its own account.

IV. EQUAL PROTECTION ANIMUS AS A LIMITATION ON GOVERNMENT EXPRESSION

Parts II and III have complicated what otherwise seems like a straightforward inquiry into the constitutional status of demeaning government speech. Part II raised the question whether such speech causes harms cognizable as a matter of equal protection law, especially (and perhaps ironically) when those harms are widely distributed beyond the targeted group itself. Part III further complicated the situation by asking whether the constitutionally protected status of private, demeaning expression might justify de facto state endorsement of that expression under the guise of protecting those private parties' free speech rights.

This Article now considers whether the animus idea can cut through these complications. Section IV.A provides a brief history of that idea, as it has been applied in equal protection doctrine. Section IV.B explains how equal protection animus remains a viable doctrine today. Part V explains how the insights of animus doctrine can assist analysis of demeaning government speech when those insights are viewed, not through the usual equal protection perspective, but instead through the prism of limitations on government powers. Part VI applies this understanding of limitations on government powers to two different types of demeaning government speech.

A. Equal Protection Animus: A Brief History

One way to view the landscape thus far painted is through the lens of the Supreme Court's animus doctrine.[32] That doctrine, derived from the Court's 1973 decision in *Department of Agriculture v. Moreno*,[33] prohibits the government from acting out of dislike or "animus" toward a particular group.[34] As Justice Brennan (*Moreno*'s author) expressed the idea, using language that would become the doctrine's cornerstone, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[35] Perhaps coincidentally, the Court decided *Moreno* the same year it embarked in earnest on its project of creating a tiered

32. The following discussion provides a brief summary of the Court's major animus cases. For a more detailed treatment of these cases, see WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017).

33. 413 U.S. 528 (1973).

34. *See id.* at 537–38.

35. *Id.* at 534.

structure of equal protection scrutiny based on political-process analysis.[36] But as it developed, the Court's animus doctrine became a way of avoiding that structure and, in particular, its imperative that courts accord meaningful scrutiny of government discrimination only after determining that the burdened group constitutes a "suspect" or "quasi-suspect" class.[37] By contrast to that structure, animus doctrine allowed courts to bypass, or at least not rely solely upon, conclusions about a group's suspectness and instead to proceed directly to the ultimate constitutional question of whether the law reflected constitutionally illegitimate bad intent.

Moreno involved an amendment to the federal food stamp law that restricted food stamp eligibility for unrelated persons living as one household and sharing expenses.[38] While the named plaintiff was a poor, elderly woman living with an unrelated family to reduce expenses,[39] the law's sparse legislative history suggested that Congress was motivated by a desire to prevent "hippies" and "hippy communes" from obtaining food stamps.[40] That "[il]legitimate government interest"[41] did not suffice to strike down the law; rather, the Court continued on to consider other, more legitimate motivations the government offered.[42] But, as Justice Rehnquist observed in dissent, that review appeared to go beyond the rationality review that was normally applied in cases not involving suspect classes.[43]

In subsequent decades, the Court relied on *Moreno*'s reasoning and "bare . . . desire to harm" language to strike down a smattering of local, state, and federal laws.[44] In *City of Cleburne v. Cleburne Living Center*, the Court concluded that a town was motivated by "irrational prejudice"[45] when it denied a permit to a group that wished to establish a group home for intellectually disabled persons in a residential neighborhood.[46] *Cleburne* featured a claim—accepted by the lower court—that intellectual disability constituted a quasi-suspect classification.[47] The Supreme Court rejected that argument, thus firmly grounding its animus conclusion in the Court's rational basis jurisprudence.[48] That

36. *See generally* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (using the tool of political process analysis to argue that sex discrimination should be accorded strict scrutiny).

37. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (upholding an age classification, after according it minimal scrutiny, based on its conclusion that age was not a suspect or quasi-suspect classification).

38. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 530 (1973).

39. For more factual background about *Moreno*, see ARAIZA, *supra* note 32, at 29–30.

40. *See id.*

41. *Moreno*, 413 U.S. at 534.

42. *See id.* at 535–38.

43. *See id.* at 545–46 (Rehnquist, J., dissenting).

44. ARAIZA, *supra* note 32, at 32.

45. 473 U.S. 432, 450 (1985).

46. *Id.* at 435.

47. *See id.* at 437–38.

48. *See id.* at 443–47 (rejecting heightened scrutiny for intellectual disability classifications); *id.* at 446–47 ("Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary

jurisprudence normally features very deferential judicial review.[49] By contrast, *Cleburne* performed a more stringent version of such review, insisting on a meaningful fit between the government's action and its asserted justifications and on record evidence supporting those justifications.[50] Thus, *Cleburne*'s application of rational basis review was quite unusual—a point made by Justice Marshall's partial concurrence and partial dissent.[51]

Three gay rights opinions—the majority opinions in *Romer v. Evans*[52] and *United States v. Windsor*[53] and Justice O'Connor's concurrence in *Lawrence v. Texas*[54]—combine with the Court's recent decision in *Department of Homeland Security v. Regents of the University of California*[55] to complete the Court's equal protection animus compendium.[56] In *Romer*, the first of these cases, the Court struck down a voter-enacted amendment to the Colorado Constitution that prohibited any state or local government entity from using gay, lesbian, or bisexual "orientation, conduct, practices or relationships"[57] as a basis for any claim of protected status or illegal discrimination.[58] Declining even to consider whether sexual orientation constitutes a suspect or quasi-suspect classification (or, indeed, even to mention that possibility), the Court instead concluded that the law's combination of comprehensive breadth and laser-like focus on sexual orientation raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[59] Thus, unlike in *Moreno* and *Cleburne*, the Court did not base its animus conclusion on direct evidence of legislators' motives, but instead characterized it as a deduction from the law's qualities and impact.[60] One can easily understand that shift in focus given that Amendment 2

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or irrational. Furthermore, some objectives-such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests.") (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

49. *See* WILLIAM D. ARAIZA, UNDERSTANDING CONSTITUTIONAL LAW, § 10.01[1] (2020) (discussing the deference courts exhibit in most rational basis cases).

50. *See Cleburne*, 473 U.S. at 449–50.

51. *See id.* at 455, 458 (Marshall, J., concurring in judgment in part and dissenting in part) (describing the Court's rational basis review as "precisely the sort of probing inquiry associated with heightened scrutiny"). *See also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 545–47 (1973) (Rehnquist, J., dissenting) (arguing that the food stamp law amendment at issue in that case satisfied the scrutiny traditionally associated with the rational basis test).

52. 517 U.S. 620 (1996).

53. 570 U.S. 744 (2013).

54. 539 U.S. 558 (2003).

55. 140 S. Ct. 1891 (2020).

56. *See, e.g.*, Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. L. REV. 183, 183, 183 n.1 (describing *Moreno*, *Cleburne*, *Romer*, and *Windsor* as "the animus quadrilogy"); *id.* at 215 n.125 (noting Justice O'Connor's separate opinion in *Lawrence*). *But see* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 906–08 (2012) (including *Palmore v. Sidoti*, 466 U.S. 429 (1984), in the animus canon). The Court has also used animus-style reasoning in its modern jurisprudence construing the Religion Clauses. Indeed, in doing so it has borrowed from its equal protection animus cases. *See* William D. Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 993–97 (2021).

57. Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting COLO. CONST. ART. II, § 30b).

58. *Id.* at 623.

59. *Id.* at 634.

60. *Id.* at 635.

was enacted by the people of Colorado, and thus resisted easy conclusions about the enactors' intent.[61]

In the next case, *Lawrence v. Texas*,[62] a five-Justice majority used the Due Process Clause to strike down Texas's sodomy law, thus overruling the Court's contrary holding seventeen years earlier in *Bowers v. Hardwick*.[63] But Justice O'Connor, who joined the *Bowers* majority, concurred in the judgment based on an equal protection ground.[64] Noting that the Texas law singled out same-sex sodomy, rather than all sodomy, for criminal prohibition, she wrote, citing *Moreno*, *Cleburne*, and *Romer*:

> We have consistently held . . . that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. [*Moreno*]; see also [*Cleburne*; *Romer*]. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.[65]

She concluded that the Texas law's restriction to same-sex sexual conduct constituted the sort of "[m]oral disapproval" of LGB persons, which, "like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[66] Indeed, in a sentence directly relevant to the government speech question, she also wrote that "because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."[67]

A decade after *Lawrence*, a five-Justice majority in *Windsor* again relied on equal protection animus[68] to strike down a provision of the federal Defense of Marriage Act.[69] That provision defined marriage, for federal purposes, as a union of a man and a woman, and thus withheld federal recognition of the married status of persons who had entered into same-sex marriages valid in the states in which those marriages were performed.[70] The Court majority, speaking as it had in *Romer* and *Lawrence* through Justice Kennedy, discerned the requisite

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61. *See* ARAIZA, *supra* note 32, at 48–63 (providing more analysis of *Romer*).

62. 539 U.S. 558 (2003).

63. 478 U.S. 186, 196 (1986).

64. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring in judgment).

65. *See id.* at 579–80.

66. *Id.* at 582.

67. *Id.* at 583; *see* ARAIZA, *supra* note 32, at 63–64 (providing more analysis of Justice O'Connor's opinion).

68. While the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause, which does apply to it, has been interpreted to include an equality requirement that mirrors that of the Equal Protection Clause itself. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (striking down school segregation in the District of Columbia under the equality component of the Fifth Amendment's Due Process Clause); *see also* U.S. v. Windsor, 570 U.S. 744, 769 (2013) ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

69. *Windsor*, 570 U.S. at 770.

70. *Id.* at 752.

animus in everything from the law's effects[71] to statements made by the law's congressional supporters[72] to the very title of the statute.[73]

B. Regents

Most recently, in *Regents*, the Court resurrected animus as a viable equal protection doctrine.[74] To be sure, the Court in that case rejected the plaintiffs' claim that animus had motivated the challenged government action—the Trump Administration's rescission of the Obama-era Deferred Action for Childhood Arrivals ("DACA") program for undocumented immigrants who had arrived in the country as children.[75] Nevertheless, a five-Justice majority entertained their animus argument, even though the Court had already rejected the administration's rescission decision on administrative law grounds.[76] In so doing, the Court[77] appeared to signal that animus claims remained conceptually viable, even after the retirement of Justice Kennedy, who had authored the most recent decisions completing the Court's animus canon.[78]

Just as importantly, in *Regents*[79] the Court traveled some distance toward explicitly connecting animus doctrine to the Court's more general discriminatory intent jurisprudence. That jurisprudence, reflected in the 1977 case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[80] provides a set of factors for courts to consider when determining whether

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71. *See id.* at 770 ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.").

72. *See id.* ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that 'it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . .'") (quoting H.R. REP. NO. 104–664, at 12–13 (1996)).

73. *See id.* at 771 ("Were there any doubt of [the law's] far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."); ARAIZA, *supra* note 32, at 65–75 (providing more analysis of *Windsor*).

74. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020).

75. *Id.* at 1916.

76. *Id.* at 1901.

77. This discussion's reference to "the Court" in *Regents* comprehends both Chief Justice Roberts's four-Justice plurality opinion on that point and Justice Sotomayor's partial concurrence and partial dissent—which agreed with the plurality's decision to reach the animus issue and also appeared to agree with its explanation of animus doctrine and disagreed only with the plurality's application of those doctrinal building blocks. *See* Araiza, *supra* note 56, at 985 n.3 (discussing the significance of the Court's voting pattern in *Regents*).

78. Justice Kennedy's retirement from the Court is notable for the fate of animus doctrine given his central role in developing the doctrine in the gay rights cases and in cases arising under the Religion Clauses. *See, e.g.*, Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYRACUSE L. REV. 69, 71–72 (2019) ("[W]ith Justice Kennedy off the Court and replaced by a social conservative more likely of a mind with Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch, [heightened rational basis review]—a powerful and lethal quill—will likely be removed from LGBT rights advocates' quiver."). To be sure, Professor Beery spoke of heightened rationality review. But, elsewhere in his article, he made clear his understanding that that review was triggered by a finding of animus. *See, e.g.*, *id.* at 86–88. *See also* Araiza, *supra* note 56, at 993–97 (discussing the Religion Clause cases where animus-style reasoning played an important role).

79. *Regents*, 140 S. Ct. at 1915.

80. 429 U.S. 252, 266 (1977).

government action constitutes intentional discrimination of the sort claimed by the plaintiffs, and thus triggers the relevant standard of review (*e.g.*, strict scrutiny for a claim of racial discrimination).[81] In *Regents*, the Court cited several of the *Arlington Heights* factors as also relevant to a claim of animus.[82] In so doing, the Court connected the intermediate intent inquiry reflected in *Arlington Heights* (that is, the inquiry into whether the government intentionally discriminated on a particular ground, thus triggering a particular level of scrutiny) with the ultimate intent inquiry reflected in animus doctrine (that is, an inquiry into whether the government acted with constitutional bad intent, thus triggering a strike-down of the law).[83] As this Article will explain,[84] those factors provide a roadmap, not just for animus inquiries grounded in equal protection claims, but also for analogous inquiries grounded in claims sounding in government power.

Regents's reaffirmation of animus doctrine as a viable doctrinal path renders this Part's discussion of pre-*Regents* cases more than a history lesson. Instead, those cases constitute a doctrinal tradition that remains viable today. The question is whether that tradition can also speak to the government power issue, and, in particular, the issue of government's authority to engage in demeaning speech. Part VI of this Article will explain how it can. Before it does that, however, Part V examines yet more history, to explain how an animus-focused government powers analysis of the government speech question can reconnect today's constitutional law to its historical antecedents.

V. ANIMUS, DEMEANING GOVERNMENT SPEECH, AND THE POLICE POWER

As a methodology for cutting through the mediating analysis of the Court's tiered scrutiny's structure, and directly engaging the ultimate question of bad government intent, animus doctrine has played a helpful role in equal protection law. That role has become especially prominent in recent decades, in light of the Court's de facto abandonment of its project of identifying additional suspect or quasi-suspect classifications.[85] Nevertheless, as an equal protection doctrine, animus still suffers from the limitation Part II explained, namely, that broad-based dignitary or material harms may not trigger cognizable equal protection claims exactly because of their broad (and hence, nondiscriminatory) impact.[86] While animus doctrine can cut through tiers of scrutiny doctrine and directly engage the ultimate question of constitutional bad intent, as a tool of equal protection law it cannot obviate a plaintiff's need to establish disparate impact.

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81. *Id.*

82. *See Regents,* 140 S. Ct. at 1915.

83. In prior writing, I have called for precisely this connection. *See* ARAIZA, *supra* note 32, at 89–104.

84. *See infra* Part VI.

85. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) ("Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed.").

86. *See supra* Part II.

That said, animus-style reasoning can still play a role in the government speech context. The key insight here is that such reasoning is relevant, not just to equal protection analysis, but also to the related but distinct project of discerning limits on the government's power or authority to act. This shift in focus from rights to powers emphasizes the foundation of the animus idea as a prohibition on government action taken for an illegitimate purpose. When one transplants that concept into the realm of government speech, such illegitimate purpose provides a justification for striking down the government action, not because it violates rights, but because it renders the government's action *ultra vires*. Under this alternative rationale, if the government's authority to speak simply does not extend to the intentional expression of demeaning views—views that reflect "a bare . . . dislike"[87] of the targeted group—then the lack of any disparate impact is irrelevant to the analysis. Instead, such speech is illegal because the government simply lacks the power to make it.

Such an approach carries promising potential. Beyond solving the disparate impact problem Part II identified, it also allows us to more closely connect the animus idea to nineteenth century American constitutional jurisprudence, in particular, its focus on the police power and its mirror image, the prohibition on class legislation. These concepts were foundational to that era's jurisprudence. As Victoria Nourse has written of the late nineteenth century, "[t]he professional lawyer of the day believed that almost everything in constitutional law depended upon power—the 'police power,' that is."[88] That power was broad, with the Supreme Court declaring in 1906 that it "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."[89]

Thus, claims that today we would characterize as sounding in substantive due process or equal protection would have, at the time, been understood as requiring judges to determine simply (or not so simply)[90] whether the challenged action lay within the scope of government's legitimate power to regulate. As Professor Nourse continued,

> [t]he question in *Lochner* [*v. New York*][91] was not the scope of the right to contract, or even whether the right triggered a particular kind of scrutiny, but whether the state had the police power to regulate the right. If a regulation were within the police power, the case ended.[92]

By contrast, if the law exceeded the legitimate scope of the police power, then it would stand condemned as class legislation—that is, legislation that did not seek

87. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

88. Victoria Nourse, *A Tale of Two* Lochners*: The Untold Story of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 761 (2009).

89. Chi., Burlington, & Quincy Ry., Co. v. Illinois, 200 U.S. 561, 592 (1906).

90. As the text will later explain, in the twentieth century police powers-centered jurisprudence began to experience strains that would lead to its demise by the time of the Court's capitulation to the New Deal in 1937.

91. 198 U.S. 45, 56–57 (1905).

92. Nourse, *supra* note 88, at 762.

"to promote the public health, the public morals, or the public safety,"[93] but rather sought to further purely private interests.

As a historical matter, the police power tradition eventually faded in the face of courts' inability to demarcate the scope of permissible government action. In its place arose a focus on "preferred" rights as limits on what, in a post-police powers jurisprudence world, would otherwise be illimitable government action.[94] Ultimately, that modern focus on particularly focused rights came to encompass equality claims as well as those of substantive right. But just as with substantive rights, equality jurisprudence in a post-police powers world focused on particular equality claims.[95] As the Court implied in its famous footnote in *United States v. Carolene Products*,[96] the Court would focus its equal protection scrutiny on claims asserted by groups who could not count on the political process to protect themselves[97] and accord minimal scrutiny to other equality claims.[98]

The story of this rights-centered approach to constitutional law has continued to intersect with the now-submerged police powers/class legislation tradition. Perhaps most tellingly, once the *Carolene Products*-based equal protection project began to sputter, the Court began reaching back to *Moreno*'s animus idea.[99] As I have written elsewhere, animus doctrine shares significant features with the class legislation tradition.[100] Both approaches abjure the idea that certain substantive or equality rights function as limits, in favor of focusing on the permissible reasons for government action. In particular, both approaches focus directly on nonpublic-regarding intent—what nineteenth century judges would have called class legislation and what *Moreno* famously described as "a bare . . . desire to harm a politically powerless group."[101] Thus, at least in some contexts, an embrace of animus-based thinking may, among providing other benefits, play a useful role in connecting American public law to its antecedents, updated to a modern age.

But leave aside these more theoretical comparisons between animus and the police powers/class legislation tradition and consider instead doctrinal

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93. *Chi., Burlington & Quincy Ry. Co.*, 200 U.S. at 592. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

94. *See* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POLI. SCI. RSCH. 623, 624–25 (1994).

95. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that courts should reserve heightened scrutiny of discriminatory laws to those that discriminate as a result of "prejudice against discrete and insular minorities," a phenomenon that "may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

96. *See id.*

97. *See id.* (noting the heightened scrutiny courts should accord legislation burdening groups that, because of prejudice, are unable to rely on the political process for protection).

98. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 109–10 (1949) (giving very deferential review to a claimed equal protection violation made by a nonsuspect class).

99. *See generally* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985) (both performing what became the last serious suspect class analysis the Court has ever done and also reaching back to *Moreno*'s animus principle to decide the case).

100. *See* ARAIZA, *supra* note 32, at 11–28, 176–78.

101. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

practicalities. Recall that animus, when deployed as a tool of equal protection analysis, remains subject to the disparate impact requirement as reflected in the cases Part II discusses. A powers analysis is different. Shorn of the disparate impact limitation, a powers-based approach resting on animus-style reasoning can rely solely on the underlying bad intent of government. Thus, transplanting animus reasoning into the powers context allows more effective policing of government speech that is alleged to communicate demeaning messages.

VI. HARD QUESTIONS

Despite the conceptual attractiveness of using animus-style reasoning to govern claims that particular instances of government speech reflect *ultra vires* government conduct, difficult questions remain when assessing whether any particular instance of government speech constitutes an *ultra vires* government action. This difficulty should not be surprising: as an equal protection doctrine, the animus inquiry often requires nuanced examination of challenged government actions, with presumptions and scrutiny levels interacting in intricate ways.[102] In other writing, I have argued that, properly understood, the animus inquiry requires courts to examine government actions to determine whether their stated legitimate justifications are in fact the real ones motivating the government.[103] That inquiry does not require there to be anything more than a rational relationship between that (actual) justification and a legitimate government interest.[104] But it does require courts to make highly context-specific judgments about the sincerity of the proffered government justifications.[105] Perhaps more relevantly for our purposes, that inquiry also requires them to make difficult judgments about situations that may feature mixed motives.

The government speech inquiry poses similar challenges. This Part considers two different types of government speech situations: those where government speech is justified as part of an attempt to achieve a material regulatory objective or is collateral to such an attempt and situations where government speech serves purely or primarily expressive goals. Both situations present potentially difficult, if distinct, problems.[106] Considering them is necessary in order to assess the

102. For a discussion of what animus inquiries should in fact inquire into, see ARAIZA, *supra* note 32, at 139–43.

103. *See id.* at 132.

104. *Id.* at 139.

105. *Id.*

106. Concededly, this distinction is not a completely sharp one; in particular, a fair argument might be made that even some speech undertaken for purely expressive reasons—for example, to reflect or express the values of the relevant polity—is best understood as speech that aims at a regulatory goal. On the other hand, intuition suggests that government speech that appears purely expressive—for example, selecting and displaying a particular flag design or issuing a government proclamation—may in fact be relevantly different for purposes of an *ultra vires* analysis. *See, e.g.*, Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1077 (9th Cir. 2012) (distinguishing a state law that communicates a message as a collateral impact of having a regulatory effect and a state law that is "merely expressive"). Regardless, the complete precision of this distinction is not critical for the discussion that follows in the text.

usefulness of an animus-grounded powers approach to scrutinize government speech that is alleged to demean or harm.

A. Speech Related to Regulation

Begin with government speech that is justified as part of a legitimate regulatory initiative. Such speech is presumptively legitimate as an adjunct to regulatory programs that the government enjoys broad leeway to pursue.[107] Nevertheless, such speech may well have the effect of demeaning a minority group.

Consider an example. The government has a completely legitimate interest in preventing obesity as part of its interest in promoting public health.[108] In such a case, what authority would it have to engage in speech that portrays obese people in a negative light—for example, as socially shunned or lacking in willpower or uninterested in their well-being, or, even worse, by portraying them or their conduct as disgusting?[109] The movement for civil rights for obese persons is now well-recognized.[110] Could advocates for such rights claim that government anti-obesity speech, or at least some exemplars of such speech, reflects anti-obesity animus and thus lies beyond the government's legitimate authority?

Scholars have connected such speech to concepts related to animus.[111] Such campaigns likely reflect some measure of good intentions—in this case, the desire to promote public health. Indeed, their good intent is presumed so unquestioningly that most debate about them focuses on their effectiveness rather than their appropriateness.[112] Nevertheless, they may well have significant negative effects on the persons those campaigns portray in such starkly negative light, either as a direct consequence of the messaging or by that messaging's impact on third parties who in turn discriminate against or shame the persons portrayed in those ways.[113] More conceptually, such speech could be understood as communicating a message of disgust toward those subjects. This is especially true to

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107. Obviously, if a particular substantive regulatory program is beyond the scope of the power of the government entity that is speaking, then government speech that serves as an adjunct to that program—or that otherwise collaterally arises along with that regulatory program—loses any authority it might possess from association with a legitimate regulatory initiative. *Cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968) (requiring that a valid government regulation of expressive conduct must, among other things, regulate conduct that is within that government entity's general regulatory power).

108. *See Strategies to Prevent & Manage Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/obesity/strategies/index.html (Oct. 29, 2020) [https://perma.cc/TGW8-354S] [hereinafter *Strategies*].

109. *See, e.g.*, Deborah Lupton, Comment, *The Pedagogy of Disgust: The Ethical, Moral, and Political Implications of Using Disgust in Public Health Campaigns*, 25 CRITICAL PUB. HEALTH 4, 4–6 (2015).

110. *See* ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 6 (2008); *see also* Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y, L. & ETHICS 264, 268 n.7 (2012) (citing other sources also discussing the antidiscrimination frame for obesity rights).

111. *See infra* note 114.

112. *See* Lupton, *supra* note 109, at 9 ("[T]here appears to be a widespread, unexamined agreement that if a public health issue is at stake, then it is appropriate to use confronting tactics to persuade people to change their behavior. When negative emotional appeals are held up to scrutiny within the public health or health communication literature, this is generally on the basis of debating whether or not they are effective rather than the ethics of their use.").

113. *See id.* at 11.

the extent graphic portrayals of either the conduct itself, its physiological effects, or the bodies of those subjects call to mind what Professor Martha Nussbaum has called "the primary objects" of disgust.[114] Professor Nussbaum observes that such disgust reactions lead their targets to be viewed as subhuman, and thus deserving the subordination or exclusion that she describes as animus.[115]

One can think of other examples where the portrayals are less graphic and the negative effects perhaps less direct but which raise the same basic concern. For example, consider a southern state government's tourist promotion campaign for antebellum plantations. Presumably, promoting such tourism, just like fighting obesity, is a legitimate government interest.[116] Could racial equality advocates challenge such advertising, or even the presentation of the tourist site itself to visitors, to the extent the government speech presented allegedly distorted or demeaning views of Black persons?[117]

Unquestionably, then, such regulation-related government speech carries the potential to demean. But leave aside that effects question. Since the animus inquiry focuses on the government's intent, impact *per se* is irrelevant, except as an evidentiary factor in the animus determination.[118] Instead, focus on intent. Beyond the extent of the disparate impact itself,[119] the *Arlington Heights* discriminatory intent/animus factors focus largely on procedural and decisional regularity.[120] Mapping that idea and those factors onto the obesity and tourism examples might lead to an analysis in which the government speech in question

114. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 15 (2010) (describing those "primary objects" as "feces, blood, semen, urine, nasal discharges, menstrual discharges, corpses, decaying meat, and animals/insects that are oozy, slimy, or smelly"). While public health advertisements may not display portrayals of those precise primary objects, they may well approach such portrayals in terms of graphicness. *See* Lupton, *supra* note 109, at 4 (describing public health anti-obesity advertisements as displaying "images of bubbling slabs of bright-yellow, blood-streaked fat covering glistening red body organs"); *id.* at 5 (describing anti-smoking advertisements displaying "gangrenous limbs or digits, lungs covered with black tar or distorted with a cancerous growth, a bleeding brain, . . . a mouth disfigured by cancerous lesions, . . . , [and] people coughing up blood"). For a discussion of how such disgust reactions relate to legal conclusions about animus, see William D. Araiza, *Disgust and Guns: Conduct, Identity, and Second Amendment Animus*, 116 NW. U. L. REV. 1365 (2022).

115. *See* NUSSBAUM, *supra* note 114, at 123 (describing the Colorado law that was struck down on animus grounds in *Romer v. Evans*, 520 U.S. 617 (1996), as based in disgust); *id.* at 1–8 (characterizing much anti-LGB discourse as based in disgust).

116. *See Strategies*, *supra* note 108.

117. *See, e.g.*, Tiya Miles, *What Should We Do with the Plantations*, BOS. GLOBE (Aug. 8, 2020, 7:30 AM), https://www.bostonglobe.com/2020/08/08/opinion/what-should-we-do-with-plantations/ [https://perma.cc/JXU3-86ZH] (noting one plantation's online presentation as including "romanticized lexicon and imagery").

118. *Cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (identifying a set of factors, including the amount of disparate impact, as relevant to the discriminatory intent inquiry under the Equal Protection Clause). In other writing, I have argued that the *Arlington Heights* factors play an analogous role in uncovering the ultimate bad intent that becomes known as animus. *See, e.g.*, ARAIZA, *supra* note 32, at 89–105. *See also infra* Section VI.B. (applying those factors to claims that pure government expression demeans).

119. *See supra* note 118.

120. *See Arlington Heights*, 429 U.S. at 267 (citing, among other factors, "[d]epartures from the normal procedural sequence," "[s]ubstantive departures," and "[t]he specific sequence of events leading up to the challenged decision," such as a sudden change in course by the government decisionmaker); *see also* ARAIZA, *supra* note 32, at 149–51 (noting how a decision the year before *Arlington Heights* implied this same sort of concern with substantive and procedural regularity).

appears facially designed to promote a legitimate interest (here, public health or tourist promotion); emanates from an institution that is tasked with promoting that interest (here, a public health or tourist promotion agency); and is presumably at least partially effective in promoting that interest. Given this description, and in the absence of a reason to suspect that government might be prone to systematically ignoring the interests of the burdened group,[121] one might conclude that any demeaning effect constitutes simply the unfortunate but collateral effect of an otherwise-valid government action.

Professor Michael Dorf's careful consideration of stigma-inducing government messaging arrives at a similar endpoint.[122] Conceding that such speech will likely feature at least some plausible claim of legitimate government intent, one of his proposed solutions is to subject such messaging to ends-means review but to reserve a searching version of such review for cases involving suspect or quasi-suspect classifications.[123] This approach would, of course, leave unregulated demeaning speech focused on new or emerging identities.[124] But this solution would also have other effects, beyond limiting the scope of any meaningful judicial review to the traditional—and unlikely to be expanded[125]—categories of existing suspect and quasi-suspect classifications. In particular, that solution would also effectively eliminate the more direct inquiry into intent that is implicit in animus review, in favor of traditional ends-means scrutiny. Thus, this approach would not only limit its scope to protecting groups that traditional, static[126] equal protection suspect class doctrine currently protects, but it would also provide that protection though the tiered scrutiny standards that are closely tied to suspect class analysis.

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121. *See* Kenneth L. Karst, *The Supreme Court—1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 12 (1977) (suggesting that such systematic disregard may exist with regard to Black citizens).

122. *See* Dorf, *supra* note 20, at 1338–42.

123. *See id.* at 1341 ("[W]orries 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."). At other times, he suggests a broader scope for his proposed ends-means review. *See id.* at 1339 (referring to "a freestanding constitutional principle condemning the labeling of persons as second-class citizens").

124. *See generally* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451 (2010) (considering the equal protection issues raised by discrimination against new or emerging identity groups).

125. The Court has not performed a serious suspect class analysis since its 1985 opinion in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439–47 (1985), and has not found a group to constitute a suspect or quasi-suspect class for even longer—despite striking down government actions discriminating against disabled persons (in *Cleburne* itself) and LGB persons (in *Romer v. Evans*, 517 U.S. 620, 635–36 (1996), and *United States v. Windsor*, 570 U.S. 744, 775 (2013)). To be sure, state courts and lower federal courts have continued to perform suspect class analysis. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 489 (9th Cir. 2014) (holding that sexual orientation is a quasi-suspect classification under the U.S. Constitution); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (holding that sexual orientation is a quasi-suspect classification under the Iowa Constitution). Nevertheless, commentators have expressed significant doubt about whether the U.S. Supreme Court will ever again find any additional classification to be suspect or quasi-suspect. *See, e.g.*, Yoshino, *supra* note 85.

126. *See supra* note 125.

A powers approach promises something different. At the very least, that approach avoids the disparate impact requirement that, as discussed earlier, stands as an obstacle to many equal protection claims. As the confederate flag cases suggest, that requirement blocks claims even where one might think that it would not.[127] If even Black plaintiffs in those cases fell victim to the disparate impact requirement, one could easily understand how it could frustrate plaintiffs in other government speech situations—such as the anti-obesity or tourism promotion speech discussed earlier—where the challenged speech might well be intuitively understood to impose more generalized harms.[128] To repeat, it is easy to shake one's head and wonder at the logic of courts' use of a disparate impact requirement to defeat Black plaintiffs' challenges to states' display of the confederate flag.[129] But the existence of the appellate cases reaching exactly that conclusion—and, indeed, the Supreme Court's decision in *Palmer v. Thompson*—reminds us that this concern is a real one.[130] That requirement may have every bit as much bite in other government speech situations. A powers approach avoids this pitfall.

Moreover, a powers approach promises more general protection against inappropriate government stigmatization of marginalized groups. Rather than being limited by the same *Carolene Products*-based criteria that govern the standard equal protection analysis,[131] a powers analysis provides a more general and open-ended restriction on such government conduct. Beyond hearkening back to nineteenth century police powers jurisprudence, this analysis constitutes a more supple tool for limiting government power—one more adaptable to new circumstances and new threats than suspect class analysis proved itself capable of.

Still, if a government powers or *ultra vires* approach avoids the disparate impact problem and provides a more adaptable tool to limit inappropriate government expression, it nevertheless raises other issues. In particular, just like more traditional ends-means review, this approach confronts an equally difficult obstacle in the form of the argument that government should enjoy wide latitude to take regulatory actions—including speaking in particular ways—that promote legitimate regulatory interests. The Necessary and Proper Clause suggests such broad latitude at the federal level,[132] while the breadth of states' legitimate regulatory authority—the modern understanding of their police powers[133]—suggests

127. *See, e.g.*, James Forman, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 513 (1991) ("It should be . . . impossible to view the Confederate flag as a symbol that affects all races equally . . . .").

128. *See, e.g.*, Lupton, *supra* note 109, at 10–11 (describing the negative effects graphic public health messaging may have on people who are "psychologically or socially vulnerable" "whether they are members of the target audience or not").

129. *See generally* Forman, *supra* note 127.

130. *See supra* text accompanying notes 18–20.

131. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

132. *See* McCulloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

133. *See, e.g.*, Bond v. United States, 572 U.S. 844, 854 (2014) ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'") (citation omitted).

the same at the state and local level. Moreover, the post-New Deal settlement appropriately recognizes the very narrow range of courts' legitimate authority to second-guess government regulation.[134] A powers approach—just like its police powers ancestor—raises the risk of such inappropriate second-guessing, unless it is itself cabined by rules that recognize legislatures' broad discretion to employ regulatory means (including speech) and courts' analogously narrow authorization to question those means.

Thus, a powers approach raises the fundamental question of how to judge government's intent consistently with the appropriate respect for and deference to government's broad discretion to select its regulatory means. To be sure, one could limit that judicial review by transplanting to the government powers context Professor Dorf's suggested approach of confining judicial review to government speech that impacts suspect classes.[135] That approach would confine the effective scope of a powers-based approach to situations that equal protection law defines as particularly fraught and thus would import equal protection concepts into the powers analysis. While this move would achieve the goal of limiting judicial review of government speech, it would do so in a way that arguably misconceives the proper analysis of a question that focuses on government powers as opposed to individual rights.

For this reason, an intent-focused inquiry may be more appropriate. An intent-focused inquiry may be particularly well-suited to a powers-based approach to the government speech issue if that approach aims to determine whether government is truly seeking to achieve a legitimate regulatory goal.[136] By contrast, an ends-means analysis limits the government's discretion to select certain means if a court finds that the government's regulatory goals could have been equally well-served by less demeaning speech. For example, Professor Dorf suggests that courts may be justified in striking down certain applications of the federal sex offender public disclosure law if they conclude that certain offenders subject to that law do not pose the public safety threat the government says they do.[137] By contrast, an intent analysis allows government discretion to select whatever means it chooses, even if those means do not satisfy the careful tailoring implied by an ends-means approach, as long as the government is deemed to have been sincerely attempting to achieve a legitimate regulatory goal.[138]

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134. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963) (abjuring significant judicial authority to second-guess legislative choices regarding social and economic regulation).

135. *See* Dorf, *supra* note 20, at 1341.

136. *See McCulloch*, 17 U.S. at 423 ("Should congress, in the execution of its powers, . . . pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land.").

137. *See* Dorf, *supra* note 20, at 1339–40 (suggesting that the stigmatization of being publicly labelled a sex offender justifies courts inquiring into whether all persons so labelled truly present the public safety risk that underlies the public disclosure scheme and suggesting that at least in some cases courts might be justified in striking down the public disclosure scheme).

138. Similarly, in other writing I have argued that the equal protection animus inquiry does not require the government to satisfy heightened scrutiny of its chosen means, as long as its goals are truly the public-regarding ones the government offers in response to a court challenge. *See* ARAIZA, *supra* note 32, at 139–43.

As Section IV.B explained, after the 2020 *Regents* case, the animus inquiry explicitly employs concepts from the Court's broader discriminatory intent jurisprudence, most notably, the factors set forth in the 1977 *Arlington Heights* opinion.[139] Those factors can also be used in an animus inquiry focused on government power. Indeed, those factors' emphasis on substantive and procedural regularity[140] make the *Arlington Heights* factors particularly appropriate tools to use in a powers-based inquiry into government speech attending substantive regulation. This is because a powers-based inquiry seeks, at base, to ensure that the government is in fact pursuing its regulatory tasks regularly and appropriately, rather than using them as pretexts for illegitimate denigration.[141] In a well-functioning bureaucracy not systemically infected by disregard for any particular group of citizens,[142] an *Arlington Heights*-powered inquiry into government intent will presumably allow government a great deal of latitude to regulate as it sees fit. Moreover, in a case where there *is* reason to suspect such systematic disregard, this inquiry is well-structured to be performed at a higher level of stringency, insisting on more conclusive evidence of government's good intent.[143]

An intent inquiry also helps resolve difficult questions involving mixed government motives. Recall a statement made earlier in this Section, to the effect that government speech tied to regulatory initiatives such as anti-obesity campaigns is generally presumed to reflect at least some measure of intent to accomplish a legitimate regulatory goal.[144] The inquiries the *Arlington Heights* factors contemplate—questions such as the procedural and substantive regularity of the decision, the immediate and deeper background of the decision, any direct statement of government's motivations, and the extent of any disparate impact—may help uncover situations where a facially legitimate government intent (for example, to combat obesity, promote tourism, or protect the public from sexual predators) is revealed to in fact implicate less benign government intent.[145]

In sum, an intent approach to the powers question provides several advantages over an approach emphasizing ends-means scrutiny. First, it better reflects the underlying goals of a powers-based inquiry. Second, it respects the government's broad discretion to select its preferred tools for achieving regulatory goals, while providing for meaningful review of the government's selection of those tools when they involve speech that has denigrating effects. Finally, it

139. *See* discussion *supra* Section IV.B.

140. *See* ARAIZA, *supra* note 32, at 149–51; *see also supra* note 120.

141. *See supra* note 136 (quoting *McCulloch* for the proposition that congressional use of its broad regulatory powers to achieve illegitimate goals would be struck down by the Court as exceeding Congress's power under the Necessary and Proper Clause).

142. *See generally* Karst, *supra* note 121 (identifying this phenomenon as important to equal protection analysis).

143. *See* ARAIZA, *supra* note 32, at 139–43 (explaining how an animus inquiry can appropriately take on a more stringent tone).

144. *See supra* text accompanying notes 112–13.

145. Such problematic intent would also include failures to give due consideration to the interests of the targeted group—for example, a disregard of the feelings or concerns of obese persons when the government crafted a public health campaign. *See generally* Karst, *supra* note 121.

allows courts to modulate the stringency of their review when appropriate, via their ability to insist on more or less conclusive findings about intent.[146]

B. Pure Government Expression

Government's legitimate interests in speaking go beyond government speech as an adjunct to regulatory programs. In addition, government has an interest in what one might call "pure expression"—that is, expression whose purpose is simply to express the community's values. No regulatory need demands that "Liberty" be placed on a coin, a president's face on a postage stamp, or a particular historical person or symbol on a state flag. Rather, any legitimate regulatory interests that might be served by expression that identifies or distinguishes among coins, stamps, and flags could easily by served by generic identifiers. Nevertheless, such pure expression serves a valid government purpose of expressing the community's values. Indeed, recent controversies over the removal of confederate statues from public spaces and the names of historical figures from public institutions reflect the importance of such expression to the community's self-identity.[147] But just as such expression is important, and thus often contested, so is it legitimate. It could hardly be otherwise. If it were, the United States Government would have been acting beyond its authority in accepting the Statue of Liberty from France, among a limitless number of other examples of government embrace of speech that simply seeks to inspire citizens or remind them of the community's shared values.[148]

Given government's undeniable authority to make such speech, to what extent can a powers analysis limit government's authority to express views that allegedly demean a minority group? It may be uncontroversial that the federal government can host the Statue of Liberty and claim its message (whatever it may be)[149] as the government's own. But what about a state government that wishes to fly the confederate flag? What, if anything, does a powers analysis say about such pure government expression?

Begin with the fundamental difference between this type of government speech and the type discussed in the prior section. The type of government speech at issue here, by hypothesis, does not seek to further a material regulatory goal, such as public health. Rather, it seeks to achieve an expressive goal, such

146. To be sure, such modulation is also possible in an ends-means analysis. *See* Dorf, *supra* note 20, at 1339–42 (considering the argument for heightened ends-means scrutiny in some cases where the victims feel demeaned by the government's speech). Still, ends-means scrutiny explicitly aims at limiting the government's freedom to choose the means it believes best serves its regulatory goals. By contrast, an intent inquiry avoids at least an explicit judicial questioning of legislatures' means.

147. *See generally* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

148. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (upholding Texas's placement of a Ten Commandments slab on the statehouse grounds, among a variety of other sculptures that were explained as expressing Texans' shared values).

149. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 474–78 (2009) (noting how the meanings of statutes on government property may be interpreted differently by different persons, and how those meanings may change over time).

as reminding citizens of shared values. Put slightly differently, such expression constitutes the government's goal, not just a tool to reach a substantive regulatory result. This difference matters because it impacts the analysis a court should perform when confronting a claim that such pure expression is motivated by bad intent. At first glance, the expressive goal of such speech makes an animus-grounded powers analysis more straightforward. Simply put, if the goal of speech is to express particular views, those views cannot be ones of denigration. On this theory, the lack of a material regulatory goal simplifies the analysis by focusing the judicial inquiry squarely on the speech itself rather than on whether the speech, despite any demeaning effect, nevertheless promotes a legitimate regulatory goal.

Nevertheless, even in the pure speech context a version of that same problem—the problem caused by the existence of a legitimate public interest that arguably justifies demeaning speech—immediately reappears. Even purely expressive speech may create mixed effects, arising from the reality that the same speech might communicate different messages or express different values. Flying the confederate flag, for example, might express a message of white supremacy and Black subordination, or it might communicate more laudable messages of reverence for ancestors, regional pride, or local autonomy. Thus, just like, for example, speech incident to a program of public health regulation, purely expressive government speech may create different effects (or, more accurately, may express different values that generate different effects).[150] That fact would require courts employing an animus-grounded powers approach to sift between different justifications for allegedly demeaning pure government expression, just as they must do when scrutinizing regulation-related government speech that is alleged to demean.[151]

Here again, though, an animus inquiry conducted through the *Arlington Heights* factors can help resolve what would otherwise be difficult questions raised by the need to privilege one side's or another's understandings of government expression. That inquiry asks a series of questions about the effects and context of a decision, its procedural and substantive regularity, and any statements by decisionmakers relevant to that decision.[152] Together, those questions

150. *See, e.g.*, Erin Blakemore, *How the Confederate Battle Flag Became an Enduring Symbol of Racism*, NAT'L GEOGRAPHIC (Jan. 12, 2021), https://www.nationalgeographic.com/history/article/how-confederate-battle-flag-became-symbol-racism [https://perma.cc/R8CE-48R3] (explaining the history of the confederate battle flag and, in particular, how it evolved into both a general symbol of rebelliousness adopted by rock bands and a symbol of opposition to desegregation and civil rights).

151. *See generally* ARAIZA, *supra* note 32.

152. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) ("The impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point. . . . The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially

seek to paint a holistic picture of the decision as a way of creating a constructed intent about it. The number and variety of those inquiries can also ensure that conclusions about the government's intent reflect the nuances of decisions as fraught as the one to display the confederate flag.

Consider how that inquiry might play out in the confederate flag context. Begin with what *Arlington Heights* called "the historical background of the decision."[153] The fact that the decisions to display the flag or add its design to the state flags of several southern states were made in the late 1950s and 1960s, in the context of bitter white southern resistance to desegregation, is surely relevant to any inquiry into the government's intent.[154] Moreover, at least in the case of Alabama, that decision was also procedurally and substantively irregular, made as it was by Governor George Wallace in the immediate run-up to the well-publicized visit of Attorney General Robert Kennedy to discuss desegregation at the University of Alabama.[155] The deeper historical background is surely also relevant to that intent: as historians have noted, white southerners embraced the confederate flag, and confederate iconography more generally, during the height of the Jim Crow system's hold on southern society.[156] As for "contemporary statements"[157] made by decisionmakers, consider Alabama Governor George Wallace's 1963 inaugural address, which favorably referred to the fact that he was being sworn in on the same site where Jefferson Davis was sworn in as president of the Confederate States.[158]

Of course, one cannot ignore questions about effects. It is undeniable that the vast majority of Black Americans view the confederate flag as a symbol of oppression and hate.[159] The fact that one side of the confederate flag controversy constitutes the quintessential politically powerless group[160] provides strong

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where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.") (internal citations omitted).

153. *See id.* at 267.

154. *See, e.g.*, Forman, *supra* note 127, at 507–08 (recounting the historical background of Alabama's decision to fly the flag in the early 1960s).

155. *See id.* at 508.

156. *See* AM. HIST. ASS'N, STATEMENT ON CONFEDERATE MONUMENTS 1–2 (2017) ("The bulk of the [confederate] monument building took place not in the immediate aftermath of the Civil War but from the close of the 19th century into the second decade of the 20th. Commemorating not just the Confederacy but also the 'Redemption' of the South after Reconstruction, this enterprise was part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South.").

157. *Arlington Heights*, 429 U.S. at 268.

158. *See* George C. Wallace, Governor, The Inaugural Address of Governor George C. Wallace at Montgomery, Ala. (Jan. 14, 1963), (transcript available at https://digital.archives.alabama.gov/digital/collection/voices/id/2952 [https://perma.cc/2T83-RBCJ]).

159. For an examination of the small percentage of Black Americans who oppose that view, see John Amis, *Photos: They're Black and They're Proud of the Confederate Flag*, ATLANTA J.-CONST., https://www.ajc.com/news/state—regional-govt—politics/photos-they-black-and-they-proud-the-confederate-flag/by06A6yw Mrqi7mYP9A1jmO/ [https://perma.cc/72YB-UV4D].

160. *See* Letter from Harlan Fiske Stone to Irving Lehman, *quoted in* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 515 (1956) (expressing concern about the treatment of racial and religious minorities). The letter was dated April 26, 1938, a day after the Court handed down its opinion in *Carolene Products*. *See also* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152 (1980)

evidence that display of the flag reflects an intentional burdening of that group, even if it may not reflect the sort of disparate impact the Court insisted on in *Palmer v. Thompson*[161] and lower courts insisted on in the confederate flag cases Part II discussed.[162] At the very least, without more, it suggests that decisions to display the flag reflect a disregard for that group's interests and concerns. *Arlington Heights* recognized the evidentiary value of such disparate impact.[163] To be sure, it cautioned that it would be "rare" that "a clear pattern, unexplainable on grounds other than [the alleged discriminatory ground] emerges from the effect of the state action even when the governing legislation appears neutral on its face," and thus creates a "relatively easy" "evidentiary inquiry."[164] Nevertheless, it observed that such disparate impact "may provide an important starting point."[165]

Taken together, these factors make out a strong prima facie case that discriminatory intent—more accurately, in the context of animus, *unconstitutionally* bad intent—motivated the government's action. As I have argued in other writing, such prima facie bad ultimate intent—just like prima facie discriminatory intent in the actual *Arlington Heights* context—justifies shifting the burden of proof to the government.[166] In the discriminatory intent context, that burden-shifting requires the government to prove that it would have made the same decision absent the alleged bad intent.[167] In most animus contexts, that burden-shifting triggers a more-careful-than-normal judicial look at whether the government action reasonably furthered its professed interests.[168]

Still, the pure expression involved in something like flying a confederate flag requires a slight adjustment when describing the government's burden. In a case involving pure expression of that sort, the burden-shifting identified in the previous paragraph would require a court to examine whether the more legitimate messages assertedly motivating the government speech (here, for example, to

(referring to Black persons as "the one group everyone seems to agree should be extended special protection under the Fourteenth Amendment").

161. *See* text accompanying *supra* notes 16–18 (discussing *Palmer*).

162. *See supra* Part II. One explanation for this admittedly delicate distinction is that a powers-based challenge to government speech focuses on the identity of the target of the government speech (in these cases, Black persons) rather than on the reactions to that speech. Thus, speech targeted at, say, Black persons may still cause offense and resentment among persons of all races (thereby defeating an equal protection claim resting on such offense or resentment, as in the confederate flag cases) while still constituting speech targeted at Black persons (thereby allowing a powers-based claim to remain viable, since it rests purely on an allegation of illegitimate government motive). To be sure, this distinction is, as conceded, a delicate one. In particular, it may require reconceptualizing the disparate impact element from *Arlington Heights* as one more akin to disparate treatment. This reconceptualization is arguably quite appropriate, given the difference between the plaintiff-focused nature of an equal protection claim and the government-focused nature of a powers claim. *Cf.* Nourse, *supra* note 88, at 761 ("[T]he professional lawyer of the [late nineteenth century] believed that almost everything in constitutional law depended upon power" as opposed to individual rights *per se*.).

163. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 256–57 (1977).

164. *Id.* at 266 (internal citations omitted).

165. *Id.*

166. *See* ARAIZA, *supra* note 32, at 124–25.

167. *See Arlington Heights*, 429 U.S. at 270 n.21 (describing this burden-shifting).

168. *See* ARAIZA, *supra* note 32, at 124–25; *see also infra* note 169.

promote reverence for ancestors or laud local autonomy) provided an independently sufficient explanation of the government's action.[169] While this sounds like an inquiry into purely subjective intent, objective markers can also help guide it. Beyond any inquiry into such subjective intent, in the confederate flag case, for example, a court could consider whether the government deciding to fly the flag considered the sensibilities of its Black citizens, whether it took concrete actions to account for those sensibilities, and whether its display of the flag included features acknowledging their equal citizenship. Any such arguments by the state would have to focus on actions taken when the decision was made to fly the flag; as the Court explained in *Hunter v. Underwood*, the relevant discriminatory intent (or animus) examination inquires into the State's intentions at the time it made the challenged decision.[170] Such facts, if established, would allow a court to conclude that the government gave what the Court in an animus-related context called "respectful consideration"[171] to the interests opposed to the government expression. Such a conclusion might successfully rebut a claim that the government's action was infected with unconstitutionally bad intent.

The final step in this approach is to connect the analysis described above to government power. As Part II explained, a powers focus may be necessary for an animus analysis to be effective, given the serious limitation on equal protection law imposed by that law's disparate impact requirement. Because a powers approach focuses on the government's authority to speak, rather than on that speech's equality implications, it avoids the disparate impact problem. Instead, a focus on government powers would allow a court to conclude that the government simply lacks the authority to engage in certain pure expression that is motivated by a desire to demean or subordinate a group. To amend *Moreno*'s canonical language to apply to such a conclusion, one might read that language to warn that "if the constitutional conception of [a government that can act (via regulation or speech) only for public-regarding reasons] means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"[172] justifying such action.

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169. This is in slight contrast to the review a court would perform in a case involving an animus allegation against a substantive regulatory decision, such as the housing permit denial in *Cleburne*. In such a case, the shifted burden would require the court to determine whether the challenged decision reasonably fit the government's alleged legitimate justifications, and thus could be concluded to have been motivated by those legitimate reasons. By contrast, in a case of pure government expression, it makes less sense to ask whether the challenged expression was reasonably related to, or "fit" a legitimate government interest. This difference again tracks the underlying difference in the analysis when the government action in question consists of pure expression rather than substantive regulation or speech related to such regulation.

170. 471 U.S. 222, 232–33 (1985). *Hunter* dealt with a challenge to an Alabama constitutional provision denying the franchise to persons convicted of certain crimes. *Id.* at 223. The Court struck down the provision as a violation of the Equal Protection Clause, concluding that, at the time of its enactment in 1901, the provision was intended to restrict the voting rights of Black persons. *Id.*

171. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (concluding that a state civil rights commissioner failed to give "respectful consideration" to the plaintiffs' request for a religion-based exemption from the state's antidiscrimination law).

172. *See also* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 275 (2011) ("The baseline of the American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in

The confederate flag example considered above constitutes one of the more—indeed, one of the most—fraught examples of a situation in which pure government expression is challenged as reflecting animus. But the analysis of that example provided above explains how a powers-based animus approach can provide a principled way of resolving such questions. To be sure, implementing this approach will still require hard work and nuanced judgments: compared with the confederate flag example, it may be that most instances of pure government expression challenged as demeaning will present more balanced arguments on each side. Nevertheless, the approach sketched out above provides real benefits. It promises to allow the government sufficient discretion to engage in pure speech when such speech is plausibly grounded in sincere attempts to express viewpoints and values that are not intended to impose psychic or other burdens on "a politically unpopular group"[173]—that is, speech that is not motivated by "a bare . . . desire to harm" that group.[174] As such, it allows the government to play one of its most important roles—as a spokesperson for the polity's values—without allowing that role to devolve into a blank check to oppress politically unpopular minorities via demeaning speech.

VII. CONCLUSION

Government speech can do great good. Pure government expression can express uplifting and unifying messages, while government speech attendant to regulation can assist government in achieving important regulatory goals. But government speech can also do great harm. Even leaving aside the horrific examples with which this Article began,[175] such speech can denigrate persons even if it also furthers important regulatory goals, and purely expressive government speech can subordinate persons and groups who find themselves on the wrong side of the values the government seeks to promote.

Distinguishing between legitimate and illegitimate government speech requires tough decisions. Obstacles to that attempt imposed by rules such as equal protection's disparate impact requirement suggest the appropriateness of other approaches—even if one believes that the government's intent remains the ultimate touchstone for the permissibility of such speech. Transplanting an intent-based approach into an inquiry into the government's legitimate powers promises to capture the benefits of an intent-based approach while allowing the government the leeway it needs to regulate and the leeway it deserves when it sincerely attempts to express public values, consistent with respect for all members of the polity as citizens of equal dignity. This Article's analysis attempts to provide a blueprint for such an intent-based approach grounded in the idea of the

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traditional thought has also meant that government's actions are undertaken in good faith and for reasons that are generally seen to be appropriate."); *cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

173. *Moreno*, 413 U.S. at 534.

174. *Id.*

175. *See supra* text accompanying note 1.

government's legitimate power. Even if this analysis does not provide the perfect and conclusive roadmap to applying such an approach, it aspires to arrange the conceptual and doctrinal building blocks to allow us to ask the right questions and, if this Article's answers are not perfect, to reach better ones.