THE ENDS AND ENDINGS OF GOVERNMENT-MOTIVE ANALYSIS

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INTRODUCTION

Many areas of constitutional doctrine accord relevance to the government's reasons for acting. Within these areas of the law, otherwise permissible forms of government action can become more constitutionally suspect (or even automatically invalid) based on a court's conclusion that the relevant decision makers acted with a disfavored motive in mind. For example, a policy that is facially neutral with respect to race might nonetheless trigger strict scrutiny under the Equal Protection Clause upon a finding that the policy furthers a racially discriminatory intent.[1] Policies normally subject to rational basis scrutiny can give rise to much more searching equal protection analysis upon a finding that they derived from a "bare . . . desire to harm" a disfavored group.[2] A policy that does not explicitly target religious practices might implicate searching free exercise review upon a finding that the policy was implemented for a religion-targeting purpose.[3] A state-based measure that does not discriminate against out-of-state commerce can still implicate heightened dormant Commerce Clause concerns upon a finding that the policy was

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1. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

2. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* United States v. Windsor, 570 U.S. 744, 770–72 (2013); Romer v. Evans, 517 U.S. 620, 634–35 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985). *See generally* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 892 (2012) ("[D]emonstrating that a law is based on unconstitutional animus is virtually the only way a plaintiff is successful under deferential rational basis review."); William D. Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 992 (2021) (noting that "the Court has applied [the animus] doctrine when . . . heightened scrutiny is, for whatever reason, unavailable or remains unmentioned" while also noting that the doctrine remains "deeply under-theorized").

3. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (emphasizing "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citation omitted)).

intended to serve protectionist aims.[4] Other examples exist as well.[5] In short, courts adjudicating constitutional cases must often investigate not just *what* a governmental action purports to do, but also *why* it was brought into being.

The analysis of government motive has long given rise to a range of difficult theoretical and methodological questions.[6] One set of questions has to do with the temporal duration of a judicial finding that the government has embraced an improper reason for acting.[7] That is, assuming that a government policy, *P*, was tainted by an improper motive, *M*, for how long and under what circumstances should *M* continue to influence courts' evaluation of *P*? For example, if *P* takes the form of a statutory enactment, should an initial finding that *P* is tainted by *M* lose all relevance if the legislature then re-enacts *P* while explicitly disavowing *M*? Does the prior finding lose relevance if the same set of decision makers, while saying nothing about *M*, seeks to revive *P* in substance or in form? What if a different set of decision-makers does the same? To what

4. *See, e.g.*, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect[.]" (citation omitted)).

5. For an especially helpful overview of government-motive-related tests in constitutional law (and other areas of public law), see Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1486–96 (2018) (noting additional examples from, *inter alia*, free speech doctrine and Sixth Amendment doctrine); see also Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 338–57 (1997) (offering a functionalist taxonomy of the different ways in which motive-based findings affect bottom-line constitutional conclusions).

6. For example, what sorts of motives should in fact qualify as constitutionally suspect (if not fully proscribed)? What sort of evidence should suffice to demonstrate the existence of an improper motive, and how (if at all) might a prima facie showing of improper motive be rebutted? Is motive to be discerned by reference to the "objective" interpretations of a third-party reasonable observer or the subjective intentions of the decision makers themselves? How, if at all, can one speak sensibly of the collective "motives" embraced by a multimember body such as a city council, agency board, or legislature? For a useful catalogue of (and some preliminary answers to) these and other questions, see, for example, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212–17 (1970) (cataloguing a series of oft-voiced objections to government-motive analysis grounded in concerns about "ascertainability," "futility," and "disutility").

7. In addition to the other contributions to this symposium issue, several recent articles have begun to grapple with various elements of this problem. For an especially incisive treatment of the problem as it relates to claims of discriminatory intent in relation to the Equal Protection Clause and the Religion Clauses, see W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1197 (2022) (advocating for an approach to the problem that would treat laws tainted by a discriminatory past as subject to disparate-impact-based analysis, which would require state officials either to demonstrate that "the contemporary policy has eliminated any meaningful disparate impact" or, in the alternative, to "make a heightened showing of why it cannot eliminate the disparate impact and why the legitimate need for this means of pursuing a non-discriminatory government interest outweighs the harm of shielding the disparate impact of a tainted rule"). For other illuminating discussions, see, for example, Garrett, *supra* note 5, at 1519–26 (arguing that when a present-day law is tainted by past discriminatory intent, "judges should . . . remain skeptical of certain do-overs, particularly because of the breadth of the harm that discriminatory intent has on society"), and Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947, 979, 1006 (2022) (noting that as a descriptive matter, "the Supreme Court's guidance" on questions related to the temporal duration of impermissible-intent findings "has been profoundly inconsistent," and as a prescriptive matter, "it is reasonable to place the burden on the state, appearing back in court to defend a subsequent version of a law that was previously invalidated, to explain how any potentially relevant developments cleanse the taint"). *See also id.* at 952 (analyzing several important dimensions to the problem of determining "when the past is really past"). For additional works that have engaged with the problem, see generally Murray, *supra*, at 1195 n.20 (collecting citations).

extent might a finding that *P* was motivated by *M* in one jurisdiction affect a court's evaluation of other *P*-like actions adopted in other jurisdictions as well? And so forth.

These questions are difficult to answer. This is so in part because the questions can arise against the backdrop of a widely varying set of factual contexts that resist easy generalization and synthesis. But there is another reason too: the questions are difficult to answer because, as we will see, the proper approach to pinpointing the temporal "ending" of an improper-motive finding depends, at least in part, on the doctrinal "end" that the finding is meant to serve. Put differently, courts can have different reasons for caring about reasons, and those reasons can affect the end-of-motive calculus in meaningfully different ways.

My aim in this Essay is to work through what I call the "end of motive" problem by reference to the "ends of motives" problem—that is, I want to consider the extent to which and ways in which the proper approach to pinpointing the temporal ending of an improper-motive finding depends on the reasons why that finding carries doctrinal relevance in the first place.[8] My analysis proceeds as follows. First, in Part I, I introduce what I understand to be the primary doctrinal functions of government-motive analysis. Building on my prior work within this area,[9] I highlight four distinctive (though not mutually exclusive) reasons why courts might scrutinize government motives when deciding constitutional cases. First, courts might scrutinize government motives because those motives—at least when publicly communicated—give rise to *expressive harms* that themselves have constitutional salience.[10] Second, courts might scrutinize government motives because those motives—whether or not publicly communicated—furnish evidence of a challenged law's tendency to generate constitutionally problematic on-the-ground (and non-expressive) *effects*.[11] Third, courts might scrutinize government motives because the government's embrace of those motives serves to cast doubt on the persuasiveness of any *justifications* for a law that might otherwise save it from constitutional attack.[12] And finally, courts might scrutinize government motives

8. Although other commentators have suggested a distinction between the concept of a governmental "motive" and that of a governmental "purpose," *see* Ely, *supra* note 6, at 1217–22 (describing the posited distinction), I use the terms interchangeably here, as I have done in the past. *See* Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333, 340 n.25 (2018).

9. *See* Coenen, *supra* note 8, at 351–56. That work itself draws on other prior scholarship regarding the doctrinal purposes behind motive-based inquiry. *See, e.g.*, Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1385–91 (2008); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 240 (2008); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 14 (2000).

10. *See infra* Subpart I.A; *see also* Coenen, *supra* note 8, at 342–46.

11. *See infra* Subpart I.B; *see also* Coenen, *supra* note 8, at 346–48.

12. *See infra* Subpart I.C; *see also* Coenen, *supra* note 8, at 349–53.

because applicable constitutional norm imposes on government actors a *duty* not to operationalize certain aims, sentiments, or desires.[13]

Having introduced these four different purposes that motive-based analysis might serve, I then turn in Part II to the end-of-motive problem itself. My overarching suggestion here is that each of the accounts introduced in Part I points to different ways of thinking about the temporal duration of a finding that policy *P* reflects an improper motive *M*. More specifically, the *expressive* account suggests that *M* should remain relevant to *P* for at least as long as the government has failed to explicitly repudiate *P*'s connection to *M*.[14] The *effects*-based account, by contrast, suggests that *M* should remain relevant to *P* regardless of any subsequent disavowals, though *M*'s evidentiary significance might eventually come to be outweighed by other more probative evidence concerning the severity of the unwanted effects.[15] The *justification*-based account, meanwhile, suggests that the finding of an improper motive should remain relevant to *P* (and subsequent *P*-like actions) pursued by the *same officials* who pursued *P* in the first place, at least insofar as those officials have failed to adduce a genuinely weighty and legitimate justification on behalf of *P*.[16] And finally, the *duty*-based account suggests that the finding of an improper motive attached to *P* should indefinitely cast doubt on *P* itself, while also raising at least a rebuttable presumption that *P*-like actions undertaken subsequent to *P* are in violation the same motive-based duty.[17]

With those suggestions on the table, Part III of the Essay then proceeds to consider some challenges and complications that would follow from attempting to operationalize the framework identified in Part II. One such challenge has to do with associating the above-described "reasons for caring about reasons" with particular areas of discrete doctrinal inquiry. To the extent that existing doctrine requires inquiry into government motive—without clearly explicating the reasons why it does so—how should courts go about identifying the applicable approach to navigating the end-of-motive problem?[18] A related challenge is raised by areas of doctrine within which the inquiry into government motive serves multiple purposes simultaneously. To the extent, for instance, that the operative motive-based inquiry implicates both the enforcement of a constitutionally based duty not to act for certain reasons and an assessment of the extent of a law's expressive harms, how should courts identify the appropriate end-of-motive approach?[19] A final complication is

13. *See infra* Subpart I.D; *see also* Coenen, *supra* note 8, at 353–55. For reasons discussed further below, the "duty-based" account that I offer here deviates somewhat from what I characterized in my prior article as a "rule-based rationale for motives analysis." *Id.* at 355.

14. *See infra* Subpart II.A.

15. *See infra* Subpart II.B.

16. *See infra* Subpart II.C.

17. *See infra* Subpart II.D.

18. *See infra* Subpart III.A.

19. *See infra* Subpart III.B.

raised by determining the precise *substantive scope* of a prior motive-based finding: assuming, that is, that some past *P* was tainted by *M*, how does a court determine whether that same finding should apply to present-day policies that differ from *P* in some respects but mirror *P* in other respects?[20]

Before proceeding further, I offer two methodological clarifications. First, the foregoing analysis largely sidesteps questions about the baseline desirability of motive-based analysis as a constitutional decision-making tool. For purposes of this Essay, that is, I simply take it as a given that the conceptual, evidentiary, and practical difficulties long associated with inquiries into government motive are not so great as to warrant an across-the-board ban on considering such motives when evaluating constitutional claims.[21] My starting point, in other words, is the descriptive observation that courts often *do in fact* care about government motive. From there, I seek to identify: (1) plausible reasons as to why that might be the case and (2) sensible approaches, by reference to those reasons, to determining when a finding of improper motive has run its course. None of what follows, however, should be understood as a normative defense of motive-based analysis itself.

Second, the analysis operates largely outside of, rather than within, existing doctrinal structures and constraints. That is, in both asking about the purposes that motive-analysis might serve and outlining various approaches to the end-of-motive problem itself, I do not seek to develop a descriptive account of what current doctrine requires courts to do.[22] Rather, I seek to offer a prescriptive account of what I think a coherent doctrinal approach to the end-of-motive problem should look like. To be sure, I will sometimes draw on existing case law for illustrative purposes, and I will sometimes offer suggestions about how a particular area of doctrine might be made more coherent in light of the framework developed below. At bottom, however, my reasoning proceeds less from the frameworks and instructions that the doctrine currently sets forth and more from a functionalist inquiry into the roles that government motive-analysis might sensibly play in guiding courts' implementation of constitutional norms.

20. *See infra* Subpart III.C.

21. *E.g.*, Aviel, *supra* note 7, at 1012 ("For all its challenges and shortcomings, motive scrutiny is a basic feature of constitutional law, and it can serve to advance interests that align with either conservative or progressive ideals. This project takes that landscape as a given and builds upon it a framework tailored to the specific context of successive lawmaking." (footnote omitted)).

22. For one such descriptive account, see *id.* at 979 ("Where the Supreme Court was once willing to acknowledge that later versions of a law can be traceable to prior unconstitutional conduct, it has more recently announced a 'presumption of legislative good faith' that threatens to be perplexingly resistant to evidence of the contrary." (quoting Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018)).

I. FOUR ACCOUNTS OF MOTIVE-BASED ANALYSIS

Imagine two identical policies, *P1* and *P2*, enacted by two different jurisdictions. Suppose further that *P1* and *P2* are identically worded, adopted at identical times (and by way of identical procedures), and have, at least on initial inspection, identical on-the-ground effects. But suppose further that we have good reason to believe that, whereas the government that adopted *P1* did so for legitimate reasons, the government that adopted *P2* did so in order to fulfill a constitutionally suspect aim. For example, if *P1* and *P2* were anti-leafletting ordinances, we might imagine that *P1* was adopted for the purpose of reducing clutter on the sidewalk whereas *P2* was adopted for the purpose of limiting the dissemination of flyers critical of the government. Or, if *P1* and *P2* were truck-length restrictions for state highways, we might imagine that *P1* was adopted for the purpose of promoting traffic safety whereas *P2* was adopted for the purpose of preventing interstate shipping companies from using its roads. Or, to take one further example, if *P1* and *P2* were government-hiring policies that had a disproportionately adverse impact on the basis of race, we might imagine that *P1* was adopted for race-neutral reasons whereas *P2* was adopted for the express purpose of achieving its racially discriminatory effects. Under these and other circumstances, courts may have reason to treat *P2* as more constitutionally suspect than *P1*, even where the two policies differ only in the reasons said to support their adoption. The question we want to ask here is why.

A. The Expressivist Account

One potential reason for treating *P2* differently from *P1* has to do with the expressive valence of the policy being adopted.[23] Even if *P1* and *P2* have identical effects in terms of, say, the number of leaflets removed from the streets, the increased costs to interstate truckers of using a state's roads, or the extent of a hiring policy's racially disparate impacts, the two policies might—on account of the reasons underlying their adoption—send different messages to the political community about the values, priorities, and commitments of the governments that adopted them. One might, in other words, posit a meaningful expressivist difference between: (1) a policy whose constitutionally suspect effects are characterized by government actors as a regrettable but necessary

23. For a small sampling of the voluminous literature dealing with the expressivist effects of governmental action, see, for example, Hellman, *supra* note 9 (outlining an expressivist theory of the Equal Protection Clause); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–64 (2000) (noting that within some areas of constitutional law, courts have invalidated laws "*solely* on account of their expressive harms," including in cases where "the court finds that the law in question has caused no material injuries or other objectionable harms, but nevertheless rejects the law for expressing an unconstitutional purpose or attitude."); see also Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

byproduct of an effort to achieve some legitimate regulatory aim, and (2) a policy whose same suspect effects are embraced by government actors as an affirmative reason to put the measure in place. *P1*, in other words, would differ from *P2* in the sense that the latter is more likely to "send a message" to the public that the government does not embrace (or even is actively flouting) a set of values that the Constitution enshrines. And, on some theories of constitutional decision making, the problematic nature of that "message" can itself provide a reason for refusing enforcement of the law.[24]

On an expressivist-based account, then, the motives underlying a policy's creation take on doctrinal relevance insofar as they help to shape and define the "message" that the policy itself is understood to send. Under some circumstances, of course, motive-based evidence might not be needed for this purpose: when, for instance, the suspect effects of a policy are sufficiently salient and severe, an adverse "message" might be discernable without any knowledge of the government's reasons for enacting the measure.[25] In other circumstances, however, the government's embrace of a bad reason for acting might suffice to make a constitutional difference.[26] Absent the motive-based

24. Here, I am glossing over some differences that exist among expressivist legal theories. Of particular importance, some theories focus specifically on whether laws express messages that inflict harm on *the particular persons* who are adversely affected by those laws. *See, e.g.*, Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 530 (2016) (raising the possibility that a law might be invalidated on the ground that "some members of the legislature . . . voted for a statute with the aim of harming a racial or religious minority" and thereby "contribute[d] to the statute's overall expressive impact in *marginalizing or stigmatizing that minority*" (emphasis added)). Other theories focus more generally on the question of whether laws express messages that undermine governmental legitimacy. *See, e.g.*, Garrett, *supra* note 5, at 1506–16. Others focus on conflicts with the values enshrined by the applicable constitutional provision being enforced. *See, e.g.*, Hellman, *supra* note 9, at 13 ("A legal classification violates Equal Protection if the meaning of the law or practice in our society at the time conflicts with the government's obligation to treat us with equal concern . . . . Just as respecting someone requires acting respectfully, so too equal concern requires expressing equal concern."); Anderson & Pildes, *supra* note 23, at 1554 (noting that intentionally protectionist state laws are invalid under the dormant Commerce Clause because they "express[] a constitutionally impermissible attitude toward the interests of other States in the political union." (citing Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986)). For my purposes here, however, I do not believe that the ultimate nature of the targeted expressive harm is of central importance; rather, the key point is simply that on an expressive theory, motive-based evidence acquires constitutional relevance insofar as it helps to "shape" or give substance to a proscribed expressivist message.

25. *Cf.* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (noting that a series of effects-based allegations regarding the discriminatory effects of a redistricting law would, if proven, be "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating" on the basis of race).

26. Thus, for instance, Professor Deborah Hellman, who has characterized an expressivist approach to equal protection doctrine as offering an alternative to the court's current (and near-exclusive) focus on discriminatory intent, nonetheless acknowledges that the government's "evidence of subjective intent" remains relevant to any expressivist inquiry insofar as "that evidence contributes to the public meaning of the action." Hellman, *supra* note 9, at 39; *see also* Fallon, *supra* note 24, at 550 (writing that in the context of discrimination-based constitutional protections, "one could imagine" an investigation into a law's expressivist meaning as involving "an inquiry into whether, as a psychological matter, individual members of the legislature had a motivating purpose of sending a message of exclusion"); Ristroph, *supra* note 9, at 1386 ("An attitude [expressed by government action] is not exactly equivalent to an intention, but government intentions help determine the social meaning, or expressed attitude, of state action.").

finding, a court might have reason to conclude that a policy is unlikely to yield expressivist harm. With such a finding in place, by contrast, a court might have reason to worry about the message the law sends. What the government *says* about what it is doing, in other words, can sometimes shape public understandings and interpretations of what it has done. And where that is so, evidence of an improper motive can prove relevant to the constitutional validity of a challenged law.

A final note about the expressivist account of motive-based analysis bears emphasizing here: Because the expressive effect of a law centers on the public "message" that it sends, government motives have significance insofar as the motives are openly communicated to the public at large.[27] What matters from an expressivist perspective, in other words, is not the internal psychological state of the persons who put a policy in place but rather the external social perceptions of what those persons' intentions seem to have been. In theory, at least, a policy that was "actually" enacted for nefarious reasons might pose no expressive problems if third-party observers fail to impute those intentions to the policy itself. Conversely, a policy that was "actually" enacted for innocuous reasons might still pose expressive problems if third-party observers (incorrectly) assume that the policy's enactors were pursuing illegitimate aims. All of which is simply to say that "motive" can be something of a misnomer when used in connection with expressivist inquiries. The analysis centers not so much on the objectives that the relevant government actors in fact set out to achieve as it does on the objectives that the relevant political community understands them to have pursued. Oftentimes, these will be the same, but sometimes they may not.

B. The Effects-Based Account

A second reason for caring about government motive has to do with measuring the on-the-ground effects of a law being challenged. We earlier stipulated that *P1* and *P2* yielded apparently identical outcomes in terms of their concrete (but non-expressive) impact on the polities to which they applied. But in a world of imperfect information, courts will often be unable to gauge with much precision the extent to which a challenged law inflicts constitutionally salient harms on the public at large.[28] Faced with such uncertainty, courts must

27. *See* Coenen, *supra* note 8, at 345, 345 n.45 (collecting citations for the proposition that an expressivist rationale for government-motive analysis "accords relevance only to the *objectively apparent* motives for a law's enactment; it provides no good reason for caring about governmental motives kept hidden from public view").

28. *See* Coenen, *supra* note 8, at 347–48.

instead rely on proxies in gauging the severity of these harms. And one such proxy might be the intentions of the persons who put the policy in place.[29]

To see the point more concretely, suppose that a state passes a law that is challenged as a violation of the dormant Commerce Clause.[30] Relevant to the merits of the challengers' claims is an assessment of the extent to which the law imposes burdens on the free flow of interstate commerce—the greater the magnitude of these burdens, the stronger the case for invalidating that law becomes.[31] And suppose further that prominent members of the state legislature sought to put the law in place for explicitly protectionist reasons; that is, they openly and enthusiastically supported the law's enactment precisely because they believed it would prop up local businesses at the expense of their out-of-state competitors.

Strictly speaking, the doctrine being applied purports to care only about on-the-ground effects. Even so, there is good reason to think that the evidence of improper motive might be relevant to the court's doctrinal analysis. The intuition goes like this: if the people who fought hardest for this law did so because they thought it would have protectionist effects, then courts should take very seriously the possibility that the law does in fact have such effects. In other words, direct evidence that government officials enacted a law for the purpose of achieving a constitutionally disfavored outcome should qualify as at least indirect evidence that the constitutionally disfavored outcome is likely to occur.

To be sure, one cannot always infer the existence of an adverse effect from the existence of a previously stated governmental intention to create that effect. Policymakers themselves lack perfect information and sometimes will misfire in their efforts to bring about the outcomes they desire. But the intuition is hardly a useless one: Under some circumstances, that is, information about the reasons why a policy was put in place will provide some, albeit imperfect,

29. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 (1996) (noting the "predictable tendency of improperly motivated actions to have certain untoward effects"); *see also id.* at 507 (positing that with respect to one potential justification for motive-based analysis in free-speech law, "[t]he reason to think about reasons has to do with the likelihood that the consideration of certain reasons will systematically and predictably lead to actions that have adverse consequences."); *see also* Ristroph, *supra* note 9, at 1385–86 ("[T]he relevance of state intentions can be defended with a consequentialist argument that focuses on the correlation between intentions and results . . . . Under this view, intent may be legally significant if it serves as a proxy or predictor of some other harm.").

30. Prior to the Court's recent overruling of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Professor Thomas Colby offered a similar hypothetical with respect to the relationship between intent and effect in connection with the undue burden test. *See* Thomas B. Colby, *The Other Half of the Abortion Right*, 20 U. PA. J. CONST. L. 1043, 1054 (2018) ("It is easy to imagine cases where the law's effect on women's rights, while significant, is hard to prove, but the purpose to hinder abortion rights is clearly demonstrable.").

31. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

evidence of the effects to which that policy gives rise. And to the extent that the operative area of doctrine cares about those effects—to the extent, that is, that the doctrine renders the policy's constitutional validity to depend on an assessment of the harms it causes on the ground—then the intent-based evidence ought to matter as well.[32]

C. The Justification-Based Account

Government motives might also matter to the extent that they color courts' assessments of the regulatory justifications said to support a suspect law. Many areas of constitutional doctrine permit governments to encroach on constitutionally sensitive interests (e.g., free-speech rights, privacy interests, equality-based protections, etc.) only if they do so in a manner that is sufficiently well-tailored to serve a sufficiently important regulatory aim.[33] And where such a rule prevails, the outcome of a case will turn on a court's evaluation of whatever regulatory justifications the government has invoked on behalf of a challenged law. Here too, however, courts will often lack the institutional capacity to determine on their own how necessary and effective a challenged measure might be in terms of, say, promoting national security interests, protecting public health, enhancing the quality of educational services, and so forth, just as they might be similarly limited in their ability to assess the adequacy of various "less restrictive alternatives" that the government might instead choose to pursue.[34] Consequently, courts must rely, at least to an extent, on the governments' representations regarding the existence of a regulatory need and a challenged law's capacity to serve that need.

In this context, it is not difficult to see how evidence of improper motives might undercut the government's case. If the officials who enacted a challenged law did so for purposes unrelated to the regulatory justifications that

32. Notice that the analytical relationship between intentions and effects can run in the opposite direction as well—that is, one sometimes might infer from the nature of a law's effects the existence of a legislative intention to create that effect. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face."); *see also* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (suggesting, by reference to the extremely discriminatory effects of a proposed redrawing of the boundaries of Tuskegee, Alabama, that "the legislation is solely concerned with" the impermissible purpose of race-based disenfranchisement). There is no inconsistency, however, between the idea that effects can sometimes tell us something about intentions and the idea that intentions can sometimes tell us something about effects. The point is simply that an intention to achieve a bad result will often go hand-in-hand with the achievement of that bad result. And from that intuition, we can simultaneously posit that: (1) evidence of bad effects supports the inference that the government embraced a bad intent; and (2) evidence of a bad intent supports the inference that a policy has bad effects. The only real difference is one of analytical utility: Where the object of the doctrinal inquiry is a conclusion about effects (and direct evidence of bad effects is lacking), then the intent-to-effects connection can prove useful to the underlying analysis. Where, by contrast, the object of the doctrinal inquiry is a conclusion about intent (and direct evidence of bad intent is lacking), then the effects-to-intent connection can prove useful as well.

33. *See* Michael Coenen, *More Restrictive Alternatives*, 96 N.C. L. REV. 1, 19–41 (2017).

34. *See id.* at 3–4.

government lawyers later put before the court, then that court should have reason to view those justifications with skepticism.[35] All else equal, a claim of regulatory justification should be regarded as more credible when the justification *actually motivated* the enactment of a law. By the same logic, such a claim should be regarded as *less* credible when the justification was reverse-engineered to support the law only after the fact.[36] And if these premises are right, then motive-based analysis becomes necessary to determining how persuasive a posited justification might be.[37]

35. *See* Young, *supra* note 9, at 240 ("[T]he presence of an illegitimate mental state animating an action might correlate at a usefully high level with the absence of any alternative and sufficient objective reason for such action[.]").

36. In my view, this was the most indefensible aspect of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), in which the Court found no constitutional defects in a later iteration of President Trump's so-called "travel ban" targeting the citizens of several Muslim-majority countries. Citing the executive's distinct responsibilities and superior institutional capacity with respect to matters of immigration and national security, the Court accepted with a straight face a regulatory justification offered on behalf of the ban that had nothing whatsoever to do with the President's actual (and explicitly stated) reasons for implementing it. *See id.* at 2408–09 ("[T]he President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries."). *But see id.* at 2435 (Sotomayor, J., dissenting) ("The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith."). It might be generally true, in other words, that the executive is better situated than the Court to evaluate and respond to security-related threats posed by visitors from abroad, thus warranting a *general* rule of deference to the President on immigration-related matters. But the application of such deference made no sense in *Trump v. Hawaii* itself because the travel ban obviously did not reflect an *exercise* of that institutional expertise, as the motive-based evidence in that case helped to reveal. *See id.* at 2442 ("Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a 'religious gerrymander.'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)).

37. One can imagine two variants of this basic approach. On one variant, the doctrine could simply require as a bright-line rule that the court may only evaluate a challenged policy by reference to regulatory justifications that were actually embraced by the government at the time of the policy's creation. *Cf.* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 680 (1981) (Brennan, J., concurring in the judgment) ("In determining th[e] benefits" conferred by a state law challenged under the dormant Commerce Clause, "a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment."). Were this the case, then motive-based analysis would prove necessary to the application of that rule—i.e., a court would need to know the officials' motivations for creating the policy in order to determine whether a particular claim of regulatory justification is disqualified from judicial consideration. On another approach, by contrast, the doctrine might allow the government to *invoke* regulatory justifications not entertained at the moment of the policy's creation based on the theory that any law that *does in fact* achieve sufficiently important regulatory goals in a sufficiently well-tailored way ought to withstand scrutiny, regardless of whether it was intended to do so. *Cf.* Young, *supra* note 9, at 199 ("If the presence of good reasons is the best practical gauge of consequences available to the judiciary, then a sufficiently powerful reason for action should permit it despite the underlying motivation."). Even on this latter approach, however, motive-based analysis might still be used to cast doubt on the *credibility* or *trustworthiness* of the government as a defender of the law on that ground. That is, if the justification is shown to be pretextual, then the justification should accordingly receive a greater degree of skepticism from the court based on the theory that justifications conjured up after the fact are less likely to reflect careful thought, study, and deliberation than are justifications that actually motivated the policy under review. *See id.* at 240 ("[A] finding of an illegitimate motive impeaches the trustworthiness of the political branches in a way that disqualifies them from making [interest-balancing] judgments in the usual de facto final way and, thus, invites intensive judicial review.").

It also bears emphasizing that, in contrast to the expressivist- and effects-based accounts, the justification-based account can accord relevance to government motives that are not in and of themselves intrinsically bad. On the justification-based account, that is, motive-based evidence can prove helpful to a challenger's case regardless of whether the government's real reason for acting involved an invidious purpose, a suspect purpose, or even just a silly but benign purpose; what matters instead is simply that the real reason for acting *differs from* the regulatory interests on which the government subsequently chooses to rely.[38] To be sure, evidence that a government actor implemented a policy for intrinsically bad reasons—i.e., to subordinate on the basis of race, to suppress dissenting speech, to cut off access to a constitutionally-protected right, etc.—is certainly capable of undercutting subsequent representations by that same actor that the policy is justified by a legitimate regulatory aim. But so too would be evidence that the actor pursued a purpose that, though innocuous in itself, has nothing to do with the "compelling," "important," or otherwise sufficiently weighty government interest later invoked on the policy's behalf. The role of motive analysis, in other words, is not so much to associate the government's action with a specific type of motive that operative doctrine has singled out as off-limits; rather, it is simply to demonstrate that an otherwise vindicating justification for the action in fact had no role to play in motivating the action itself.

D. The Duty-Based Account

The final reason why courts might care about government motive is also the most straightforward: The government's reasons for acting might matter simply because the government actors are subject to a constitutional *duty* not to pursue, operationalize, or effectuate certain desires, intentions, or aims. It has sometimes been suggested, for instance, that the Court's decisions regarding discriminatory animus are reflective of this idea. If, as Professor Dale Carpenter has suggested, animus doctrine stems from the basic intuition that "it is wrong for one person to treat another person malevolently,"[39] then one must know something about the government's reasons for acting in order to know whether

38. *See* Coenen, *supra* note 8, at 349–53.

39. Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 184, 185; *see also id.* ("[J]ust as *individuals* have a moral and sometimes legal duty not to act maliciously toward others, the *group* of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people."). Elena Kagan has also offered what might be described as a duty-based account of government-motive analysis in First Amendment law, suggesting in particular that, to the extent that free-speech doctrine imposes motive-based restrictions on government actors, those restrictions derive from a "duty of equal respect for ideas and their proponents," which "serves as just one application of a general ban on subjecting people to disadvantage for reasons that do not relate to harm, but instead arise from judgments of moral value (or from official self-interest)." Kagan, *supra* note 29, at 512–13.

a constitutionally wrongful form of conduct has occurred. Put more generally, we might understand some constitutional norms as restricting not just things that governments can do but also goals that they can pursue. And if certain goals themselves are constitutionally proscribed, then an inquiry into government motive becomes essential to identifying an operative constitutional wrong.[40]

It is worth further specifying here the precise sense in which this "duty"-centered account of government motive differs from the three other accounts I have offered above. The central distinction, it seems to me, is that the expressivist, effects-based, and justification-based accounts all treat motive-based evidence as relevant in the instrumental sense of helping to flag some other constitutional defect in a challenged law: on the expressivist account, for instance, motive-based evidence might contribute to a finding that a law sends an intolerable message; on the effects-based account, motive-based evidence might contribute to a finding that a challenged law yields intolerable effects; and on the justification-based account, motive-based evidence might contribute to a finding that a law fails to further some legitimating regulatory goal. With the duty-based account, by contrast, the motive-based evidence has intrinsic relevance to the content of the underlying norm.[41] Here, in other words, we care about the government's reasons for acting not because those reasons correlate with or provide evidence for some other finding of doctrinal significance but rather because those reasons define the wrongfulness (and hence doctrinal impermissibility) of the action under review.

One other feature of the duty-based account warrants noting here. In its purest form, the duty-based account would seem to fit most comfortably with government motives that are categorically forbidden rather than merely presumptively disfavored: that is, it might seem odd to speak simultaneously of a constitutional "duty" not to pursue certain ends while leaving open the possibility that some violations of the duty might remain constitutionally

40. I flag this possibility while also noting that duty-based framings of constitutional rights and protections rest in tension with the idea that the existence of a constitutional violation does not typically depend on whether the official(s) who engaged in challenged conduct are deserving of moral blame. *See* Ristroph, *supra* note 9, at 1387 ("On most accounts . . . the Constitution is not so much a moral catechism for a personified government as a set of limitations on government power."). One way to sidestep this difficulty is to suggest that motive-based duties derive not so much from notions of official culpability and blameworthiness but instead from the idea that, as Charles Fried once put it, the Constitution "rul[es] certain goals out of bounds for government altogether." *See* Charles Fried, *Types*, 14 CONST. COMMENT. 55, 64 (1997); *see also* Colby, *supra* note 30, at 1052 ("Purpose matters in its own right" because "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end." (alteration in original) (quoting City of Richmond v. United States, 422 U.S. 358, 378–79 (1975))).

41. Another more jargon-y way of putting the point is that the expressivist, effects-based, and justification-based accounts seek to justify purpose-based inquiries in consequentialist terms, whereas the duty-based account seeks to justify purpose-based inquiries in deontological terms. I think this distinction largely captures the difference as well, though I offer the further point of caution that some expressivist theories might also be characterized as deontological in orientation. *See* Hellman, *supra* note 9, at 13–14 (developing an expressivist theory of equal protection that "denies that the wrong is rooted in consequentialist concerns").

permissible. But I do not think this relationship is totally airtight. For one thing, courts might define the duty itself in qualified rather than absolute terms. (They might suggest, for instance, that government officials are duty-bound by the Equal Protection Clause not to intentionally discriminate on the basis of a suspect classification except insofar as is necessary to achieve some sufficiently important regulatory objective or aim.) Conversely, non-duty-based accounts of motive analysis might sometimes support treatment of a motive as categorically off-limits, even where the targeted motives have only instrumental significance. (On the expressivist account, for instance, a court might conclude that motive *M* so frequently causes an unwanted expressive harm *H* as to obviate the need for a case-by-case investigation into *M*'s relationship with *H*.) On the effects-based account, too, if the presence of *M* virtually always correlates with an unwanted effect *E*, then it might well make sense to forbid all *M*-motivated actions across the board rather than to repeatedly probe the relationship between *M* and *E* in each and every case.[42] Thus, while doctrinal recognition of a constitutional duty not to pursue *M* may often imply the existence of a bright-line rule against pursuing *M*, I do not think we can treat the former as a necessary or sufficient condition for the latter.

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The discussion thus far has suggested four reasons why courts adjudicating constitutional cases might care about the government's reasons for acting. More specifically, motive-based evidence might inform a judgment:

1. That the challenged action communicates a particular type of message that the doctrine disfavors or disallows (the expressivist account).
2. That the challenged action yields a particular type of outcome that the doctrine disfavors or disallows (the effects-based account).
3. That the challenged action is unsupported by a particular justification that would otherwise save it from constitutional attack (the justification-based account).
4. That the challenged action involves a breach of a duty not to operationalize certain intentions or aims (the duty-based account).

42. Hence my decision to reframe this account in terms of motive-based "duties" rather than, as I did in my previous work, motive-based "rules." *See* Coenen, *supra* note 9, at 353 ("On this account, courts must screen for bad motives for the simple reason that they violate a rule against bad motives."). On further reflection, I think characterizing this last account in terms of "rules" threatens to muddle the distinction between (1) prophylactic motive-based rules that are adopted in order to achieve some expressivist, effects-based, or justification-based end; and (2) genuinely deontological motive-based rules that stem from the premise that pursuit of the motive itself is intrinsically wrong. As I now understand it, rules falling within the first of these categories are better understood as deriving from whatever instrumentalist account justified their adoption in the first place.

In the real world, of course, we cannot always know the reasons why a given area of doctrine instructs courts to analyze government motives, and it may sometimes be the case that a single motive-based inquiry finds support in more than one of the accounts I have summarized above. These are complications we will consider in due course. For now, however, I want to ask the question of how best to approach the end-of-motive problem in light of each of these four accounts.

II. FOUR APPROACHES TO THE END-OF-MOTIVE PROBLEM

The end-of-motive problem, recall, goes something like this: Stipulate that the government embraced at *T1* some suspect motive *M* when implementing policy *P*. Suppose further that either *P* remains on the books or that, following a judicial invalidation of *P*, the policy has been reinstated. If *P* is challenged again at *T2*, under what circumstances should the government's past embrace of *M* continue to affect courts' evaluation of *P*? The answer, I think, depends on the reasons why *M* initially mattered at *T1*: that is, in asking whether the finding of *M* at *T1* ought to affect courts' evaluation of *P* at *T2*, courts should begin by identifying the mechanism through which *M* initially cast doubt on *P*'s constitutional validity.

A. The Expressivist Approach

Consider first the expressivist account, according to which a finding of improper motive carries relevance because it informs the content of a "message" that the public understands a law to send. If *M* helped to endow *P* with a constitutionally harmful social meaning at *T1*, then *M*'s relevance to the constitutional inquiry at *T2* should depend on the extent of *M*'s continued salience and significance to the public at large. The overarching expressivist question at *T2*, in other words, is whether *P* continues to carry the message and meaning that inflicted expressive harm back at *T1*. And the more particular question of interest to us is whether a reasonable person would still understand *M* as an active contributor to the message embodied by *P*.[43]

Keeping all else equal, the temporal distance between *T1* and *T2* seems of obvious relevance to this inquiry: that is, the longer it has been since the government's original embrace of *M*, the less likely it is that *M* will still inform

43. One question that I bracket here—and that might, in any event, vary from context to context—is how, specifically, the relevant reasonable observer should be identified. For a persuasive argument that, on an expressivist view of equal-protection principles, "the meaning of a government action [should] be determined from the perspective of a reasonable member of the *allegedly affected* community," see Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 251 (2003) (emphasis added).

a reasonable person's expressive construction of *P*.[44] In my view, however, temporal dissipation alone should not suffice to remove *M* from the expressivist equation. Rather, some sort of *official repudiation* of *M* ought to be required as a precondition to an expressivist evaluator's willingness to ignore it.[45] In other words, on my prescribed approach, courts should treat *M* as relevant to *P*'s social meaning unless and until the government has made it clear to the public that it no longer regards *M* as a reason for pursuing *P*.[46]

To be sure, this approach may involve some degree of overinclusiveness. There may well be circumstances in which the bad motives originally underlying a policy can and do passively exit the public's consciousness by virtue of time and forgetting alone. But even if a "public repudiation" requirement amounts to something of a prophylactic rule, it is one that, in my view, is well worth having in place. For one thing, such a rule hardly asks too much of the government itself: From the government's perspective, after all, the only potential downside to explicitly severing the connection between *M* and *P* is that doing so might cause loss of political support for *P* among those who endorse *M*. But if the government finds it too politically costly to repudiate *M*—that is, if it fears that a disavowal of *M* will erode public support for *P*—then that in itself is a reliable indicator that *P*'s expressive significance remains tainted by *M*. That is, the only circumstance in which adherence to a public-disavowal requirement would prove too costly for the government is precisely that scenario in which courts have good reason to treat *P* as constitutionally suspect.

On the other side of the ledger, moreover, there is reason to worry that unrepudiated government motives from even the distant past remain capable of inflicting expressive harm in the present. One concern is the risk that an unrepudiated *M* might enable present-day government officials to perpetuate *P*'s harmful message by appealing generally to the policy's "history" or to the "traditions" underlying it. Such appeals in particular might operate as coded

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44. *Cf.* McCreary Cnty. v. ACLU, 545 U.S. 844, 846–49 (2005) (noting first that "[r]easonable observers have reasonable memories" while also disclaiming any suggestion that government actors' past embrace of an improper purpose will "forever taint any effort on their part to deal with the subject matter").

45. *See* Murray, *supra* note 7, at 1243–44 (advocating for a decision rule requiring that governments cannot cleanse the discriminatory taint associated with a law unless they have "engage[d] with problematic history" underlying the challenged law).

46. Notably, the Court and its Justices have sometimes explicitly faulted government actors for their failure to disavow past expressions of constitutionally impermissible sentiments. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) (emphasizing that certain governmental officials' "expressions of hostility to religion" had not been "disavowed . . . at any point in the proceedings"); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2439 (2018) (Sotomayor, J., dissenting) (positing that President Trump's earlier discriminatory statements concerning a proposed "Muslim ban" should have remained relevant to a later iteration of his so-called "travel ban" in part because "despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam"); Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) ("[T]he legacy of racism" underlying Louisiana's and Oregon's nonunanimous jury rules "is worthy of this Court's attention. . . . not simply because that legacy existed in the first place . . . but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them.").

endorsements of *M* even when never making direct mention of *M* itself. In addition, there remains the possibility that *P*'s past connection to *M*—even if largely unnoticed in the present-day moment—might regain public salience in light of future, as-yet-determined events. Indeed, even where the bad motivations articulated at *T1* fail to shape *P*'s expressive message at *T2*, those same motivations might still lie around like bombs waiting to go off at some future *T3*. An official, on-the-record repudiation of those motivations by the government—even if perhaps not necessary to alleviate present-day expressive harms—might still prove helpful in defusing those explosives.[47]

47. Another potential objection to a public-repudiation requirement would likely focus on its potential subjectivity. The trouble here is that courts tasked with enforcing such a requirement must make some effort to assess the completeness and sincerity of whatever official statements are said to constitute its repudiation of a previously embraced improper motive. Suppose, for example, that *P* is a legislative enactment that was originally motivated by an intention to discriminate against a religious minority. What must the legislature do to repudiate the earlier expression of this discriminatory intent? Must it formally enact a retraction of the previously expressed motive? Must the retraction be accompanied by a formal apology for the motive, some effort to repair the expressive damage caused to the religious minority in question, or both? Might collections of individual legislators instead manage to repudiate the motive by offering their own informal statements of retraction and remorse? What if the legislature adopts a resolution apologizing for its prior embrace of the motive but only because a court says that such an apology is necessary to save the law from constitutional invalidation? What if some (or more?) legislators who voted for the apology later say they did not mean it? And so on. In sum, if a public-repudiation requirement is to have real teeth, it cannot be enough for a court to simply take the government at its word that it no longer endorses a motive it once embraced. But any judicial scrutiny of a disavowal's genuineness and earnestness will give rise to knotty and probing questions that courts may not be especially well-equipped to answer. *Cf., e.g.*, Washington v. Trump, 858 F.3d 1168, 1174 (9th Cir. 2017) (denial of rehearing en banc) (Kozinski, J., dissenting) ("If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ('just kidding!') and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official's 'heart of hearts' to divine whether he *really* changed his mind, just as the Supreme Court has warned us not to?").

I think this objection is a serious one, but I also think it proves too much. More specifically, I do not regard the line-drawing questions that one must ask about attempted repudiations of a previously embraced motive as qualitatively more difficult or intractable than line-drawing questions one must ask about governmental embraces of those motives in the first instance. That is, if we are comfortable with allowing courts to make judgments concerning an initial public association of improper motives and challenged enactments, then we should be similarly comfortable with allowing courts to make judgments concerning a subsequent disassociation of those two things as well. Perhaps those judgments really are too difficult for courts to bother with in the first place. But if that is so, then courts really should not be thinking about government motives at all.

I also regard the objection as misplaced insofar as it suggests that assessing the adequacy of an attempted public repudiation of *M* is a task that lies beyond the capacity of judges to conduct. Much to the contrary, such an inquiry has obvious parallels to other things that judges frequently do, such as evaluating a witness's credibility or (even more to the point) assessing a defendant's acceptance of responsibility and expressions of remorse for past behavior. What is more, judging the adequacy of apologies, retractions, disavowals, and other related acts is an ever-constant challenge that both lawyers and nonlawyers must confront across a range of different political, professional, and social settings. True, those challenges typically arise under circumstances more discrete and confined than those presented by motive-based constitutional inquiries. But even if governmental-repudiation assessments are *generally* more difficult to conduct than are analogous problems from day-to-day life, they remain assessments that, at their core, implicate the sorts of impulses, instincts, and intuitions about human behavior that we already must consult on a relatively frequent basis. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 874 (2005) ("[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.").

I have thus far suggested that, on an expressivist account of government-motive analysis, an official repudiation of *M* ought to be a necessary condition for severing its link to *P*. But should it qualify as a sufficient condition as well? That is, does a public repudiation of *M* have the automatic effect of liberating *P* from the heightened judicial scrutiny that *M* would otherwise have necessitated, or must the government be required to take certain additional steps in order to secure that result? Here, I am not sure whether a simple answer can be given. After all, the bottom-line question that the expressivist must ask is whether, from the perspective of the reasonable observer, *M* continues to endow *P* with a social meaning that inflicts expressive harm. Under some circumstances, perhaps, a public disavowal of *P* might be enough to do the trick—particularly if that disavowal is sufficiently explicit, sustained, and earnest-seeming—but in other circumstances, it may not. That is, under some circumstances, the reasonable observer might refuse to "buy" the government's disavowal of *M* unless and until the government can further demonstrate that it has some *other good* reason for keeping *P* around. Where this is so, in other words, the only way to disassociate *M* from *P* would be *both* to publicly repudiate the past *M*-based rationale for *P* and to publicly introduce (and make a strong enough case for) a *new*, *M*-independent rationale that justifies *P*'s continued legal presence notwithstanding its constitutionally problematic past.[48]

B. The Effects-Based Approach

Suppose now that *M* mattered at *T1* because it supported the inference that *P* was likely to yield intolerable on-the-ground effects. That is, *M* took the form of a governmental intention to achieve some constitutionally disfavored result—e.g., the curtailment of a fundamental right, the production or reification of subordinating inequalities, the creation of tariff-like restrictions on interstate commerce, etc.—and *M* thus bolstered worries that *P* would in

48. This latter suggestion somewhat aligns with Professor W. Kerrel Murray's proposed decision rule for determining whether a past "discriminatory taint" associated with a present-day law has been eliminated. Under this rule, as Professor Murray explains, courts should "first ask whether the state can show that the contemporary policy has eliminated any meaningful disparate impact" and, if not, courts should then require the state to "make a heightened showing of why it cannot eliminate the disparate impact and why the legitimate need for this means of pursuing a non-discriminatory government interest outweighs the harm of shielding the disparate impact of a tainted rule." Murray, *supra* note 7, at 1197. A potential point of difference is that Professor Murray would appear not to require a "heightened showing" from the state under circumstances in which *P* was modified so as to eliminate its discriminatory impact, whereas my prescribed approach would continue to require both a repudiation of the past discriminatory motive and a demonstration that *P* serves some non-discriminatory objective even where the policy's disparate impact has been eliminated. While I do not think that this distinction would matter much in practice, it seems to me to be at least theoretically possible that a policy *severely* tainted by the government's past embrace of an improper motive might continue to impose at least some level of expressive harm even when modified so as to eliminate its disparate impact. If so, then requiring both an explicit repudiation of *M* and a sufficiently persuasive non-discriminatory justification for the policy might prove necessary to eliminating the remaining expressive harms.

fact yield that result. For how long should *M* retain its doctrinal relevance? And what, if anything, might the government do to make it go away?

We can begin to answer this question by noting that unlike with the expressivist approach, a governmental repudiation of *M* should have *no impact at all* on an effects-based end-of-motive inquiry. On the effects-approach, that is, *M*'s doctrinal significance derives from the fact that the motive demonstrates the attractiveness of *P* to people who are determined to do the bad thing that we are worried *P* might do. That analytical linkage will continue to exist regardless of whether those people (or other people) subsequently come to support *P* for an altogether different and constitutionally unobjectionable reason. The bell simply cannot be unrung.

To see the point more concretely, suppose *P* takes the form of a facially neutral set of weight and length restrictions for vehicles that traverse a state's highways. Suppose further that the state officials who implemented *P* did so because they were confident and excited about the fact that it would deter interstate trucking companies from making use of the state's roads.[49] To care about those motives for effects-based reasons is to say that the motives are problematic because they provide affirmative evidentiary support for the proposition that *P* will in fact deter interstate trucking through the state. Any subsequent retraction of the bad, protectionist motive by these same officials should have no effect on that conclusion. What supports the conclusion about bad effects, after all, is simply the fact that *P* initially proved attractive to these officials when they were seeking to achieve protectionist goals. And, to the extent we are worried about the magnitude of *P*'s impact on interstate commerce, the policy's initial appeal to people who, at the time of its implementation, wanted to achieve those effects should continue to count as just as much of a strike against the law as it did back when those officials acted on the motives that they now disavow.[50]

So what, then, can suffice to justify a decision to ignore *M* when evaluating *P* at *T2*? Strictly speaking, there is nothing the state can do to eliminate the suggestion that, keeping all else equal, the existence of *M* makes it more likely that *P* will cause constitutionally unwanted effects. At the same time, however, there is plenty the state might do to *rebut* the inference that *M* in fact supports. Since *M* is significant only insofar as it suggests that *P* will have troubling effects on the ground, it always remains available to the state to present additional

49. *Cf., e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 677 (1981) (plurality opinion) (writing that by adopting a set of truck-length restrictions governing the use of its road, "Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic.").

50. Indeed, we can push this point further: *M* should retain its relevance even if *P* is later reinstated by an *entirely different set of decision makers* who have no interest whatsoever in pursuing *M*. Again, those decision makers' innocent intentions do nothing to undercut what *M* still reveals: *P* at one point in time had a gravitational pull on people who wanted to achieve a bad outcome. That fact should continue to raise suspicions that the bad outcome will in fact occur, even if it is an outcome of no interest to *P*'s present-day implementers.

effects-based evidence—evidence, perhaps, that emerged subsequent to its initial embrace of *M*—that cuts the other way. To return to our example of the protectionist-motivated road restrictions, the implications of *M* might eventually become outweighed by additional facts and data that bear more directly on the restrictions' effects on interstate travel. (If interstate travel through the state—as measured, for instance, by toll-road receipts, weigh station reports, survey data, etc.—remained steady for several years after the restrictions' enactment, then we would have good reason to believe that the effects initially desired by the restrictions' enactors never came to pass.)

In sum, when motive-based evidence supports an inference about bad effects, the evidence should retain its constitutional significance unless and until countervailing effects-related evidence materializes.

C. The Justification-Based Approach

Consider now the end-of-motive problem from a justification-based point of view. Here, recall, *M* carries doctrinal significance insofar as it undercuts a government actor's claim that *P* is necessary to achieve some regulatory objective of overriding importance. The basic intuition, in other words, is that a government who pursues a policy for an illegitimate reason is not an especially credible communicator that the policy turns out to be justified for some legitimate reason instead. Regulatory justifications that were *actually embraced* by the government at the time of a policy's enactment should, all else equal, receive more deference from the courts as compared to regulatory justifications that were conjured up after the fact by lawyers tasked with defending the policy in court.

Assuming then that *M* drove the enactment of *P* at *T1*, how, if at all, can *M* cease to carry a justification-undermining effect at some later *T2*? Put differently, are there any circumstances in which courts might, at *T2*, defer to a claim of regulatory need even though *M* dissuaded it from doing so back at *T1*? I think so. The most obvious scenario that comes to mind is one in which different individual decision makers with no prior connection to *M* have reenacted *P* in response to materially changed circumstances. Suppose, for instance, that *P* takes the form of a presidentially issued travel restriction whose issuance at *T1* was motivated by openly espoused sentiments of religious animus towards the citizens of the foreign nation to which it applies. Suppose that a different president, who has never expressed such sentiments, issues an identical restriction at *T2* in response to an outbreak of a highly contagious disease in that country specifically. The earlier president's embrace of animus as a reason for adopting *P* should not, in my view, justify a reduced degree of judicial deference to the later president's claim that *P* serves an important governmental interest in safeguarding public health.

A harder question is raised by the following scenario: suppose that the contagious disease was to materialize in the target country shortly after the animus-espousing president had adopted the policy at *T1*. The president obviously did not implement *P* for health-related reasons, but the disease's subsequent emergence now furnishes a potential justification for keeping *P* on the books. Nevertheless, I would maintain in this scenario that the president's prior embrace of *M* continues to warrant heightened judicial skepticism toward the claim of regulatory need. That is, a court still has reason to worry that the president is pointing to the disease in an opportunistic, rather than earnest, manner and that any administrative findings related to *P*'s public-health-related benefits are the product of results-oriented decision making rather than a good-faith utilization of agency expertise. None of which is to say that the disease cannot under any circumstances qualify as a constitutionally sufficient justification for leaving *P* undisturbed. But it is to say that, in determining whether that is so, a reviewing court ought not to rely reflexively on any representations to that effect from a president who previously favored the policy for an altogether different and inappropriate reason.

Another question raised by the justification-based approach is whether, as with the expressivist approach, a government actor's explicit repudiation of *M* ought to minimize *M*'s influence on a subsequent evaluation of *P*.[51] To continue with the prior hypothetical, suppose that, having previously issued *P* at *T1* for an animus-related reason, the president proceeds to (1) rescind the policy; (2) apologize profusely for the prior expressions of animus; and (3) reissue the policy while taking pains to emphasize the policy's connection to the new, public health-related threat. Should a reviewing court now ignore *M* when evaluating the president's new justification for *P*? From an exclusively justification-based perspective, this question is trickier to answer. Unlike with the expressivist approach, the relevant issue here is not whether a government official has done enough in the public eye to change social understandings of what *P* itself signifies about the government's values and priorities. Rather, the question is whether the official has done enough in the *reviewing court*'s eye to regain the credibility, trust, and presumption of expertise to which that person's office is normally entitled. And the analytical difficulty stems from the fact that one cannot fully disentangle the official's reliability as a communicator about the regulatory interests being furthered by *P* from the overall persuasiveness of the claims being made about those regulatory interests themselves. A president's disavowal of *M*, for instance, might provide some basis for taking more seriously a regulatory justification that the president now offers on *P*'s behalf. But if the justification is unpersuasive on the merits, then the court still has reason to worry that the President remains secretly committed to *P* for *M*-related reasons. One cannot, in other words, affirm that an official who

51. *See supra* Subpart II.A.

previously embraced but subsequently repudiated *M* now embraces an alternative (and constitutionally legitimate) reason for *P* without, at least to some extent, "peeking ahead" to the merits of the justification-related inquiry. The strength of the justification being advanced has everything to do with the credibility of the official's insistence that the justification is strong.

In light of that reality, perhaps the most sensible approach to the repudiation problem (at least, for justification-based purposes) is for a court to treat the repudiation as presumptively insufficient to justify restored deference to that official's claim of regulatory need. If, however, the court (while still proceeding from a posture of reduced deference) subsequently finds that the claim of need is sufficient to justify *P*, then the court can thereupon conclude that *M* no longer taints *P* and that any subsequent challenges to *P* should not, absent the introduction of some new, improper motive, require heightened judicial skepticism toward the arguments being offered on behalf of the policy. The approach, in other words, imposes on the *M*-repudiating official a sort of "one-case penalty," aimed at ensuring, by way of an independent judicial assessment of the justification offered for *P*, that the repudiation is genuine rather than feigned.

D. The Duty-Based Approach

The final account of government-motive analysis posits that badly motivated actions are problematic because they violate established constitutional duties not to act for particular reasons. Just as the presence of a *mens rea* might render otherwise innocent private actions wrongful in a tort-law or criminal-law sense, so too might it render otherwise permissible governmental actions wrongful in a constitutional sense.[52] Thus, in contrast to our other three accounts of government-motive analysis, all of which see *M* as an indicator that *P* suffers from some correlative constitutional defect (i.e., a bad expressive message, bad on-the-ground effects, or an insufficient regulatory justification), the duty-based account sees *M* as the gravamen of the constitutional violation itself.

The key thing to recognize about any duty-based approach to the end-of-motive problem is that it must proceed from the premise that the constitutional wrongfulness of a government action is established at the time the action occurs. If it is constitutionally impermissible for a government to operationalize *M*, then *P* becomes irrevocably tainted by *M* at the moment that an *M*-motivated governmental actor puts the policy into place. To analogize once again to private law, an intentional tortfeasor cannot escape liability for a past tortious act by subsequently "disavowing" or expressing regret for the past intention to cause harm to the victim. So too, on a duty-based approach to

52. *See* Ristroph, *supra* note 9, at 1359.

government-motive analysis, a duty-violating government official or institution cannot "cure" the constitutional violation by attempting to persuade the court that the bad motive it previously embraced is one that it no longer holds.

The harder question posed by the duty-based account has to do with governmental efforts to remove the taint of *M* by *reenacting P* at some future *T2*: that is, even if a duty-violating *M* irrevocably dooms a policy that was enacted at *T1*, might government actors manage to salvage the policy by rescinding the tainted version currently on the books and then implementing a substantially similar (or even identical) version without making any mention of *M*? Under this scenario, after all, the government's prior embrace of *M* at *T1* would no longer carry any direct implications for the constitutionality of the new successor policy, as the duty-based question must now focus on the motive that was (or was not) embraced at the moment of the new policy's adoption. But *M* might still prove indirectly relevant to the duty-based inquiry insofar as it provides circumstantial evidence that the reenactors of *P* are once again acting for *M*-related reasons.

Under what circumstances, then, does the duty-based approach permit a reviewing court to ignore an *M* embraced at *T1* when evaluating the constitutionality of *P*'s re-adoption at *T2*? Here, I am afraid that not much can be offered in the way of generalized guidance. Several of the factors we have already mentioned—e.g., the passage of time between *T1* and *T2*, the presence of any official disavowals of *M*, the identity of the officials who re-adopt *P*, the extent to which changed circumstances provide a new and different justification for *P*, etc.—might well prove relevant to the overall inquiry. But how much weight they each ought to carry is likely a matter that will vary from context to context. In addition, the proper duty-based approach to gauging *M*'s relevance at *T2* may depend to some extent on the content of the particular duty being enforced. If, for instance, the operative doctrinal rule incorporates a relatively weak duty not to act for *exclusively M*-related reasons, then it might not take much to cleanse the taint of *M* with a readoption of *P*; if, by contrast, the rule incorporates a stronger duty not to treat *M* as even a *partial reason* for acting, then the government's past embrace of *M* might retain its evidentiary significance for quite some time.[53] In sum, while we can certainly say that the duty-based approach leaves open the possibility that some reenactments of a duty-violating policy might be permissible at least sometimes, it is difficult to

53. Another possibility is that the duty itself might take the form of an injunction not to *publicly embrace* a disfavored motive, *M*, when adopting a particular type of policy, *P*. *Cf., e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1721, 1731 (2018) (referencing "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint" while also emphasizing that in this case, "the Commission was obliged under the Free Exercise Clause to *proceed in a manner* neutral toward and tolerant of [the rightsholder's] religious beliefs" (emphasis added)). If so, then it might be enough for the government simply to remain silent about an *M* it previously embraced at *T1* when proceeding to readopt *P* at some later *T2*.

offer any more generalized prescriptions as to when and under what circumstances that might be the case.

III. CHALLENGES AND COMPLICATIONS

I have thus far sought to furnish clarity on the question of when courts should disregard the government's past embrace of an improper motive when conducting a present-day assessment of the policy to which that motive previously (and unquestionably) attached. My argument, in a nutshell, has been that the answer to that question depends on the answer to the antecedent question of *why* the initial embrace of that motive would have carried doctrinal relevance at any earlier point in time. I have further posited four potential answers to that latter question, and I have explored the implications that each such answer might carry for appropriately attending to the end-of-motive problem itself.

Some aspects of my discussion, however, have involved simplifying assumptions that now warrant greater scrutiny. In particular, the discussion thus far has assumed: (1) that one can easily impute to a given motive-based inquiry a particular doctrinal function or purpose that the inquiry exists to serve; (2) that each such motive-based inquiry serves one and only one such function or purpose; and (3) that one can always easily identify whether some present-day policy is sufficiently similar in substance to a past policy as to qualify as a continuation or outgrowth of that earlier policy (thus raising the question whether any *M* associated with the past policy should continue to cast doubt on the present-day policy as well). These assumptions, however, will not often hold.

A. Imputing a Purpose to a Motive-Based Inquiry

The first simplifying assumption of my framework has to do with the idea that the function or purposes served by a motive-based requirement will be easily identifiable to a reviewing court tasked with applying it. In other words, when faced with the responsibility of enforcing the relevant motive-based requirements of the equal protection doctrine, free exercise doctrine, Establishment Clause doctrine, dormant Commerce Clause doctrine, or some other area of substantive constitutional law, the reviewing court will face minimal difficulties in determining whether that particular requirement derives from concerns about expressive harms, non-expressive effects, unpersuasive justifications, or breached official duties. In reality, however, many areas of motive-oriented doctrine speak only cryptically, if at all, to the precise reasons why the targeted motive-based findings carry the constitutional significance assigned to them.

The Court's equal protection jurisprudence, for example, leaves little doubt that a governmental *intent* to discriminate on the basis of certain classifications is a *sine qua non* for the application of heightened scrutiny to any law that is facially neutral with respect to that classification.[54] But that same jurisprudence is considerably less clear, at least from a functionalist perspective, as to why a governmental intent to discriminate should make a difference in this way.[55] Is it because the Equal Protection Clause imposes on governmental actors a duty not to *intentionally* engage with suspect or quasi-suspect classifications (while not imposing on these actors an analogous duty to avoid the unintentional creation or perpetuation of unjust inequalities)?[56] Is it because intentionally discriminatory measures are materially more likely to stigmatize, reify stereotypes, and in other ways inflict expressive harm?[57] Or is it because such measures involve classifications "so seldom relevant to the achievement of any legitimate state interest" that courts should be especially skeptical of any regulatory justifications adduced on their behalf?[58] These all strike me as plausible reasons for targeting intentional discrimination in the manner the Court's equal protection jurisprudence currently does. But that jurisprudence hardly answers the question of which among these reasons ought to be understood as the doctrinally operative one.

A similar sort of ambiguity bedevils the Court's dormant Commerce Clause jurisprudence, which, among other things, generally suggests that states may not pass measures that, though facially neutral with respect to interstate

54. *See* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 850 (2011) (noting, with respect to modern equal protection doctrine, that "it is hard to overstate the significance of a finding of discriminatory purpose for ultimately denying the constitutionality of government action," as "[f]acially race-neutral government action is immunized from constitutional attack unless the Court can draw an inference of discriminatory purpose").

55. In *Washington v. Davis*, for instance, the Court justified the discriminatory-intent requirement largely by reference to its concerns about the "far reaching" implications of permitting heightened scrutiny on the basis of disparate impact alone. *See* Washington v. Davis, 426 U.S. 229, 248 (1976). Whatever the merits of that argument on its own terms, it furnishes no guidance as to the substantive reasons why one should regard intentionally discriminatory governmental action as qualitatively more constitutionally problematic than governmental actions whose discriminatory effects, though unintended, are pervasive and severe. Put another way, justifying the discriminatory-intent requirement by reference to the essentially pragmatic claim that it will result in fewer equal protection violations does not in any way move the ball forward in terms of justifying the requirement's further implicit suggestion that intentionally discriminatory actions are, *ceteris paribus*, more constitutionally suspect than their unintentionally discriminatory counterparts.

56. *Cf.* Pers. Adm'r v. Feeney, 442 U.S. 256, 273 (1979) (suggesting that *Davis*'s discriminatory-intent requirement derives from "the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results").

57. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

58. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–266 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the [government's] decision, this judicial deference is no longer justified.").

commerce, nonetheless have a discriminatory purpose or effect.[59] Does the disjunctive formulation of the rule indicate that inquiries into discriminatory purpose must proceed along an entirely separate track from inquiries into discriminatory effect, thus removing from view the effects-based account of government-motive analysis (while still leaving on the table the expressivist, justification-based, and duty-based accounts)? Or does the pairing of purpose and effect together in fact support the opposite inference—namely, that evidence of a discriminatory purpose should always be scrutinized with an eye toward their implications for the scope and severity of a law's discriminatory effects (and perhaps vice versa as well)? And if courts may not draw purpose-based inferences about effects when applying the "discriminatory purpose or effect" requirement, may they nonetheless do so when separately asking, under the so-called *Pike* balancing test, whether a facially neutral law's burdens on interstate commerce are "clearly excessive in relation to [its] putative local benefits"?[60]

These and other examples help to illustrate the key point that even where the Court is clear in requiring judicial attention to government motive, it is not similarly clear in identifying the reasons why that attention should be given. That being so, one might object to my prescribed framework for confronting end-of-motive questions by contending that the initial step of that framework—i.e., identifying the functionalist purpose of a motive-based requirement—will be difficult, if not impossible, for courts to complete.

I think, however, that this objection is misplaced. For one thing, even if the Supreme Court doctrine is *currently* unclear about doctrinal purposes that motive-based requirements exist to serve, the Court might subsequently choose to furnish clarity on these issues when deciding future cases. More importantly, the Court's lack of guidance hardly precludes lower courts from themselves filling the void. That the doctrine in its current form fails to associate a particular motive-based requirement with a particular reason for having motive-based analysis in place, in this sense, turns out to involve little more than the unremarkable fact that the Court leaves many issues up to the lower courts to

59. *See generally* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 677–678 (1981) (plurality opinion) (concluding that Iowa's statutory scheme restricting the length of vehicles that may use its highways violated the dormant Commerce Clause in part due to the Governor's Iowa-favoring motivations in enacting the border-cities exemption). Analogous questions are likely to be raised by the now-defunct "undue burden" test that previously governed substantive due process review of abortion restrictions. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." (emphasis added)), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

60. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

decide.[61] In itself, this fact should not count as a reason against engaging with end-of-motive questions in functionalist terms.

B. Multipurpose Motive-Based Inquiries

A second simplifying assumption has to do with the idea that each individual motive-based requirement can perform only one doctrinal function at a time rather than multiple such functions at once. That is, we have thus far spoken as if courts must conclude that a motive-based inquiry must *exclusively* be framed in expressivist, effects-based, justification-based, or duty-based terms. In reality, however, *M* might serve some or all of these goals simultaneously. *M* might indicate, for instance, that *P* sends an unwanted message to the regulated public *and* that *P* is also especially likely to yield intolerable on-the-ground effects. Similarly, *M* might indicate that *P* rests on an inadequate regulatory justification *and* that *P* involves a violation of a constitutional duty not to effectuate *M*. There is no obvious reason why reaching any one of these conclusions would disqualify a court from reaching one or more of the others as well. What I have thus far shown, in other words, is only that there exist multiple different functions that government-motive analysis might play; I have not further shown (and do not believe it could be shown) that these functions are mutually exclusive of one another.

The possibility of a "multipurpose motive-based inquiry" poses the following complication for a functionalist framework to the end-of-motive problem: if, as we have suggested, each of the four "accounts" of motive-based analysis points to a different way of analyzing the temporal duration of a motive-based finding, then it is not immediately clear how courts should navigate end-of-motive problems when more than one of those accounts seem to account for a single motive-based inquiry. If, for instance, a court has concluded that the equal protection doctrine's "discriminatory intent" requirement serves *both* expressivist and justification-based goals, then how should that same court reconcile those goals when conducting the end-of-motive analysis itself? Must we simply choose one approach at the expense of the other? Must we instead specify additional approaches for a hybridized expressivist/justification-based form of motive review? Or is there some simpler way of combining or reconciling the different "single-purpose" approaches to the end-of-motive problem when multipurpose inquiries are on the table?

Framed in this way, these questions no doubt seem daunting to answer. But there is an alternative way of framing the issue that makes the problems posed

61. *See* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 649 (2014) (writing that the Supreme Court often decides cases in a manner that "leave[s] room for lower courts to clear up uncertainties in the doctrine with rules of their own creation").

by a multipurpose motive-based requirement somewhat easier to solve. That framing begins from the observation that the different "accounts" of motive-based analysis that I offered earlier ultimately describe different ways in which a motive-based finding (*M*) might bolster a bottom-line conclusion regarding the constitutional validity of a challenged governmental policy (*P*). Thus, to say that *M* can serve multiple doctrinal purposes at once is no different from saying that *M* can simultaneously furnish separate and independent *lines of argument* against the constitutionality of *P*. Those different lines of argument, in turn, can themselves be disaggregated for purposes of confronting the end-of-motive problem. That is, for purposes of asking whether the government's past embrace of *M* continues to furnish an expressivist argument against *P*—an argument that *P* is unconstitutional because it sends a bad message about the values and priorities of the governmental institutions that created it—we can confront the end-of-motive problem from an expressivist perspective. And then, for purposes of asking whether that same past embrace of *M* continues to furnish a separate, justification-based argument against *P*—an argument that *P* is unconstitutional because it lacks a strong enough regulatory objective to justify its encroachment on personal liberty, equality, or another constitutionally sensitive interest—we can confront the end-of-motive problem from a justification-based perspective. If *M* serves multiple (and different) doctrinal purposes, then *M* can have multiple (and different) temporal durations as well. Rather than seek to reconcile these multiple purposes with a single, "one-size-fits-all" approach to the end-of-motive problem, courts can instead proceed to disaggregate that problem alongside the different doctrinal purposes being served.

This proposed solution to the problem, however, is subject to one significant limitation: namely, the solution will not work in connection with motive-based requirements that take the form of bright-line rules with determinate doctrinal consequences. Consider, for instance, the discriminatory-animus line of equal protection cases, which, at least in one common reading, appears to suggest that any law motivated by "a bare . . . desire to harm" a targeted group should qualify as categorically unconstitutional.[62] These cases can plausibly be understood as laying down a bright-line rule that obviates (and perhaps even precludes) any case-specific investigation into *M*'s tendency to

62. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment) (alteration in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)); *see, e.g.*, Pollvogt, *supra* note 2, at 929–30 (writing that the Court's animus jurisprudence is best read to mean that "animus acts as a doctrinal silver bullet" in that a finding of animus "discredits the other purported state interests, regardless of whether they are legitimate on a superficial level"); *see also* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 188 (2019) ("Unlike a finding of discriminatory intent, a finding of animus should not trigger further scrutiny; rather, it should end the case, and end it with a defeat for the government."). *But cf. Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment) ("When a law exhibits . . . 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.").

support inferences about messages, effects, justifications, or duties. Instead, on this view, the court's job is simply to ask whether a particular type of *M* (i.e., *animus*) exists within the record and, if so, to declare the policy unconstitutional without probing the particular functional considerations that might provide analytical support for that conclusion. Some (if not all) of these considerations, to be sure, may help to justify the *existence* of the rule itself, but the rule's own structure requires that a court reach only a single motive-based conclusion with a single, outcome-determinative effect. And where that is so, it will not be possible for a court to deem some previously embraced *M* as still relevant for one functionalist purpose but not relevant for another.

How, then, should courts deal with multipurpose, motive-based "rules" of this sort? If, in other words, the relevant motive-based requirement appears (1) to serve multiple functionalist purposes (e.g., it is animated by both expressivist and effects-based concerns); and (2) to demand a single, one-size-fits-all answer to the question of whether a previously embraced motive continues to taint a challenged government policy (e.g., it instructs courts to automatically invalidate any policy that reflects a proscribed type of government motive), then how should courts conduct the end-of-motive analysis for purposes of applying that rule? I am not sure what the answer to this question ought to be, but one possibility would be to embrace a "lowest common denominator" type approach to the problem, according to which *M* would lose its relevance only when such a conclusion is independently supported by *all* of the considerations that justify the rule's existence. Thus, for instance, if the rule derives from both expressivist and justification-based concerns, any previously embraced *M* subject to the rule should continue to attach to *P* for as long as that conclusion is justified by *either* the expressivist *or* the justification-based approach to the end-of-motive problem. This approach would carry the potential upside of simplifying (at least somewhat) the operative end-of-motive analysis (a benefit that seems especially salient when connected with the application of a bright-line rule), but it would also carry the potential downside of rendering the rule somewhat more stringent than it was intended to be.

C. Successor Policies and Sufficient Similarity

A final challenge posed by my framework is a challenge that any proposed approach to the end-of-motive problem must confront. The problem in a nutshell is this: Suppose that a court points to *M* as a reason to invalidate *P* at *T1*. Suppose further that, with *P* no longer on the books, governmental officials subsequently enact another policy, *Q*, at *T2*. If *Q* is identical to *P*, then any subsequent constitutional analysis of *Q* will have to engage with questions related to the temporal duration of *M*—there is every reason to regard *Q* as a "successor policy" to *P* that, so long as *M* remains doctrinally operative, is equally vulnerable to invalidation on motive-based grounds. If, by contrast, *Q*

is completely unrelated to *P* (because, say, it addresses a totally different subject matter or because it addresses the same subject matter in a totally different way), then it becomes much easier to conclude that *M*'s temporal duration is altogether irrelevant to *Q*'s constitutional validity. Between these two extremes, however, middle-ground cases are likely to arise, thus raising the question of how substantively similar *Q* must be to *P* in order to qualify as a successor policy to *P* itself.

I will not attempt a comprehensive answer to this question here. But a few points warrant mention. First, as Professor W. Kerrel Murray has recently noted, courts have long grappled with similar versions of this question across a range of different public-law doctrines. Professor Murray highlights an example from the mootness doctrine, which, as he describes, sometimes requires courts to ask whether "a supposedly new governmental policy is different enough from a policy it replaced that it moots litigation on the older policy."[63] A related example from administrative law is the "logical outgrowth" test, which courts rely on in determining whether a proposed administrative regulation that is modified after an initial round of notice-and-comment rulemaking is sufficiently similar to an originally proposed rule as to obviate the need to undergo a new round of notice-and-comment procedures.[64] These tests, to be sure, involve some measure of discretion and subjectivity, but they at least help defeat any suggestion that the task of gauging policy similarity is one that judges are inherently incapable of performing.

Second, it may also be the case that just as the overarching purpose served by a motive-based inquiry should inform courts' approach to the end-of-motive problem, so too should that purpose inform courts' approach to the problem of determining whether *Q* qualifies as a successor policy to *P*. Consider, for instance, the justification-based account: if, as that account posits, *M* has doctrinal relevance because it casts doubt on the credibility of a particular government actor's representation that *P* is justified by an important government interest, then we have reason to treat that particular actor's *involvement* in the creation of *Q* as a factor militating in favor of treating it as a successor policy to *P*. (After all, the argument would go, if that actor has already revealed a willingness to attempt a pretextual justification for one policy that actually serves *M*, then we have extra reason for thinking that other policies even roughly similar to *P* might suffer from the same constitutional defect.) On the effects-based account, by contrast, the identity of *Q*'s creator(s) should not likely factor into the sufficient-similarity inquiry: on that theory, by contrast, the more relevant question would seem to be whether *Q* is likely to produce the

63. *See* Murray, *supra* note 7, at 1218–19 (citing Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993)).

64. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174–75 (2007).

same sorts of on-the-ground effects that *M* first alerted us to in connection with *P*.

Finally—and I raise this point most tentatively—it may ultimately be more fruitful to treat the "sufficient similarity" question as incorporated within, rather than antecedent to, the end-of-motive inquiry. I have thus far suggested that, when faced with a *Q* of some uncertain relation to *P*, courts should proceed in sequential stepwise fashion, asking, first, whether *Q* is a successor policy to *P*, and then, only if the answer to that question is "yes," asking, second, whether the *M* previously associated with *P* remains relevant to the successor policy of *Q*. But one alternatively might avoid disaggregating the two questions in this way. On that alternative approach, in other words, a court tasked with reviewing *Q* would simply ask whether the bad motive previously associated with its predecessor policy *P* should or should not inform its constitutional analysis of *Q*. That analysis, as I have already argued, ought to begin with an identification of the functionalist purpose served by the operative motive-based requirement. But once that purpose is identified, a court should then proceed to treat *Q*'s substantive similarity to *P* as merely one factor (along with the various other ones I have already identified) bearing on *M*'s continued relevance (or lack of relevance) to the case at hand. Put another way, rather than render an initial "yes/no" answer to the question of whether *P* and *Q* are similar enough to implicate questions related to *M*'s temporal duration, the reviewing court might simply begin by focusing its attention on *both M*'s temporal duration *and* the substantive scope of its influence. And with the inquiry reframed in that way, a court could proceed from the understanding that *M* is, *ceteris parabus*, more likely to cast doubt on the constitutionality of *Q* as *Q* becomes closer in substance to *P*.

CONCLUSION

I began this Essay by bracketing away broader questions about the general appropriateness of motive-based scrutiny in U.S. constitutional law. But let me end the Essay by engaging briefly with those questions in light of some of the conclusions I have reached above. What I have suggested, after all, is (1) that motive-based findings can plausibly serve a variety of different doctrinal functions; and (2) that the end-of-motive problem itself is best confronted by reference to the particular doctrinal function(s) that a given motive-based finding is understood to serve. Those suggestions do not definitively demonstrate that courts should attend to government motives when deciding constitutional cases. Nor do they definitively demonstrate that motive-based inquiries, to the extent they exist at all, should generally assume one or another particular doctrinal form. But they do, perhaps, yield some helpful observations about these and other bigger-picture issues.

In particular, and to build on an observation that I offered in Part III, I suspect that end-of-motive issues will be most difficult to navigate when the operative area of doctrine ascribes rigid, on/off consequences to motive-based findings that, as far as the doctrine is concerned, are simply required for their own sake. Where that is so, it will not always be easy for courts to tease out the reasons why *M* matters in the first place. Similarly, if multiple such reasons seem to be at play, the binary nature of the motive-based rule will frustrate courts' efforts to navigate and reconcile the different and potentially conflicting functionalist implications for the end-of-motive inquiry itself. In contrast, I think these same problems will be easier for courts to navigate where motive-based findings merely play an ancillary role in guiding the application of rules that, by their own terms, concern expressivist messages, on-the-ground effects, regulatory justifications, official governmental duties, or some combination thereof. That is, courts will have a tougher time gauging the temporal duration of *M* where *M* acts as the on/off trigger for a bright-line, motive-based rule, and they will have an easier time gauging the temporal duration of *M* when *M* simply informs the application of rules and frameworks whose proximate focus is on other doctrinal conclusions that motive-based findings help to support. Motive-based inquiries in the latter context, after all, will necessarily proceed against a clear functionalist backdrop. And, to the extent that a motive-based finding serves multiple functions at once, such inquiries will alleviate courts of the obligation to reach a single and discrete conclusion about *M*'s continued doctrinal relevance.

Thus, while my analysis by no means resolves the questions of whether and, if so, how motives ought to matter within U.S. constitutional law, it does provide some reason to think that categorically bright-line, motive-based *rules* might turn out to be, somewhat counterintuitively, both more conceptually dubious and more pragmatically unworkable than open-ended and amorphous motive-informed standards. If motive-based findings are relevant only insofar as they support inferences about messages, effects, justifications, and duties, then there is no good conceptual reason for treating government motives as the be-all and end-all of a given doctrinal inquiry. And if motive-based *rules* (as opposed to motive-informed standards) tend to complicate rather than facilitate courts' engagement with the end-of-motive problem itself, then that fact at least weakens the pragmatic suggestion that bright-line rules about government motives can help to simplify and streamline courts' evaluation of complex, real-world phenomena. Many other variables, to be sure, can and should affect our overall assessment of these issues. At the same time, however, I think it is fair to say that the arguments I have offered regarding the ends and endings of government-motive analysis are also arguments that might support an end to

motive-dependent bright-line rules.[65] The arguments suggest, in other words, that courts should eschew doctrinal rules that call for outcome-determinative judgments about motives *qua* motives and that they should instead focus more directly on the various sorts of constitutional defects that government motives can help to reveal.

65. *Cf.* Murray, *supra* note 7, at 1197 (advocating for a doctrinal approach to antidiscrimination cases that eschews a focus on "decisionmaker 'intent'" and instead focuses attention on the problem of "discriminatory taint").