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Government of the Good

Abner S. Greene

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Recommended Citation

Abner S. Greene, *Government of the Good*, 53 *Vanderbilt Law Review* xv (2000)
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VANDERBILT LAW REVIEW

VOLUME 53

JANUARY 2000

NUMBER 1

Government of the Good

*Abner S. Greene**

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Webster's definition of the noun "good" begins: "something that possesses desirable qualities, promotes success, welfare, or happiness, or is otherwise beneficial."¹ Whether government should promote the good, and in particular whether government should use its powers of persuasion—its "speech," if you will—to promote contested views of the good, is the subject of this Article. I will argue that, as a matter of political theory, government in a liberal democracy not only *may* promote contested views of the good, but *should* do so, as well. Further, nothing in our constitutional jurisprudence demands otherwise, assuming certain conditions are met. In taking these positions, I will be opposing those scholars who either argue for a caretaker government or accept government speech only insofar as it establishes the preconditions for citizen autonomy. I will argue, instead, for a thicker "perfectionism."² That is, I will defend government advancement of specific, perhaps contested, conceptions of the good. Moreover, I will be opposing many constitutional theorists who seek to hold government to certain open forum baselines, especially when government places conditions on funded private speech. Instead, if such funding conditions raise no concerns of monopoly, coercion, or ventriloquism on a case by case basis, then the conditions are constitutional.

I. INTRODUCTION

Government regulation of private speech is subject to a strict set of constitutional rules, developed in fits and starts by the Supreme Court. But the government's own speech, and the government's

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1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 978 (1993).

2. Jeremy Waldron defines perfectionism as "the view that legislators and officials may consider what is good and valuable in life and what is ignoble and depraved when drafting the laws and setting the framework for social and personal relationships." Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1102 (1989); see also STEVEN WALL, LIBERALISM, PERFECTIONISM AND RESTRAINT 8 (1998) ("Perfectionism is committed to the general thesis that political authorities should take an active role in creating and maintaining social conditions that best enable their subjects to lead valuable and worthwhile lives."). The thick perfectionism I urge, however, is limited to governmental persuasion. I do not take the further step and argue for governmental coercion to achieve perfectionist ends. *But see id.* at 79.

attachment of speech conditions to its funding,³ have been relatively unexplored areas for the Court. Scholars writing about government speech have struggled to apply concerns developed for cases involving the regulation of private speech—specifically, concerns about the robustness of public discourse and about individual autonomy—to cases involving government speech. A fundamental paradox, though, hinders these efforts. As Robert Post has explained, “the state is prohibited from imposing any particular conception of collective identity when it regulates public discourse, but the state must perforce exemplify a particular conception of collective identity when it acts on its own account.”⁴ Doctrine covering the regulation of private speech is constantly attentive to government imposition of favored conceptions of the good. When government either speaks itself or attaches speech conditions to its funding, however, it necessarily advances such a favored conception. We cannot apply basic free speech doctrine to government speech without jeopardizing the very possibility of such speech. But if we are to scrap the basic doctrine, and its attention to viewpoint pluralism and autonomy, then we open the door to government’s capturing through speech the minds on which it may not impose more direct limitations.

Many scholars writing about government speech, either as a matter of constitutional law or political theory, object to governmental persuasion to advance contested conceptions of the good. For example, consider legislation conditioning funds for health clinics on their advocacy of abstinence to teens. Or consider the federal government engaging in a public relations campaign to convince parents to send their children to private school. For many scholars, governmental advocacy of these sorts of parochial viewpoints, when the matters are clearly ones of great contemporary social contest, is either unconstitutional as a matter of first amendment theory (on the ground that the speech is viewpoint-based, rather than merely the expression of a social consensus) or improper as a matter of liberal democratic theory (on the ground that at most government should provide the opportunity for citizens to speak, but should not wield its heavy hand on contested social matters). Indeed, the two cases I discuss most often in this

3. I will use the phrase “government speech” to refer to both the government’s own speech and the government’s funding of speech, which sometimes appears as the government’s own speech and sometimes as the speech of private persons. At times, though, I will specifically address one of these referents rather than both as a unit. I will also discuss the transparency/opacity problem, or what I refer to as the ventriloquism problem, i.e., the problem of a message appearing to be that of a private person when it is best understood as that of the government. See *infra* Part III.C.

4. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 183 (1996) (footnote omitted).

Article—*Rust v. Sullivan*⁵ and *NEA v. Finley*⁶—have become lightning rods for many scholars precisely because they involve government using its power (through setting speech conditions on federal funding programs) to influence expression regarding hotly contested social matters. In *Rust*, the Reagan Administration promulgated regulations forbidding doctors receiving federal family planning funds from either discussing abortion with their patients or referring those patients to abortion providers. In *Finley*, Congress amended the national arts funding statute to make adherence to standards of decency a factor in determining grants. The scholars in this area, for the most part, deem these governmental acts unconstitutional.⁷ This position tracks the position of the “thin perfectionist” political theorists, who would draw the line at seed money for speech opportunity.⁸

All of this is wrong, and this Article attempts to show why. There are great virtues to government speech, even controversial, viewpoint-based speech, and I reject the theoretical case for either extremely limited government, government that is neutral as to the good, or government that is thinly perfectionist. Thick perfectionism⁹ is both defensible and desirable. Furthermore, it is wrong to read our robust first amendment jurisprudence as extending in any deep way to government speech. Except for specific instances of government speech that we can see as raising concerns of either monopoly, coercion, or ventriloquism, the Constitution imposes no hurdle to government speech, even speech that backs a specific viewpoint in a matter of current social contest. For those whose intuitions tell them otherwise, as a matter either of theory or of constitutional law, flip the two

5. *Rust v. Sullivan*, 500 U.S. 173 (1991).

6. *NEA v. Finley*, 524 U.S. 569 (1998).

7. See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* 45-48 (1996) [hereinafter FISS, *IRONY*]; OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 107 (1996) [hereinafter FISS, *DIVIDED*]; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 115, 231 (1993) [hereinafter SUNSTEIN, *DEMOCRACY*]; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 312 (1993) [hereinafter SUNSTEIN, *PARTIAL*]; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 743 (1992); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Under-inclusion*, 1992 SUP. CT. REV. 29, 67; Post, *supra* note 4, at 173-74; Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 576, 580 (1996).

8. See generally, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385 (1996); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998); Waldron, *supra* note 2. For a discussion of Raz as a thin rather than thick perfectionist, see *infra* Part II.C.3.

9. See *supra* note 2 and accompanying text.

hypotheticals from above. Should it be improper as a matter of political theory, or unconstitutional, for government to condition the funding of health clinics on their advocating condom usage by teens? Should it be improper as a matter of political theory, or unconstitutional, for the federal government to spend money trying to persuade parents to send their kids to public school? Issues such as these should be fought in the political arena, and cannot be resolved by a rule of restraint on government persuasion as a matter of either political theory or constitutional law.

Part II examines the theoretical debate, making the case for thick perfectionism through government persuasion. Government may, and should, use its speech powers to advance specific conceptions of the good, even if those conceptions are contested, controversial, or seen as favoring a particular viewpoint. Part II.A situates this claim within the multiple repositories of power framework I have set forth in other writing.¹⁰ If we sharply constrain government's regulatory power by dissenters' rights to advance their own conceptions of the good, then government speech can serve as one voice among many, seeking to assert the power of the center even as it respects the rights of the dissenters. Part II.B lays out the virtues of government speech, and carves out an exception for government religious speech. Part II.C describes and rebuts three principal attacks on government speech. There, I reject the extension of *Abood v. Detroit Board of Education*¹¹ to government speech generally; I show how political liberalism's conception of neutrality cannot withstand close scrutiny; and I respond to those who advocate a thin perfectionism, i.e., who contend that government should provide seed money for citizen speech opportunity, but should not itself advance contested conceptions of the good.

Having made the general theoretical case for government speech, and more specifically for thick rather than thin perfectionism, I turn in Part III to specific vices of government speech that might arise in particular cases, and explore these concerns as a matter of constitutional law. Thus, Part III.A investigates the problem of government speech that monopolizes discourse in a given speech market. Here, two independent problems might arise: the speech might jeop-

10. See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993) [hereinafter Greene, *Political Balance*]; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 293 (1996) [hereinafter Greene, *Irreducible*]; Abner S. Greene, Kiryas Joel and *Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996) [hereinafter Greene, Kiryas Joel].

11. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The extension would require taxpayer opt-out rights from government speech with which individuals disagree.

ardize the knowing exercise of citizen autonomy, and the speech might skew public discourse by advancing a controversial viewpoint. Government speech that monopolizes a speech market should be deemed unconstitutional for both of these reasons, but otherwise it should be considered constitutional, even if viewpoint-based. Part III.B takes up the concern that government speech might be coercive, i.e., that it might undercut the voluntariness aspect of citizen autonomy. Here, I agree in theory that coercive government speech would be unconstitutional, but explain why it is unlikely that this will be much of a problem in practice. Part III.C discusses the ventriloquism problem, that is, the problem of government's failure to disclose either that it is the speaker or that it has placed conditions on the funding of private speech. It is less clear whether an instance of government speech should be invalidated solely because of ventriloquism, though the existence of ventriloquism should matter in analyzing the constitutionality of the government speech in question. In sum, I suggest that we analyze the validity of specific acts of government speech according to whether sufficient monopoly, coercion, or ventriloquism concerns have been raised.

Perhaps the main issue that has occupied the attention of constitutional law scholars writing in this area is what I call the forum-change problem. If a speech forum has been generally understood as open—that is, open to all viewpoints and subject to time, place, and manner regulations only—may the government shift such a forum to a limited one, definable by viewpoint or subject matter? The scholars have converged on a principle that would sharply limit government's power to convert open forums to limited ones. I analyze these arguments in some detail in Part IV, concluding that they grant too quick deference to established open forum practice. Other, stronger arguments for maintaining the open character of forums exist, however, by reference to Court doctrine regarding physical forums (streets and parks) that are treated as open. Even this analogy, I conclude, fails properly to restrict government from changing the character of funded speech from open to limited. I offer a conclusion in Part V.

II. THE THEORETICAL DEBATE

A. *The Case for Government Speech Within the Multiple Repositories of Power Framework*

The case for thick perfectionism¹² works in a liberal democracy only as part of the broader case for divided power, or for what I have called “multiple repositories of power.”¹³ The multiple repositories of power theory of our Constitution rests on the view that fractured sovereignty both wards off certain risks and has its own virtues. Structurally, power is disaggregated through separation of powers (including judicial review) and federalism. Constitutional rights—both those of political process (speech, press, petition, voting) and autonomy (religion, family, substantive due process)—serve to ensure that sovereignty remains ultimately in the citizens and not their delegates. This combination of structure and rights prevents the concentration of power that is the harbinger of despotism. In addition to providing this insurance function, the structure/rights combination helps foster separate sources of norms, of value, of notions of the good. If power is properly fractured in this way, then government speech can be part of a robust debate in which the government must compete with other speakers. If power is not properly placed in multiple hands—for example, if dominant religions insist on using the legislative process to establish the hegemony of their faith, or if the points of view of dissident speakers are squelched—then the case for thick perfectionism would weaken.

The argument in this Article for government speech, thus, complements arguments I have made elsewhere for rights of religious minorities against the government.¹⁴ I have made that case in three ways: the establishment clause should be construed to prevent dominant religions from passing legislation through predominant, expressly religious arguments; the free exercise clause should be read to provide a system of prima facie exemptions to religions whose prac-

12. See *supra* note 2 and accompanying text.

13. See sources cited *supra* note 10.

14. See generally Greene, *Political Balance*, *supra* note 10; Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535 [hereinafter Greene, *Rejoinder*]; Abner S. Greene, *Uncommon Ground—A Review of Political Liberalism by John Rawls and Life's Dominion by Ronald Dworkin*, 62 GEO. WASH. L. REV. 646 (1994) (book review) [hereinafter Greene, *Uncommon Ground*]; Greene, *Irreducible*, *supra* note 10; Greene, Kiryas Joel, *supra* note 10; Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1999) [hereinafter Greene, *Vouchers*]; Abner S. Greene, *The Incommensurability of Religion*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* (Stephen M. Feldman ed., forthcoming 2000) [hereinafter Greene, *Incommensurability*].

tices are burdened by nondiscriminatory, general legislation; and nothing in the establishment clause (or any other clause) should be construed to prevent legislatures from accommodating minority religions by granting them various forms of special relief through law. Each of these arguments advanced the case for decentralized power, but I made clear that the multiple repositories of power scheme does not privilege decentralized power. "[O]ur constitution no more countenances the foundationalism of fractured power than it does the foundationalism of centralized power."¹⁵ Thus, at the end of two prior articles, after advancing the case for fractured power, I added short sections on government speech, explaining that through its powers of persuasion, government may seek to achieve various ends it may not seek to achieve through regulation.¹⁶ This Article, then, is the playing out of those prior suggestions.

B. *The Virtues of Government Speech*

It is hard to imagine government functioning without communicating. But claiming government speech is a necessity is not the same as defending its virtues. In addition to the truism that government officials must speak to govern, in the most basic sense of issuing laws and orders, there are four ways in which government speech can be seen, more affirmatively, as a good.¹⁷

First, government communication can assist the execution of law through explaining and supporting the laws that are enacted.¹⁸ Second, and more controversially, the government can act to enhance public debate. It can establish opportunities for citizen speech by establishing either funding forums or physical forums that are open to all speakers, as in the Hyde Park corner soapboxes in London. Indeed, for some scholars, this is the primary justification for government speech, and government speech that does other than establish the preconditions for citizen participation is deemed less defensible.¹⁹

15. Greene, *Irreducible*, *supra* note 10, at 309.

16. *See id.* at 309-10; Greene, Kiryas Joel, *supra* note 10, at 83-86.

17. For various statements supporting government persuasion on conceptions of the good, see THOMAS HURKA, *PERFECTIONISM* 5, 158-60, 163 (1993); JOHN STUART MILL, *ON LIBERTY* 142-43, 149-51 (Gertrude Himmelfarb ed., Penguin 1974) (1859); GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 6-7 (1997); CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 14, 17, 34, 37, 56 (1997); WALL, *supra* note 2, at 6 n.8, 79, 201; Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1230-31 (1989).

18. *See* Cole, *supra* note 7, at 681, 702; Redish & Kessler, *supra* note 7, at 560-61; Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980).

19. *See, e.g.*, ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 33-35 (1969); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 187 (1995); MILL, *supra*

Owen Fiss has emerged as the strongest advocate of this position. Free speech is primarily justified as enhancing public debate; the purpose of the liberty is "to make certain that the people are aware of all the issues before them and the arguments on both sides of these issues."²⁰ Fiss even goes so far as to suggest that "[t]he judiciary . . . in the worst of all possible worlds . . . might have to mandate a freeze or even an increase in levels of spending to protect First Amendment values."²¹

Third, various forms of speech, including art and information, might be considered a kind of public good, the production of which would lag if left to the private sector.²² The benefits from much speech outstrip the ability of the producers of speech to internalize them. The government can provide incentives for speech and can disseminate the results of such incentives in a way that solves this collective action problem. The copyright laws are but one example of this. More generally, anti-perfectionism "would lead not merely to a political stand-off from support for valuable conceptions of the good. It would undermine the chances of survival of many cherished aspects of our culture."²³

Finally, and perhaps most importantly, government speech often makes a distinctive contribution to public debate.²⁴ If the government's point of view were simply corroborative of private points of view, the affirmative argument for government speech would weaken as the concerns about government power rise. There are three reasons, though, to believe that government speech will be distinctive. First, preferences expressed through voting are often different from those expressed through consumption or other forms of nonpolitical behavior. Someone might smoke cigarettes but support the Surgeon General's warnings; someone else might be careless about discarding waste but support government efforts to clean up the environment, through both regulation and public service announcements. In other

note 17, at 168-83; MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 15, 34, 112 (1983); see also Cole, *supra* note 7, at 681, 703; Redish & Kessler, *supra* note 7, at 560-62. See generally SUNSTEIN, *DEMOCRACY*, *supra* note 7.

20. FISS, *DIVIDED*, *supra* note 7, at 5; see also *id.* at 19, 37-38, 101.

21. *Id.* at 106.

22. See *id.* at 98; FISS, *IRONY*, *supra* note 7, at 27, 48; HOLMES, *supra* note 19, at 37, 186; SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 226-27.

23. RAZ, *supra* note 8, at 162.

24. One has to be a bit careful about what "distinctive" means here. My point is that the government may be better situated than citizens in their private capacity (either as individuals or in groups) to advance certain arguments or foster certain conceptions of the good. My point is not that government officials have legitimate interests separate from those of the citizens they represent. For a general theoretical argument backing the "service conception of the function of authorities," see *id.* at 47-56; see also Raz, *supra* note 17, at 1231.

words, it is possible, through government, to bind ourselves to a notion of the good from which we fear we will stray in our private lives.²⁵

Second, government may use its powers of persuasion to alter social norms, when individuals acting without governmental involvement would not be able to do so on their own or in smaller groups. Even though it might be generally preferable for people to alter social norms without governmental intervention, "sometimes it is too costly for individuals to create or join [norm communities], and sometimes the generally held norm is too damaging to human well-being."²⁶ Moreover, people in their private capacities don't just "have" preferences to which government should respond. People's desires are deeply embedded in various structures, both private and public. Since preferences are, in this way, endogenous to rather than exogenous from context,²⁷ government is not improperly reaching across some sacrosanct public-private boundary when it uses its persuasive powers to alter norms (for example, regarding race, sexual preference, cigarette smoking, or overeating) and thereby modify preferences.

Third, the government's distinctive contribution to public debate will often involve advocacy of shared values, of the virtues of the unum over the e pluribus, of integration over multi-culturalism. Although the government might also, at times, advocate more controversial, parochial perspectives, the centralizing message of government speech is often an important quality. As discussed above, our constitutionalism is based in multiple repositories of power; through both structure and rights, power is fractured, not concentrated. So long as speech, press, and religion rights are vigorously protected, we can assume that advocacy of various cultural perspectives will be advanced, and that the e pluribus will flourish. Given this assurance, the government has an important role to play in competing for the allegiance of its citizens, to attempt to persuade them to adopt a shared, American identity rather than a separate identity based in a sub-community.²⁸

25. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 76 (1979); HOLMES, *supra* note 19, at 179; SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 245-46; SUNSTEIN, *supra* note 17, at 20-24, 44-45.

26. SUNSTEIN, *supra* note 17, at 55.

27. See JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY*, at vii, 22 (1983); RAZ, *supra* note 8, at 140-42; SHER, *supra* note 17, at 80; SUNSTEIN, *supra* note 17, at 14, 17, 34, 38, 43, 49, 54-55; Lawrence Lessig, *The New Chicago School*, 27 J. LEG. STUDIES 661, 662-63 & n.1 (1998); RAZ, *supra* note 17, at 1235.

28. See Greene, *Irreducible*, *supra* note 10, at 309; see also Greene, Kiryas Joel, *supra* note 10, at 85-86 ("Government can help homogenous nomic communities thrive while simultaneously encouraging citizens—sometimes the same citizens who comprise those homogenous nomic communities—to find common ground.").

Government speech virtues obtain even when government is advancing contested viewpoints. For example, assume that a city council decides, after debate, to spend money educating teens about condom usage to prevent sexually transmitted diseases.²⁹ Assume further that there is a substantial minority—both on the council and among the citizenry—that opposes this position. Some of the minority would prefer to spend the money educating teens about abstinence. Others would prefer to offer teens an alternative between condom usage and abstinence. Still others would prefer not to spend any tax dollars in this area. Putting aside which view is correct, spending the money to advance a contested viewpoint (be it condom usage or abstinence) is often a good thing. First of all, if an elected majority believes that one message or the other is true, or good, then perhaps we could say it has a duty to express what it believes to be true or good. Better that than to be silent. This is an extension of an argument about individual responsibility: if I believe X to be true or good, and I have a responsibility to another person on the subject, then arguing for X (when Y is a competing position) might be considered morally obligatory, and silence would be an error. The same could be considered true of government's moral obligation to its citizens. Moreover, government persuasion on a contested matter plays an important role in countering private power. As one locus of power in society, government can check agglomerations of private power, just as checks on government ensure that it be only one voice among many. Additionally, even in a contested arena government speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer.

Before turning to the principal arguments against this more robust role for government speech, I offer a few caveats to the foregoing. First: I am not in this Article arguing for any specific conception of the good that government should advance. Rather, I am making the general case for a thicker perfectionism.³⁰

Second: My support for government speech even in areas of great social turmoil—that is, my support for government using its

29. Or assume they set up a program to fund private organizations, with a condition that the organizations educate about condom usage.

30. For more specific conceptions, see WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 173-76 (1991) (describing a liberal perfectionist agenda); DAVID JOHNSTON, *THE IDEA OF A LIBERAL THEORY: A CRITIQUE AND RECONSTRUCTION* 97 (1994) (arguing government should support "some degree of ability to appraise or reappraise one's projects and values critically") (emphasis omitted); WALL, *supra* note 2, at 2 n.3 (declaring liberal perfectionism holds that "personal autonomy is a central component of human flourishing"); *id.* at 208-33; McClain, *supra* note 8, at 36 (describing a feminist perfectionist agenda); *id.* at 39 (describing a civic republican perfectionist agenda).

powers of persuasion even to advance a contested viewpoint—is in sharp contrast with my views regarding government support for religion. This position requires an argument that religion is distinctive, for constitutional purposes. I have made that argument in detail elsewhere,³¹ and will only summarize it here. When dominant religions advance predominantly religious arguments in the legislative process, they effectively disenfranchise nonbelievers from meaningful participation in that process. Religious arguments rely, ultimately, on reference to an extra-human source of normative authority, and nonbelievers have not engaged in the leap of faith necessary to appreciate the force of that authority. Thus, the establishment clause of the United States Constitution should be (and has been) construed to invalidate such legislation.³² More generally, the establishment clause should be construed to bar dominant religions from using law to advance their religious missions. But reliance on controversial nonreligious arguments, either as part of the legislative process or to support government speech in an area of social contest, does not disenfranchise those on the other side in the way that religious argumentation does. The Constitution forbids the establishment of religion, but it does not forbid the establishment of secular conceptions of the good, at least if done through persuasive and not coercive means.

C. *The Arguments Against Government Speech*

1. *Abod-Writ-Large*

The broadest attack on government speech asserts that the proper role of government is to provide for defense, police, and fire protection, to build roads and bridges, and to stay out of the advancement of the good if at all possible. Such a libertarian argument rejects even thin perfectionism. That is, it rejects the idea that government should provide for the preconditions of living a good life, whatever that

31. For more information about this argument, see generally Greene, *Incommensurability*, *supra* note 14; Greene, *Irreducible*, *supra* note 10; Greene, *Political Balance*, *supra* note 10; Greene, *Rejoinder*, *supra* note 14; Greene, *Uncommon Ground*, *supra* note 14; Greene, *Vouchers*, *supra* note 14.

32. The free exercise clause should be construed as a counterweight to the Establishment Clause, creating *prima facie* exemptions for those burdened by nondiscriminatory, general legislation in their religious practice. See Greene, *Political Balance*, *supra* note 10, at 1633-40. But just as there is no constitutional provision barring the establishment of secular conceptions of the good, neither should we understand there to be a constitutional provision requiring *prima facie* exemptions for those burdened by nondiscriminatory, general legislation in their secular lives. See *id.* at 1640-43.

good life is, through general funding of schools, museums, libraries, art, etc.

This broad anti-perfectionist attack has found an ally in a line of Supreme Court cases that is threatening to become even more important than it now is. In *Abood v. Detroit Board of Education*, the Court ruled that contributions compelled by law from nonunion members violated the first amendment when used for political and ideological purposes rather than for collective bargaining.³³ The *Abood* principle is a close cousin of the extreme anti-perfectionist brand of liberal argument. The natural extension of the *Abood* principle would grant all taxpayers a right not to contribute to government speech with which they disagree. Indeed, a recent decision of the Seventh Circuit, which the Supreme Court will review this term, extended *Abood* to mandatory student fees at public universities. Many universities collect such fees and authorize their student governments to spend the money in ways both nonideological (e.g., athletics, music, drama) and ideological (e.g., organizations dealing with issues of the environment, poverty, gender). Some students at the University of Wisconsin sued, alleging that their first amendment rights were violated when the mandatory fees were spent to support ideological ends with which they disagreed. The Court of Appeals in *Southworth v. Grebe* agreed that *Abood* applied here.³⁴ A Supreme Court affirmance would represent a dramatic step toward concretizing anti-perfectionism into constitutional law.

There are three ways to respond to *Abood* and its possible extension to a broad, invasive taxpayer right not to fund government speech with which one disagrees.³⁵ First, one could accept *Abood* but limit it, distinguishing both cases such as *Southworth* and taxpayer rights more generally. Thus, one could fend off *Abood*-writ-large by citing administrative concerns; while it is possible to issue pro rata refunds of the dues of nonunion members, it would be impossible (i.e., prohibitively costly) to do the same for taxpayer refunds. Or consider the situation when the taxes or dues in question are part of a small subset of governance, and they involve the livelihood of those assessed. Here, the dissenters can properly argue that although the cost of citizenship generally must include disfavored government speech,

33. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

34. See *Southworth v. Grebe*, 151 F.3d 717, 723-32, *reh'g denied*, 157 F.3d 1124 (7th Cir. 1998), *cert. granted sub nom.*, *Board of Regents v. Southworth*, 119 S. Ct. 1332 (1999).

35. Even with this extension, the Court would have to leave open government speech to promulgate laws and issue orders. See YUDOF, *supra* note 19, at 204-07; Shiffrin, *supra* note 18, at 588-93. Other government speech—even that used to drum up support for laws and regulations—would be eliminated in a world in which *Abood* were writ large.

the cost of one's occupation should not include compelled contributions toward such speech.

Another argument for limiting *Abood* might be stronger still. In *Abood* and *Keller*,³⁶ the union and the state bar had certain ideological interests that their funding choices reflected. In *Southworth*, to the contrary, the student government did not have specific ideological interests, but rather funded an array of private groups. Thus, Judge Wood, dissenting from the Seventh Circuit's refusal to reconsider the panel decision en banc, correctly characterized the pot of money created by mandatory student activities fees as creating a viewpoint-neutral (and one might add subject matter neutral) forum.³⁷ We can therefore analogize to other public forums funded by many people—a public park, a municipal auditorium, a public library, a public museum.³⁸ Many people who have to pay money to support these forums doubtless disagree with many messages being disseminated in these forums, but it is a deep misunderstanding of the free speech right (and the freedom of association implied right) to require opt-outs in these settings. It is the open forum that is funded; many voices are then heard in the forum, none specifically attributable to any one citizen or citizens, none specifically fostered by any one citizen or citizens.

A helpful analogy here is the line of establishment clause cases upholding government funding that runs to religious institutions so long as the subject matter of the funding is secular and so long as the recipients are sufficiently general, i.e., secular and religious alike.³⁹ It is true that Justice O'Connor, in her *Rosenberger* concurrence, held open the possibility of an opt-out for students who disagree with certain funded speech activities.⁴⁰ But one should not let that undercut the larger point of the Court's obsession with "generality": If a funding program is sufficiently general, it cannot be said that the state is en-

36. 496 U.S. 1, 17 (1990) (applying *Abood* to mandatory state bar dues).

37. As she put succinctly: "It is the same as if they simply built a large auditorium and held it open for everyone." *Southworth*, 157 F.3d at 1129 (Wood, J., dissenting from denial of rehearing en banc).

38. Not to mention that student tuition pays for lots of ideological speech—salaries of faculty members who advance ideological positions, library and museum acquisitions, etc.

39. See generally *Rosenberger v. Rectors & Visitors*, 515 U.S. 819 (1995) (upholding as part of a general state-compelled student activities fund funding of a religious newspaper); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding as part of a general program of state aid to disabled students funding of sign-language interpreter used by student in private religious school); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding as part of a general program of aid to disabled students state funding of a blind person studying at a private religious college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state deduction from income tax for educational expenses at both secular and religious schools).

40. See *Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring).

dorsing any of the recipients' messages, religious or otherwise. Similarly (and despite Justice O'Connor's musings), it cannot be said that the citizens who make up the state (whose funds become the state's funds that go to the various recipients) are endorsing any of the recipients' messages. There is no reason to believe this conclusion is any different in a non-establishment clause case.

The main problem with this method of limiting *Abood* is that if the forum were truly an open one—subject to reasonable time, place, and manner restrictions but without the possibility of any content-based access or funding determinations—it would be easier to invoke the cases involving truly “general” access. In *Southworth*, it is not clear what the student government's criteria are for selecting funding recipients; it doesn't appear that one can assert that the criteria are just like reasonable time, place, and manner restrictions. Similarly, when government uses taxpayer funds to support ideological speech (whether its own or by funding private speakers), it does not operate through strict open forum rules of content neutrality. It remains true, though, that general taxpayer funds, just as student activities fees at most universities, are used for a wide array of speech purposes. Therefore, one could avoid the precise complaint raised in *Abood* and *Keller*—that a single recipient (the union; the state bar) was using the funds to advance its own fairly limited set of causes.

The other two responses to *Abood* undercut that precedent itself, and the theory of limited government that lies behind it. First, even if we accept the Court's general compelled speech jurisprudence and its cases on rights of political association, *Abood* does not necessarily follow. Beginning with *West Virginia State Board of Education v. Barnette*,⁴¹ the Court sometimes has invalidated state actions compelling speech under a “right not to speak” doctrine, and sometimes has upheld such state actions in the face of such a doctrine.⁴² If the government commands that citizens speak or foster a particular message, the statute will be invalidated (as applied, not on its face).⁴³

41. 319 U.S. 624 (1943) (holding that a public school cannot require its students to pledge allegiance to the flag).

42. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding the Agriculture Marketing Agreement Act's advertising regulations); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), 520 U.S. 180 (1997) (upholding the Cable Television Consumer Protection Act's requirement that cable television systems provide public stations); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (upholding a state's constitutional protection of speech in private shopping centers); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC's fairness doctrine).

43. See *Wooley v. Maynard*, 430 U.S. 705, 713-17 (1977) (striking down compelled “Live Free or Die” motto on state license plates); *Barnette*, 319 U.S. at 642 (invalidating compelled pledge of allegiance in public school).

Similarly, if a statute gives some citizens a right to speak in the publication of another citizen, and if this right is triggered by specific speech content, that statute will be invalid (these were done facially).⁴⁴ None of these cases turned on whether a listener/viewer of the speech would be at a high risk of attributing the compelled speech to the speaker. The one case that did turn on that fact was *Hurley v. Irish-American Gay, Lesbian & Bisexual Group, Inc.*⁴⁵ There, a state statute had been construed to give a gay and lesbian group the right to march in a privately sponsored St. Patrick's Day parade. The Court accepted the parade organizers' argument that the gay and lesbian message might be falsely attributed to the parade organizers, and that the gay and lesbian message would detract from the message that the organizers wished to send.

None of these lines of precedent supports *Abood* or any of its extensions. In *Abood*-type cases, the government does not compel citizens to speak or foster any particular message (by displaying a sign on their property, for example); it does not grant some citizens a right to speak in or on the property of another citizen, triggered by specific speech content; and there is no reasonable chance that people will attribute speech to a particular person because such speech was paid for in minuscule part by her taxes or dues or fees.⁴⁶ As a tax/dues/fees payer, a person remains free to speak all she wants or not at all.

Abood also purported to rely on the right of political association, and in particular the political patronage cases. The Court has held that, except for those officials in policymaking positions, public employees may not be hired and fired on the basis of their political association; in other words, political patronage has its constitutional limits.⁴⁷ *Abood* cited this line of patronage cases without careful analysis.⁴⁸ The patronage cases and the *Abood* problem are quite

44. See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (invalidating statute that gave public interest group right to publish in utility's billing envelope after group objected to specific company messages); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down statute that gave right of reply to political candidates whose records had been attacked in that very media outlet).

45. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557 (1995).

46. This is especially true once we consider that others will know the taxes/dues/fees are mandatory, and therefore know that the payers had no choice but to pay. It is unreasonable to assume anything about the beliefs/ideologies of the payers in such circumstances. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 473-75 (1995).

47. See, e.g., *Rutan v. Republican Party*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

48. The Court wrote:

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the [Constitution]. Equally clear is the proposition that a government may not require an individual to

different. The former involve use of political affiliation to condition public employment; the latter involves taking a portion of one's tax/dues/fees dollar and spending it on ideological causes with which one disagrees. The former use one's identification as a member of a political party to deprive one of a job to which she would be otherwise entitled; the latter imposes no such direct and particularized harm. In the political patronage setting, either one renounces one's political affiliation or one loses the government job. In the *Abood* setting, one can vigorously advocate one's political positions, and lose only money exacted for union dues. It is hard to see how this constitutes compelled association.

The other way to undercut *Abood* is to reject its strictly-neutral conception of liberal democracy. *Abood* appears based on a mistake about what sort of legitimacy argument is needed to overcome governmental coercion. If the government forbids (or requires) specific conduct, it should have a justification based in a theory of how that specific conduct is harmful (or good) and an explanation for why public sanctions are needed. The justification for taxation—a type of coercion—should sound in general terms. In other words, the government must be able to explain why it is, generally, a legitimate form of authority with power to compel taxation. But the justification for any particular use of tax dollars should not have to overcome these stricter hurdles of legitimacy, but rather merely those of policy. *Abood* treats specific uses of compelled payments as if they were specific requirements or prohibitions on behavior, rather than asking whether the tax/dues/fees assessment is generally legitimate and leaving to the policy arena the debate over the use of funds.

Instead of the extreme anti-perfectionism that *Abood* supports, we should endorse a more limited conception of neutrality, under which government let individuals develop their own conceptions of the good life and live such conceptions accordingly, subject to some sort of clear harm principle. Here, the government may advance particular conceptions of the good and encourage people to follow such con-

relinquish rights guaranteed him by the First Amendment as a condition of public employment. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one. . . . [A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1976) (citations omitted).

ceptions, so long as dissent is left open and the government's conceptions are just some of many advanced. Under this thicker theory of liberal democracy, one must accept that on some legislative battles one will be in the minority, and that the result of losing in a fair and open democratic process will be not only having to live under unwanted laws but also having to listen to (and help fund) speech with which one disagrees, in this case by the government. *Abood* has made possible cases such as *Southworth* and has made plausible arguments that would close down all publicly funded speech forums, on the ground that objecting taxpayers have a right not to fund speech with which they disagree in any setting. *Abood* is an unwarranted extension of both the compelled speech and political association cases; it exhibits a cramped view of the power of government to advance theories of the good through persuasion; it does not fit with any of our practices. It should be dispensed with.⁴⁹

2. The Lure of "Neutrality"

The *Abood*-writ-large argument generally comes from the political right. From the political left comes a different type of argument against a thicker perfectionism. Rawls, Dworkin, and others have advanced various theories of liberal neutrality, and with it various arguments about why government should not enter contests about the good. The liberal way of treating citizens as equals, says Dworkin, "supposes that government must be neutral on what might be called the question of the good life."⁵⁰ The contrasting political view, says Dworkin, supposes that "government cannot be neutral on that question, because it cannot treat its citizens as equal human beings without a theory of what human beings ought to be."⁵¹ Bruce Ackerman defines neutrality in this way: "No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens, or (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens."⁵² As David Johnston puts it, liberalism presupposes the "assumption of reasonable value pluralism."⁵³ According to George Sher, the broadest theory of neutralism rules out

49. For arguments rejecting something like the *Abood* principle, see RAZ, *supra* note 8, at 418; WALL, *supra* note 2, at 199-200. For an argument supporting something like the *Abood* principle, see Waldron, *supra* note 2, at 1139-40.

50. RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

51. *Id.*

52. ACKERMAN, *supra* note 8, at 11; *see also id.* at 43.

53. JOHNSTON, *supra* note 30, at 26 (emphasis omitted).

various methods of promoting the good, including not only forces and threats, but also rewards and nonrational manipulation through the "attitudes and actions of those whom [one] admires and wishes to imitate."⁵⁴

The most influential advocate of governmental neutrality toward conceptions of the good has been John Rawls.⁵⁵ Although in *A Theory of Justice*⁵⁶ he suggested the possibility of a comprehensive liberalism—all citizens (at least hypothetically) accepting certain basic principles about equality—in *Political Liberalism*⁵⁷ he set out to solve the problem of how to justify governmental power in societies in which people have fundamentally different notions of the good. In such a society, in which common ground is hard to find, we can operate only through an "overlapping consensus."⁵⁸ In other words, citizens with differing comprehensive views of the good can endorse a shared political conception of justice, each from the point of view of his or her own conception of the good, but without advancing any of those conceptions as foundational for the society. In sum, for Rawls, it is impermissibly sectarian to advance contested conceptions of the good as part of governance in a society defined by divisions in what people believe to constitute the good, i.e., in any liberal democracy currently existing.⁵⁹

This type of argument for political liberalism—advanced by Rawls, Dworkin, Ackerman, and others—fails. It rests on a conception of neutrality that purports to be not, itself, a conception of the good, but rather to be standing outside or above conceptions of the good. If it rested on a conception that was, itself, just another conception of the good, then it would not be neutral toward notions of the good. Rather, it would be (just) another type of comprehensive theory of the good that would have to compete with other such theories in the political arena. I share the view of critics who contend that the higher/outside ground of neutrality cannot be found, and that Rawlsian political liberalism is, in fact, another sectarian theory of the

54. SHER, *supra* note 17, at 36.

55. My discussion of Rawls below draws on Greene, *Uncommon Ground*, *supra* note 14.

56. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

57. JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

58. *Id.* at 133-72.

59. As Steven Wall cogently explains, Rawls' strongest argument for such neutrality is from a conception of democratic toleration. If we appeal to controversial ideas in politics, then the results will not, for Rawls, "tolerate those who hold opposing philosophical views. It will be objectionably sectarian." WALL, *supra* note 2, at 72. Citizens should be disposed to seek "principles that others could accept." *Id.* at 73. They also must accept what Rawls calls the "burdens of judgment," or what Wall calls being "epistemically charitable," that is, "People who maintain that their controversial views are correct and that others should accept them because they are correct are being unreasonable in an epistemological sense." *Id.*

good.⁶⁰ In the remainder of this Section, I show why the critics are correct; then suggest that a modified version of political liberalism might come closer to working; and finally explain that, although I agree liberal neutrality has been exposed as a comprehensive doctrine (what some call comprehensive liberalism), my general argument for government speech does not reject comprehensive liberalism in the political arena. Rather, my argument rejects the contention that comprehensive liberalism is required as a matter either of moral theory or of American constitutional law.

The principal and most stinging critique of Rawlsian political liberalism is that it cannot defend the high ground that it seeks to establish. The argument for abstracting from the actual, contested notions of the good that people hold is not a neutral, removed, higher ground argument; it is itself a (contested) conception of the good. If Alice believes in some fundamental good, and offers it for acceptance in the political arena, and Sarah responds by saying that pursuit of contested conceptions of the good should be left to citizens in their private lives, and that politics should be a ground for sharable conceptions of justice only (from the point of view of the various conceptions of the good, i.e., Rawls' overlapping consensus), Sarah cannot win the argument without explaining why this notion of political agnosticism is better than Alice's push for good X. But if Sarah is to win that argument, she must be able to show that political agnosticism is better than good X, and that argument must defend, at some level, the goodness of agnosticism. Another angle on this is to realize that the type of neutrality for which Rawls argues necessarily benefits those who already, from the viewpoint of their conceptions of the good, accept agnosticism about the good in politics, while necessarily harming those who already, from the viewpoint of their conceptions of the good, cannot accept such agnosticism.⁶¹ As Stanley Fish sums it up in his brilliant attack on higher-ground moves of neutrality:

[T]here are no different or stronger reasons than policy reasons, and . . . the announcement of a formula (higher-order impartiality, mutual respect, or the judgment of all mankind) that supposedly outflanks politics, or limits its sphere by establishing a space free from its incursions, will be nothing more or less than politics—here understood not as a pejorative, but as the name of the activity by which you publicly urge what you think to be good and true—by another name, the name, but never the reality, of principle.⁶²

60. See *infra* notes 62-63.

61. See Greene, *Uncommon Ground*, *supra* note 14, at 667-71.

62. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2297 (1997). As will be clear in a moment, although I share Fish's general distaste for moves toward a higher ground of neutrality, I disagree with him on the

Liberalism of any kind isn't neutral; as William Galston puts it, "[l]ike every other political community, it embraces a view of the human good that favors certain ways of life and tilts against others."⁶³

Political liberalism (or liberal neutrality, I mean these as synonyms) could succeed, but only by acknowledging its lack of neutrality and correcting the harm done to those whose views of the good cannot countenance agnosticism in politics. If we acknowledge that keeping contested views of the good out of politics is intrinsically helpful to some comprehensive theories of the good and harmful to others, and adopt such "common ground" rules of politics anyway, then we have indeed created a politics that is not worthy of the name neutrality. But perhaps we could adopt common ground rules and simultaneously recognize that the gag rule we have imposed has harmed citizens disproportionately, cutting to the quick those whose views of the good require (or at least permit) their admission into the political arena. If we follow that recognition by creating a system of exit options for such citizens, then our claim of legitimately binding them to the polity can stand. We must see sovereignty as permeable; that is, if we restrict the introduction of certain types of arguments in politics, then we must create at least a *prima facie* system of exemptions from law (a type of exit option) for those whose arguments we have excluded.⁶⁴ In this way, we can continue our claim of legitimate government (for excluding someone's voice and binding her by law without exception cuts to the core of illegitimacy), while establishing a form (though not Rawls' form) of political liberalism.

I would not, though, exclude from politics all contested conceptions of the good. Rather, we should exclude from politics only expressly religious arguments, and allow secular arguments about the good to be advanced, whether by individual citizens, legislators, or the government itself. I have summarized above my argument made in other places about the need for a gag rule on arguments from religious faith.⁶⁵ The burden of much of the rest of this Article is to show the virtues of (nonreligious) government speech and the failings of both theoretical and constitutional arguments to the contrary.

Finally, the exposure of liberal neutrality as another comprehensive doctrine does not mean that we should not accept comprehensive liberalism. As I explained earlier, my argument in this Article is

specific question of religion in politics. See Greene, *Incommensurability*, *supra* note 14; Greene, *Political Balance*, *supra* note 10; see also *supra* notes 31-32 and accompanying text.

63. GALSTON, *supra* note 30, at 3; see *id.* at 92; see also SHER, *supra* note 17, at 80.

64. See generally Greene, *Incommensurability*, *supra* note 14; Greene, *Political Balance*, *supra* note 10; Greene, *Rejoinder*, *supra* note 14; Greene, *Uncommon Ground*, *supra* note 14.

65. See *supra* text accompanying notes 31-32.

not that liberal conceptions of the good are wrong, or that they should not be advanced through politics, or by government speech. The argument, rather, is that if we are to be liberals, we must be liberals in the cauldron of politics, and that one set of arguments against government speech—that government may not and should not advance contested conceptions of the good—cannot stand on the ground of neutrality, and is not supported by constitutional doctrine.

3. Thin Perfectionism

Many scholars do not consider themselves anti-perfectionist, but neither are they comfortable urging government to intervene on behalf of contested notions of the good. Rather, these “thin” perfectionists urge government to provide the preconditions for citizen autonomy—or, more generally, for citizens’ capacity to advance their own conceptions of the good—and then to stand back from the fray. Linda McClain, for example, distinguishes between government facilitation of citizen choice—“to foster the capacities for self-government by measures that do not obviously steer or take sides”—and government attempts to persuade or moralize—“to use measures short of coercion with the intention of steering citizens toward certain values, choices, and behavior and away from protected though disfavored values, choices, and behavior.”⁶⁶ “[T]oleration as respect”—McClain’s term for how government in a liberal democracy should treat its citizens—

supports governmental persuasion in certain cases, for example, when it furthers the ends of democratic self-government or promotes public values. The more difficult question is whether government should, as [thick] perfectionists urge, engage in the business of . . . steering citizens toward better or more valuable ways of life by such means as shaping preferences and social norms and encouraging certain choices over others.⁶⁷

McClain’s answer to this question is a fairly clear “No.” She writes, for example, that toleration as respect would

favorably distinguish, on the one hand, government acting to further the capacity for self-government through encouraging reflective decisionmaking and, on the other, government steering in favor of a sectarian orthodoxy or contested view of the good life. . . . [T]oleration as respect . . . should be cautious about embracing [thick perfectionism’s] call for government evaluating and preferring some lives over others and seeking to perfect persons’ lives by altering their preferences, particularly in light of such prudential concerns as whose perfectionism will supply the content of govern-

66. McClain, *supra* note 8, at 23.

67. *Id.* at 26.

ment's project and how a deliberative democracy will resolve conflicts over what it means to live a good, self-governing life.⁶⁸

Other scholars follow similar tacks.⁶⁹ Joseph Raz offers what is commonly thought to be a perfectionist brand of comprehensive liberalism. However, at critical moments he steps back from a thicker perfectionism, instead resting with a thin perfectionism that allows a governmental role in creating autonomous citizens, but little more. He writes:

There is more one can do to help another person have an autonomous life than stand off and refrain from coercing or manipulating him. There are two further categories of autonomy-based duties towards another person. One is to help in creating the inner capacities required for the conduct of an autonomous life. . . . The third type of autonomy-based duty towards another concerns the creation of an adequate range of options for him to choose from.⁷⁰

He says later, "Autonomy-based duties, in conformity with the harm principle, require the use of public power to promote the conditions of autonomy, to secure an adequate range of options for the population."⁷¹ It is true that Raz offers the following, which might be thought⁷² to promote a thicker perfectionism:

[T]he autonomy principle is a perfectionist principle. Autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships. The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones. [This is not inconsistent with the harm principle, for it] merely restricts the use of coercion. Perfectionist goals need not be pursued by the use of coercion. A government which subsidizes certain activities, rewards their pursuit, and advertises their availability encourages those activities without using coercion.⁷³

And again here:

The conditions of autonomy, it was emphasized before, include the existence of a public culture which maintains and encourages the cultivation of certain tastes and the undertaking of certain pursuits. A public culture which inculcates respect for the envi-

68. *Id.* at 41-42; *see also id.* at 57 ("governmental persuasion should foster, not hinder, the capacity for self-government"); *id.* at 75 (toleration as respect "assumes a basic governmental responsibility to facilitate persons' capacity for self-government"); *id.* at 97 (toleration as respect would agree with Dworkin that government may "encourage reflective decisionmaking"); *id.* at 107 (Rawls' political liberalism, with which McClain sympathizes, "recognizes a proper role for government in helping to develop the moral powers, or moral capacities of citizens, to prepare them for self-governing citizenship").

69. *See, e.g.,* ACKERMAN, *supra* note 8, at 139, 156; BERLIN, *supra* note 19, at 33-35; FISS, DIVIDED, *supra* note 7, at 5, 19, 37-38, 101, 106; HOLMES, *supra* note 19, at 187; JOHNSTON, *supra* note 30, at 69-70, 77, 97; MILL, *supra* note 17, at 168-83; SUNSTEIN, *supra* note 17, at 19; YUDOF, *supra* note 19, at 15, 34, 112; *see also* Cole, *supra* note 7, at 681, 703; Redish & Kessler, *supra* note 7, at 559.

70. RAZ, *supra* note 8, at 407-08.

71. *Id.* at 418.

72. *See* McClain, *supra* note 8, at 36.

73. RAZ, *supra* note 8, at 417.

ronment, and for its transformation at the hands of past generations, and which cultivates agreeable design and good taste in landscaping and urban planning, while not positively required as a condition of autonomy, is consistent with it. Autonomy requires a public culture and is consistent with a tasteful rather than a vulgar and offensive environment.⁷⁴

But remember that the question now is whether Raz offers a thick or thin perfectionism, i.e., whether he thinks it appropriate for government to persuade on contested conceptions of the good, or instead merely to provide the seed for citizen debate and choice on conceptions of the good. He states the following restrictions on perfectionism: "First, the perfectionist policies must be compatible with respect for autonomy. They must, therefore, be confined to the creation of the conditions of autonomy. Second, they must respect the limitation on the use of coercion that is imposed by the harm principle, as well as the analogous restriction on manipulation."⁷⁵ This view differs from some collectivist beliefs, argues Raz, stating that "[t]he role of government is extensive and important, but confined to maintaining framework conditions conducive to pluralism and autonomy."⁷⁶ Thus, in the end, despite some language suggesting sympathy with a broader perfectionism, Raz promotes a thin perfectionism, requiring (not merely permitting) government to lay the foundation for citizens to develop their own notions of the good life. His argument—and the arguments of McClain, Fiss, Sunstein, and others⁷⁷—goes this far, but no farther.

So the question is whether the argument for thin perfectionism can stand, and whether it offers any reason to reject a thicker perfectionism. Let me use McClain's thin perfectionism as an example. What exactly is her argument against government speech pushing a contested conception of the good? One possibility is the concern with government fanning the flames of controversy. But this is a purely practical warning ("Don't fan the flames!"), demanding a careful political calculus about the efficacy of government speech in a contested arena.⁷⁸ It does not offer a reason in theory to draw a line between the

74. *Id.* at 421-22.

75. *Id.* at 423.

76. *Id.* at 427.

77. *See supra* note 66-69.

78. As Joseph Raz notes,

The pursuit of full-blooded perfectionist policies, even of those which are entirely sound and justified, is likely, in many countries if not in all, to backfire in arousing popular resistance leading to civil strife. In such circumstances compromise is the order of the day. There is no abstract doctrine which can delineate what the terms of the compromise should be. All one can say is that it will confine perfectionist measures to matters which command a large measure of social consensus, and it will further restrict the use of

contested and the uncontested when it comes to government persuasion. Another possibility is suggested by McClain's question: "Whose perfectionism will supply the content of government's project?"⁷⁹ Indeed, for many left-of-center scholars writing about neutrality versus perfectionism, an overriding concern appears to be the use of government speech to advance items on the right-wing agenda. My response to that concern is this: It is a matter of politics, and not of principle or constitutional law. Some days your point of view will get pushed; other days someone else's will; so long as government neither monopolizes, coerces, or ventriloquizes,⁸⁰ its voice will be one of many, it will be one of persuasion not coercion, and the speech will be clearly in the government's voice.

Finally, consider McClain's concern with another prudential matter, "how a deliberative democracy will resolve conflicts over what it means to live a good, self-governing life."⁸¹ If McClain's concern is the spillover from government persuasion to government coercion, I am with her. My argument is not the even thicker perfectionist argument for government coercion to advance contested conceptions of the good.⁸² But if "resolving conflicts" can be limited to government speech—i.e., governmental attempts to persuade citizens to adopt one as opposed to another side of a currently contested social matter—then I fail to see the theoretical concern with a governmental role in this discussion.⁸³

More generally, if government believes that one side of a currently contested social matter offers the better answer to living a good life—say, encouraging teenagers to use condoms as opposed to teaching abstinence, or the other way around—what is the reason *not* to offer that argument to the citizens? Only, I would suggest, the fear that the government's voice will be too loud (the monopolization concern), or the danger of persuasion slipping into coercion, or the problem of the government masking its voice as the voice of another. Each of these is a legitimate concern, and Part III deals with each in detail below. But absent these problems, should we not trust the citizens to

coercive and of greatly confining measures and will favour gentler measures favouring one trend or another.

RAZ, *supra* note 8, at 429.

79. McClain, *supra* note 8, at 42.

80. *See infra* Part III.

81. McClain, *supra* note 8, at 42.

82. *But see, e.g.,* WALL, *supra* note 2, at 79.

83. Again, putting to one side the possibility of monopoly, coercion, or ventriloquism.

take the government's view into account in their decisionmaking process, and to do so as they evaluate all arguments?⁸⁴

One final point about the argument for thin perfectionism: To the extent that some support seed money for parks, libraries, museums, etc., but refuse to support other government speech initiatives on the ground that they are improperly partisan (and therefore violate either principles of liberal democracy or our Constitution's first amendment), what response can be given to those who deem even money for parks, libraries, museums, etc. to be entering an arena of social contest? Remember that those who advocate a caretaker government and thus support *Abood-writ-large* would object even to the so-called "neutral" seed money given to these forums of expression. First of all, they would contend, some views but not all will wind up being expressed. Second, they would argue, even seed money for speech forums is not supported by all, and therefore must be seen as the offspring of a particular view of the good, one that is itself contested. It is not easy to see how the advocates for thin perfectionism can ward off this challenge.⁸⁵

III. GOVERNMENT SPEECH IN PRACTICE

The attacks on government speech cannot overcome its virtues. But this is the general case, and the question remains whether in practice some instances of government speech might be thought to violate either the Constitution or some principle of political theory. Here, much of the scholarship either inveighs against controversial government speech,⁸⁶ or carves out certain areas in which open forums may not be altered.⁸⁷ My approach is different. I would subject government speech to a case by case analysis focusing on three concerns: monopolization, coercion, and ventriloquism. Only if the speech fails any of these conditions should it be deemed unconstitutional.⁸⁸

84. Indeed, our First Amendment caselaw generally trusts them to evaluate all arguments. *See infra* text accompanying notes 147-154.

85. Steven Wall adds, in rejecting thin perfectionism and advocating a thicker perfectionism, that the so-called common principles of justice, or of what constitute citizen autonomy, might themselves be either wrong (and therefore should be open to scrutiny) or not truly shared (and therefore no less contested than other conceptions of the good). *See WALL, supra* note 2, at 98-100, 122-23. Moreover, argues Wall, autonomy is not the only value, and it is valuable only insofar as it is part of a life made up of valuable pursuits. *See id.* at 201.

86. *See* the discussion of viewpoint discrimination *infra* Part III.A.2.

87. *See infra* Part IV.

88. *See infra* Part III.C for a qualification regarding ventriloquism.

A. Monopolization

Government speech is most justifiable when it is clearly one voice among many. At the other extreme, government speech is highly problematic when it is the only voice in a relevant speech market.⁸⁹ As a theoretical matter, this conclusion flows easily from the multiple repositories of power theory of our Constitution, which is, after all, a version of pluralism.⁹⁰ The domination of any one voice infringes on this version of pluralism, be that voice private or public. But unless one adopts a very broad view of state action, the Constitution is implicated only when the dominant voice is the government's. First amendment doctrine would easily invalidate government suppression of dissent in a relevant speech market. The harder question is whether we should construe the Constitution to invalidate government speech when the effect is to monopolize, but without suppressing dissent. Does this count as abridging the freedom of speech? There are two separate concerns.

First, I will focus on the effect on citizen decisionmaking, or autonomy, in a governmentally monopolized speech market. The concern here is with citizen choice under conditions of monopolized information; thus, the constitutional objection sounds not in the first amendment, but rather in substantive due process (i.e., autonomy more generally).⁹¹ Second, I will discuss what many contend is a first amendment problem—the skewing of public debate by government speech. For either of these two concerns, actual monopolization should be understood to violate the Constitution. Whether monopolization has occurred in a given speech market is, though, a difficult question. Furthermore, and contrary to the view of many scholars, viewpoint-based government speech, absent monopolization, should not be deemed unconstitutional.

89. See Cole, *supra* note 7, at 680; Post, *supra* note 4, at 192-93. See generally FISS, *DIVIDED*, *supra* note 7; FISS, *IRONY*, *supra* note 7. For a discussion of the government monopoly problem in connection with unconstitutional conditions generally, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1493 (1989).

90. See *supra* Part II.A; see also YUDOF, *supra* note 19, at 22 (stating that there must be a "consciously fostered pluralism in communications networks"). See generally Greene, *Irreducible*, *supra* note 10.

91. See Greene, *supra* note 46, at 480-82.

1. Undercutting the Knowledge Aspect of Autonomy

Citizen autonomy involves elements of both knowledge and voluntariness: one should know the full set of arguments and options before making a choice, and one should be able to make a choice free of coercion. The problem of government monopolization in a given speech market implicates the knowledge aspect of citizen autonomy. When only the government's message is available to a citizen attempting to make a decision, the resulting choice is not the product of coercion; the citizen's will has not been overborne.⁹² Rather, the resulting choice is the product of such a skewed knowledge base that we should deem it not knowing. The calculus I set forth here should seem familiar; it is the basic method for determining whether a constitutional right has been validly waived. The waiver of constitutional rights must be knowing and voluntary.⁹³ Waiver under conditions of a monopolized message cannot be considered knowing.⁹⁴

If this argument makes sense in theory, the next question is how to apply it in practice. Can judges determine in a reasonably reliable fashion when the government has monopolized speech in a relevant market? This would involve figuring out (a) when monopolization has occurred (or, perhaps, is in danger of occurring) and (b) what counts as a relevant speech market. Examining *Rust v. Sullivan* reveals some of the complexities of this judicial inquiry.⁹⁵ In *Rust*, the Court upheld the Reagan Administration's abortion counseling/referral "gag rule," under which public health clinics, as a condition of receiving federal funds, were prohibited from counseling pregnant women about abortion or referring them to abortion providers. No such gag rule was placed on discussions about carrying fetuses to term. The Court reasoned that the government was not forcing women to forego abortion, nor was the government forcing health facilities to take federal funds. The government was acting in a merely persuasive role, encouraging childbirth but not insisting on it. There is a fairly strong argument, however, that for the indigent women who use public health facilities, the information they receive

92. I deal below in Part III.B with the argument that government speech is coercive.

93. See *Johnson v. Zerbst*, 304 U.S. 458, 464-66 (1938).

94. One could perhaps argue that citizen choice regarding the exercise of a constitutional right should be subject to this knowing and voluntary test, but that government speech should be less closely scrutinized in situations in which constitutional rights are not at stake. Any government speech that produces either a not knowing or not voluntary citizen choice, however, can be understood as undermining citizen autonomy. Accordingly, my discussion will not turn on whether constitutional rights are being exercised.

95. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

there, from the only medical professionals they know and trust, is the only information they will receive and rely on regarding the choice between abortion and childbirth.⁹⁶ If the government insists that information about childbirth only be available, and is, in the public health clinic setting, blocking any information about abortion or even referral to other sources of such information, perhaps we should conclude that the government has monopolized a particular speech market. Thus, the resulting decisions of the women in question are not properly knowing and therefore not properly autonomous. We could consider this a violation of the right in question (here, the right to choose between abortion and childbirth) or a violation of substantive due process/autonomy more generally.

The problem with this argument is that information about abortion *is* available elsewhere. The real question is whether the affected women have access to this information, or should we say, have “reasonable” access to this information. This seems to be an empirical question; one could imagine some towns or cities in which abortion information is easily available, and others in which it is not. If we are to resolve these cases on the empirical evidence, then we would also have to know the extent and reliability of informal information networks that might be available to pregnant women.⁹⁷ But one might argue that the question is not merely empirical. One might suggest that so long as dissent is not suppressed (i.e., abortion information generally is not prohibited by law), pregnant women have full autonomy because they can, in theory, access such information.

This is tough stuff, in large part because identifying the relevant speech market is so hard.⁹⁸ In *Rust*, is it the public health clinic, in which the government clearly has monopolized speech, or is it the pregnant woman’s community at large, in which such monopolization has not (or might not have) occurred? Take another example, the former California Elections Code § 3572 (“Elections Code § 3572”).⁹⁹ That

96. See, e.g., Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993).

97. See EPSTEIN, *supra* note 89, at 300 (no obvious barriers to entry in the market for providing abortion information, there might be little alternative to governmentally funded information in some areas).

98. For general discussion of both product and geographic markets, see IIA PHILIP E. AREEDA ET AL., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 550-65 (1995 & Supp. 1999). For an important and relevant case regarding how broadly or narrowly to define a market, based on whether “consumers” in fact view other sources of supply as substitutes (and thus relevant to cases such as *Rust* in determining whether citizens in fact get information elsewhere than from the government), see generally *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

99. See CAL. ELEC. CODE § 3572 (recodified at CAL. ELEC. CODE § 9087 (West 1996)). (1985), repealed Stats. 1994 ch. 920 §1.

section empowered the government to place a statement of projected financial impact on the ballot of a proposed initiative. No other messages were permitted on the initiative ballot. Steve Shiffrin argues that because the voter is, at the moment of voting, a captive audience, this form of monopolization is unconstitutional, for even if the financial impact statement makes accurate projections, the question is "whether the government should be able to monopolize for itself the right to address the merits of an issue on the ballot or to call the voters' attention to issues which it and perhaps it alone wishes considered."¹⁰⁰ But is the moment of voting the relevant speech market for measuring monopolization? Groups dissenting from the government's position were allowed to speak all they wanted during the initiative campaign. Is the campaign the relevant speech market or the moment of voting? Both here and in the *Rust* setting, the degree of captivity of the relevant citizen group is important to the analysis,¹⁰¹ but hard to reach clear conclusions about in any given case.

Another issue affecting the autonomy aspect of monopolization is the accuracy of the government speech. In *Rust* and Elections Code § 3572, the government's speech was not so much inaccurate as incomplete. But what if the government deliberately distorts the truth, or, less nefariously, what if the result of government speech is such a distortion, even if not intentional? *Meese v. Keene*¹⁰² involved such a problem. Federal law at the time classified films made by agents of foreign governments as political propaganda.¹⁰³ The plaintiff alleged that such a classification would make it more difficult to exhibit certain films made by the National Film Board of Canada. Note that although the statute classifies such films as political propaganda, no such label need be attached to the films' distribution, although distribution must include disclosure of the connection to the foreign government. The Court upheld the statute, ruling both that the term "propaganda" has a nonpejorative as well as pejorative meaning and that the statute simply adds to the information potential viewers have in evaluating whether to see a film. The Court refused to accept dissenting Justice Blackmun's concerns that the average potential viewer would attach a pejorative meaning to the term "propaganda," and would be (in some instances, at least) deterred from seeing the film.¹⁰⁴ The Court did not seriously address this argument, but it raises a dif-

100. Shiffrin, *supra* note 18, at 639 (footnote omitted).

101. See YUDOF, *supra* note 19, at 169-70.

102. 481 U.S. 465 (1987).

103. *Id.* at 467 (citing 22 U.S.C. §§ 611-621), 469-70.

104. *Id.* at 483-85.

ficult question: Are there constitutional limits on government deception or on unintentional government misinformation? Even if we accept the Court's claim that propaganda has a nonpejorative meaning, surely Justice Blackmun is correct that the average potential film viewer would consider the term as indicating a slanted, deliberately distorted government message. If the relevant films are not propaganda in this commonly understood sense, has the U.S. government distorted that truth, thus rendering citizen choices (whether to see the film) not properly knowing?

These questions are difficult, but worth asking on a case by case basis. The ad hoc approach, I will contend throughout Part III, is preferable to either total deference to government persuasion or the categorical approach advocated by others.¹⁰⁵

2. Skewing Public Discourse

The matters I have discussed—*Rust*, Elections Code § 3572, and *Meese*—involve government speech that might be thought to distort a particular citizen choice by monopolizing a relevant speech market. The *Rust* gag rule might result in more children born and fewer abortions. The Elections Code § 3572 ballot statement might produce a victory for the government's side in the initiative campaign. The *Meese* propaganda label might dissuade viewers from seeing the films in question. Whether monopolization is sufficient to render choice unknowing can be determined only on a case by case basis. Other types of government speech affect specific instances of citizen autonomy less directly, but might endanger pluralism through skewing viewpoint diversity. The concern is that by pushing one point of view at the expense of another, government will improperly distort public debate. One of the main attacks on the “standards of decency” provision upheld in *NEA v. Finley*¹⁰⁶ is its capacity to skew art in a

105. See *infra* Part IV.

106. *NEA v. Finley*, 524 U.S. 569 (1998). Congress had amended the relevant statute, providing that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1)). The Court upheld the statute on its face, in a messy opinion that provides fodder for both sides in the continuing debate. On the one hand, the Court stated that the new criteria “do not silence speakers by expressly ‘threaten[ing] censorship of ideas.’” *Id.* at 583 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 393 (1992)) (alteration in original). Furthermore, the Court explained that “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding,” and that “absolute neutrality is simply ‘inconceivable.’” *Id.* at 585. On the other hand, the Court stated, “If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.” *Id.* at 587.

mainstream direction, away from the unorthodox. There are three issues to discuss here: First, what is viewpoint discrimination? Second, why is viewpoint discrimination problematic in a regulatory statute? Third, is viewpoint discrimination similarly problematic in the government speech setting?

Identifying viewpoint discrimination is notoriously difficult. There are easy cases, of course—it is clearly viewpoint discrimination to prohibit speech opposed to the Mayor but to permit speech supporting him—but the Court's treatment of this area has been unsatisfactory. In *Boos v. Barry*,¹⁰⁷ the Court invalidated a District of Columbia law prohibiting protests outside foreign embassies, but permitting supportive demonstrations. In so doing, however, the Court said the law was not viewpoint-based, but rather had excluded a category of speech. This seems wrong. To be sure, the ordinance did not single out any particular viewpoint for regulation (say, anti-Israeli or anti-Arab). Nonetheless, the law on its face allowed support for, but not criticism of, foreign governments outside their embassies; in the separate context of each embassy, the law seems viewpoint-based both facially and as applied.

Then in *Rosenberger v. Rector & Visitors of the University of Virginia*,¹⁰⁸ the Court considered a challenge to the University of Virginia's scheme of using mandatory student fees for funding various programs. In particular, the scheme barred funding for religious, political, and philanthropic student publications, while permitting funding for other student journals. The Court concluded (in the context of a challenge brought by an unfunded Christian religious publication) that the limitation was viewpoint-based. But the University would have funded many publications with religious viewpoints contained therein—a sports publication, a music publication, a publication on world affairs, etc. What the University seemed to be trying to do was refuse funding to publications that would appear particularly sectarian or controversial, either in terms of politics or religion.¹⁰⁹ In other words, the scheme did not bar the expression of religious viewpoints, but rather religion (and politics) as the primary subject of a periodical. There was no skewing of debate in favor of one viewpoint over others.

It is hard to know how to characterize the standards of decency provision at issue in *Finley*. From one angle, it is viewpoint-based—

107. 485 U.S. 312, 334 (1988).

108. 515 U.S. 819, 822-23 (1995).

109. I take it that the exclusion of philanthropic publications had a separate and totally defensible justification.

the NEA could fund a patriotic depiction of the American flag, but could not fund a painting of a defaced, pissed-on flag (the reference is to Serrano's *Piss Christ*,¹¹⁰ using urine in a different fashion). The pro-USA viewpoint would be funded, but not the anti-USA viewpoint. But from another angle, the "decency" amendment is not viewpoint-based—the NEA could not fund (arguably) a painting of an aborted fetus by a right-to-life supporter, but neither could it fund (arguably) a painting by a pro-choice supporter of a woman injured by a back-alley abortion. Whether strictly viewpoint-based or not, though, the decency provision certainly represents a governmental effort to enhance a certain kind of artistic orthodoxy.¹¹¹

It is difficult to know whether a statute is viewpoint discriminatory in part because whether we see viewpoint discrimination depends on whether an issue is seen as disputed in the current legal culture.¹¹² For example, if one had lived during an era in which homosexuality was widely thought to be deviant, a statement to that effect might not have seemed the expression of a viewpoint, but rather just the recitation of a fact. When, later in time, homosexuality becomes more widely (but still not uniformly) accepted, a similar statement now seems viewpoint-based. There are many examples of this—think of shifting societal understandings of smoking, littering, or cleaning up after one's dog.¹¹³

When we do see viewpoint discrimination by government, we usually think it is unconstitutional, at least in the criminal/regulatory setting. Governmental favoring of certain viewpoints through the regulation of other viewpoints reflects both invidious purpose and unacceptable effects. Viewpoint discrimination is strong evidence of the desire of the "ins" to exert their political muscle by harming the

110. See *Finley*, 524 U.S. at 574-75.

111. See SUNSTEIN, *PARTIAL*, *supra* note 7, at 312.

112. For insightful discussion of the distinction between the "contested" and the "uncontested" for purposes of constitutional interpretation generally, see Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1802 (1997) ("An issue is contestable when there is actual and substantial disagreement about it (that is, when it is actually contested), and when that disagreement is in the foreground of social life (that is, when it is seen and understood as generally contested)."); Lessig, *supra* note 27, at 683; Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1393-1400 (1997).

113. As Elena Kagan puts it:

The very notion of viewpoint discrimination rests on a background understanding of a disputed issue. If one sees no dispute, one will see no viewpoints, and correspondingly one will see no viewpoint discrimination in any action the government takes. Similarly, how one defines a dispute will have an effect on whether one sees a government action as viewpoint discriminatory.

Kagan, *supra* note 7, at 70 (footnote omitted).

“outs.”¹¹⁴ Such a legislative purpose cannot be considered legitimate, at least in the regulatory setting. In addition, regulatory viewpoint discrimination poses too great a risk that the diversity we expect in any given speech market will dry up, replaced by the government’s favored position. As Geof Stone writes, “[T]he first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate.”¹¹⁵

Despite the arguments of many scholars¹¹⁶ and occasional Supreme Court dicta,¹¹⁷ the constitutional arguments against regulatory viewpoint discrimination do not apply to government speech (direct or through funding conditions) that is viewpoint discriminatory. If government speech monopolizes a speech market, then I agree it is unconstitutional, both because it disrupts the knowledge aspect of citizen autonomy and because it converts public discourse from the voice of many (or at least some) to the voice of one. But if in a given case the government is not monopolizing a speech market, if dissenting views are readily produced and out there to be heard and seen, then there is no disruption of autonomy based on skewed knowledge and no reduction of viewpoint diversity. In such cases, the government’s favored view will be one among many views worth supporting, and it will be valuable for the citizens to know which view the government favors and for the majority to be able to advance its notion of the good. For example, in *Finley*, if the decency provision results in more mainstream art, but dissident art is still produced and available, there is little reason to strike down the provision. One might object that even in the setting of viewpoint-based regulation, our concerns with skewing effects are about risk and not actuality. We do not, that is, demand proof that such a statute has skewed debate, but merely

114. For discussion of improper government motivation through content discrimination, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54-57 (1987) [hereinafter Stone, *Content-Neutral*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983) [hereinafter Stone, *Content Regulation*]; Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 103 (1978) [hereinafter Stone, *Restrictions*].

115. Stone, *Content Regulation*, *supra* note 114, at 198; *see also* Stone, *Restrictions*, *supra* note 114, at 101; Stone, *Content-Neutral*, *supra* note 114, at 54-57.

116. *See* SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 115; SUNSTEIN, *PARTIAL*, *supra* note 7, at 310; Cole, *supra* note 7, at 687; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 432 (1996); Kagan, *supra* note 7, at 55-56, 67; Redish & Kessler, *supra* note 7, at 568; Sullivan, *supra* note 89, at 1496.

117. *See* NEA v. *Finley*, 524 U.S. 569, 587 (1998); *see also id.* at 610-16 (Souter, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).

that viewpoint-based statutes carry too great a risk of doing so. Is such a risk not also present, one might argue, with viewpoint-based government speech? The answer is that a real distortion of public debate is far less likely from government speech than from restrictions on private speech, precisely because in the government speech setting many viewpoints are still aired, while in the regulatory setting one viewpoint is legally barred. Additionally, the virtues of government speech discussed in Part II are present when the government speaks or funds private speech on certain conditions. Such virtues are not present when government merely restricts the private expression of a particular point of view. Thus, we correctly invalidate regulatory viewpoint discrimination because, unlike (most) government speech, it affects the autonomy of those regulated, and because the virtues of government speech are absent in a scheme that merely prohibits private speech.

Many scholars seem to think that government speech on an uncontested matter is fine, while government speech in an arena of social contest is not. We should now be able to see that this distinction is a proxy for the concern about viewpoint discrimination, and we should reject it just as we reject that concern in the nonregulatory setting. Cass Sunstein, after explaining why viewpoint discrimination in government funding programs is generally impermissible¹¹⁸ (for reasons I have just considered and rejected), muses that “viewpoint discrimination may be acceptable in some narrow circumstances.”¹¹⁹ He gives as examples (a) funding programs that celebrate democracy and (b) funding programs on the Civil War that forbid advocating slavery.¹²⁰ We should apply the prohibition on viewpoint funding, says Sunstein, “only in the most straightforward cases of viewpoint discrimination,” permitting “aesthetic or qualitative judgments so long as they are not conspicuously based on partisan aims.”¹²¹ Elsewhere, Sunstein confirms this intuition when he suggests that government may be “permitted to discriminate on the basis of point of view if (1) it is doing so in the context of sharply limited, discrete initiatives and (2) the viewpoint discrimination does not involve taking sides in a currently contested political debate.”¹²² Pro-democracy and anti-smoking funding, thus, might be permissible, perhaps because each of these ends has “come to be understood as a sufficiently shared, sufficiently

118. See SUNSTEIN, *PARTIAL*, *supra* note 7, at 310; see also SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 117, 228, 231.

119. SUNSTEIN, *PARTIAL*, *supra* note 7, at 311.

120. *Id.*

121. *Id.* at 312.

122. SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 231.

nonpartisan goal as to escape the prohibition on viewpoint discrimination.¹²³

Others echo similar positions, often without making the connection between the category "uncontested/noncontroversial" and the absence of viewpoint discrimination.¹²⁴ For example, Elena Kagan says that intuitively we believe a governmental "No Smoking" campaign is permissible (without funding a "Smoke" campaign).¹²⁵ There are three reasons for this, she says. First, "the debate in this case, by its nature, offers the hope of right and wrong answers—answers subject to verification and proof."¹²⁶ Second, "society has reached a shared consensus on the issue; the answers, in addition to being verifiable, are widely believed."¹²⁷ Third, and most important, she says, "one side of the debate appears to do great harm."¹²⁸ This third reason, though, is hard to apply consistently across cases and probably merely restates the other two reasons. These go to the contingent cultural fact that, at this point in time, smoking appears to be something (a) subject to scientific scrutiny and (b) on which we have reached a consensus. But why should this be relevant to the first amendment question? It is because, as Sunstein suggests, it helps show how we fail to see the matter as one in which viewpoint is contested.¹²⁹ Therefore, when the government funds "No Smoking" (and not "Smoke") and "Pro-democracy" (and not "Pro-Marxism") we do not see it as entering an arena of viewpoint debate. Thus, it is easier to accept the government speech or funding condition.

We should note three things here. First, these scholars who would permit government speech on issues for which there is a broad social consensus would impose constitutional restrictions on government speech that enters an arena of current social controversy. This might be merely a prudential concern.¹³⁰ But to the extent it is an argument from principle, which it often appears to be, it makes little sense apart from its role as a proxy for exposing viewpoint discrimina-

123. *Id.* (footnote omitted).

124. See EPSTEIN, *supra* note 89, at 311; GALSTON, *supra* note 30, at 256; see also WALL, *supra* note 2, at 14 (explaining that many neutralists "have no objection to the idea that political morality should be informed by shared ideals of the good. They object only to the idea that political morality should be informed by *controversial* ideals"). For an extended discussion on this matter in the setting of public monuments, see generally SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

125. See Kagan, *supra* note 7, at 75.

126. *Id.*

127. *Id.*

128. *Id.*

129. See SUNSTEIN, DEMOCRACY, *supra* note 7, at 231.

130. See *supra* text accompanying note 78.

tion. And as a categorical argument against viewpoint discrimination in government speech, it is wrong for reasons I have discussed above.¹³¹

Second, the very plasticity of the category “viewpoint discrimination” should give one pause before condemning government speech on this ground. Even in the setting of the regulation of private speech, we should now be aware that our ability to ascertain what appears to be viewpoint discrimination (bad) versus what appears to be fact or science (fine) is distorted by the lenses we happen to wear. In the setting of the regulation of private speech, however, the potential harm to personal autonomy and public debate, combined with the absence of the virtues of government speech, are sufficient to warrant judicial intervention. But in the setting of government speech—where autonomy is not (generally) infringed and where the virtues of the government pushing a position are present—we should be cautious about invoking “viewpoint discrimination” as a reason for judicial intervention. Our caution is justified by the reasons I have mentioned above¹³² and because the very category “viewpoint discrimination” is itself in constant flux.

Third, even though we might “see” viewpoint discrimination from government speech in arenas of current social contest only, and therefore be more willing to accept government speech on currently uncontested matters, this is not how things would work regarding the regulation of private speech. We would not accept a statute barring private speakers from advocating “Smoke” or “Pro-Marxism.” We would see the viewpoint bias there, even though it is bias against (perhaps) a small minority only. Those who support government speech on relatively uncontested matters only have not adequately addressed this point.

I have argued, in this Section, that viewpoint-based government speech should not be deemed unconstitutional (unless it in fact monopolizes a particular speech market). There should be an exception to this principle, however, for viewpoint-based government speech that either (a) favors views supportive of the current administration or majority party while disfavoring views of the opposition, or (b) favors views extolling the virtues of a particular race, religion, or gender or casting aspersions on a particular race, religion, or gender. The concern here is not that the government has violated rules about monopoly, coercion, or ventriloquism. Rather, viewpoint-based speech of the type described violates cardinal constitutional norms, based in struc-

131. See *supra* text accompanying note 116-117.

132. See *id.*

ture and text. For example, while I have argued that it is constitutional for government to fund decent art and refuse to fund indecent art, it is unconstitutional for government to fund art supporting the administration and refuse to fund art criticizing the administration. This type of viewpoint-based funding tends toward entrenching the current ruling party, and blocks the paths of political change. It thus violates one of the two key principles of the famous footnote four on *Carolene Products*,¹³³ and should be deemed invalid. As another example, it should be considered unconstitutional for government to fund speech praising whites and refuse to fund speech praising blacks. This violates another of the key *Carolene Products*' footnote four principles, threatening to harm discrete and insular minorities.

Now it is true that for both of my hypothetical cases, government monopoly power does not necessarily exist, and therefore one could say, "Why not let the government express its point of view—directly or through funding—and leave it to dissenters to express their point of view?" I need to answer this in two parts. First, the *Carolene Products*-based exception I discuss here applies to much government speech—such as speech conditions in funding programs or government-sponsored advertising campaigns—but does not apply to some other government speech. Thus, it would be permissible for a government official or legislator to extol the virtues of her party in a speech, and it would also be permissible (though condemnable) for a government official or legislator to denigrate another race in a speech. Second, my argument that much viewpoint-based government speech is permissible does not depend on its being ineffectual, and is not blind to the risk that it might help entrench orthodox mores. Thus, the standards of decency provision in *Finley* might well have some effect on the production of dissident art,¹³⁴ but I would still argue that it is constitutional despite being (most likely) viewpoint-based, so long as the government is properly considered one player among many in the relevant speech market. Using government funds to entrench the ruling party or disfavor a disliked racial minority, however, creates too great a risk of blocking the channels of political change or of further ghettoizing a discrete and insular minority. Thus, for reasons expressed in *Carolene Products*' footnote four and well developed by

133. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

134. Of course the effect might be perverse—it might encourage more dissident art (not NEA-funded) as a reaction to the restriction.

John Ely in *Democracy and Distrust*,¹³⁵ such funding must be considered invalid.

In an important current case that the Court might review,¹³⁶ the Second Circuit relied on a distinction of this sort to invalidate a speech condition in the federal statute funding the Legal Services Corporation. The provision in question refuses funding for a person or entity

that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.¹³⁷

The Second Circuit, via Judge Leval, construed the first part of this provision as applying both to those who favor and to those who oppose welfare reform. Thus, reading the first part as subject-matter based and not viewpoint-based, the court upheld it.¹³⁸ But the court deemed the second part of the provision viewpoint-based, for it allows “funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules.”¹³⁹ The court distinguished the permitted viewpoint-based funding in *Rust* and *Finley*¹⁴⁰ by maintaining that

135. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-104 (1980).

136. See *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 767-72 (2d Cir. 1999), *reh'g en banc denied*, (July 2, 1999); but see *Legal Aid Soc'y v. Legal Servs. Corp.*, 145 F.3d 1017, 1024-27 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998).

137. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504 (a)(16), 110 Stat. 1321-55-56 (1996).

138. See *Velazquez*, 164 F.3d at 769.

139. *Id.* at 769-70.

140. There is some language in both *Rust* and *Finley* suggesting that the Court did not deem the speech restriction in either case viewpoint-based. In *Rust*, the Court stated that in promulgating the abortion counseling gag rule, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” 500 U.S. 173, 193 (1991). This is best read as holding that the gag rule does not constitute impermissible viewpoint discrimination; the gag rule certainly favored the “give birth to your child” point of view over the “it’s okay to have an abortion” point of view. In *Finley*, the Court wrote that “If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.” 524 U.S. 569, 587 (1998); see also *id.* at 583 (standards of decency provision does not “engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face”). But the standards of decency provision upheld facially in *Finley*, even if not strictly speaking viewpoint-based (discussed at text accompanying note 111, *supra*), still clearly favors mainstream over dissident art. Thus, the Court must have been content with a certain amount of governmental favoring of one view of the world (“decent”) versus another view of the world (“indecent”). Also note that the *Finley* Court stated that “absolute neutrality is simply ‘inconceivable’” in the arts funding process, *id.* at 585, and that “[a]ny content-based considerations

different types of speech enjoy different degrees of protection under the First Amendment . . . The strongest protection of the First Amendment's free speech guarantee goes to the right to [criticize] government or advocate change in governmental policy. . . . In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art.¹⁴¹

Although not expressly relying on *Carolene Products'* footnote four or Ely's elucidation thereon, this argument by Judge Leval rests on similar logic, and should be sustained if the matter reaches the Supreme Court.

* * *

The difficulties discussed in this Section with case by case determinations of whether monopolization has occurred have led scholars to propose certain areas of speech in which open forum rules must govern.¹⁴² As Steve Shiffrin puts it, it is better to engage in some form of categorical balancing than to attempt ad hoc inquiries into the presence of monopolization or other relevant factors.¹⁴³ I will discuss this move toward categorical balancing in Part IV. The questions judges would have to answer using a case by case approach, however, do not appear more difficult than many other questions judges have to answer in matters of constitutional law. Although determining whether unacceptable monopolization has occurred might be tough, and although the questions I will discuss below about coercion and ventriloquism are hard, too, so long as the concerns can be identified, case by case analysis is worth trying. It may be, though, that we will not see too many invalidations based on monopolization. As Fred Schauer has written, "[W]e ought to be highly skeptical of the commonly used metaphor that the government's voice 'drowns out' other voices."¹⁴⁴

that may be taken into account in the grant-making process are a consequence of the nature of arts funding." *Id.*

141. *Velazquez*, 164 F.3d at 771.

142. See *infra* Part IV.A.

143. See Shiffrin, *supra* note 18, at 600, 607, 610, 646-47.

144. Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 380 (1983) (reviewing MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983)); see also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 252 (1992). I have deliberately avoided extended discussion of the difficult problem of government speech in public schools. Because of legislation requiring schooling until a specified age, and because many families cannot afford private schools, public schools are often the only option for many children. School boards, principals, and teachers must make subject-matter and viewpoint-based decisions all the time, and courts are reluctant to second-guess such decisions. For this general pattern of deference to be appropriate—and I think it is—we must see the public schools as just one venue in which children learn. They are exposed to different ways of learning and ideas in their homes,

B. Coercion

Many scholars writing in this area are concerned not only with government monopolization in a given speech market (i.e., the knowledge aspect of autonomy and the problem of skewing public discourse), but also with government speech moving beyond persuasion to coercion (i.e., the voluntariness aspect of autonomy).¹⁴⁵ In the Section above, I shared the concern that government speech might, in some instances, capture a speech market so as to endanger knowing choice. I am less sympathetic, however, with the notion that government speech might be coercive, thereby endangering the voluntariness of choice. If we are to maintain an analytic separation between the knowledge and voluntariness aspects of autonomy, then we must think of coercion not as choice under a severely limited base of knowledge, but rather as choice under a kind of pressure that allows us fairly to say, "she did not choose; she was compelled." Our standard paradigm for coercion involves action in the face of a threat of private force ("do X or I'll kill you") or public force ("do X or we'll jail you"). We accept analogues to coercion from without when we permit a defense based on either justification (e.g., "I acted in self-defense") or excuse (e.g., "I couldn't help but do it because of the following psychological/biochemical condition"). But in each of these settings, we do not

in their churches and synagogues, and from various other associations (little league, Boy Scouts, etc.) and cultural outlets (movies, music, etc.). For a discussion of monopoly in the setting of educating children, which supports a strong role for public schools, see Greene, *Vouchers*, *supra* note 14, at 406-08.

Although I leave for another day more detailed discussion of government speech in the public schools, I will comment briefly on the Court's major case in this area, *Board of Education v. Pico*, 457 U.S. 853 (1982). A local school board ordered certain books removed from the shelves of the public high school library. The record was unclear as to the reasons, and the Court's holding was that summary judgment for the school board was improper, that the matter should proceed to trial. If such library decisions are totally within the board's discretion, this result would be wrong, and so the question was what constitutional limits exist over the board's discretion, if any? The Justices were sharply divided, with four essentially supporting the position that the board may remove books for vulgarity but not for disagreement with ideas, *see* opinions of Brennan, J., and Blackmun, J., another four essentially supporting the position that the school board has (virtually) complete discretion, *see* opinions of Burger, C.J., Powell, J., Rehnquist, J., and O'Connor, J., and one basically avoiding the hard issues altogether, *see* opinion of White, J. Justice Rehnquist's opinion is best here, I believe. He maintains that the government's role as educator requires it to make decisions based often on the personal or moral values of those in charge, and that this is appropriate because "the government is engaged in inculcating social values and knowledge in relatively impressionable young people." *Id.* at 909. Although he would make an exception for book removal based on party affiliation or racial animus (*see supra* the discussion at text accompanying notes 133-141), he thought it not unconstitutional for the school board to act for a variety of other reasons.

145. This is a central theme of Mark Yudof's work. *See* YUDOF, *supra* note 19, at xv, xvi, 6, 15, 73, 93, 152; *see also* Cole, *supra* note 7, at 711; Redish & Kessler, *supra* note 7, at 555; Shiffrin, *supra* note 18, at 608, 611.

accept anything less. That is, "do X or I'll kill you" is different from "do X because it's best for you." Although there are difficult cases at the margin, we generally accept the distinction between coercion and persuasion, deeming action pursuant to persuasion a proper exercise of autonomy. Most scholars writing about government speech do not explicitly argue that merely persuasive government speech should be deemed invalid; that should happen only when such speech is properly deemed coercive.¹⁴⁶ But some scholars do suggest that certain types of government speech should be considered improperly persuasive. And there is a further-reaching argument that the line between persuasion and coercion itself is unstable, rendering even apparently persuasive speech illegitimate.

I object to all of these moves. Taking them in reverse order: the line between persuasion and coercion is basically sound, although difficult at the margins; the notion of government speech as improperly persuasive should be rejected; and although I cannot object in theory to invalidating government speech that is properly deemed coercive, in practice, there are virtually no examples of such speech.

Let me start with the line between coercion and persuasion.¹⁴⁷ Consider basic first amendment doctrine regarding the regulation of private speech. With a few exceptions (sexual speech being the key example), the government may regulate speech based on content only in categories involving some sort of imminent physical harm from the speech in question. Thus, the tests the government must pass to regulate advocacy of unlawful action,¹⁴⁸ fighting words,¹⁴⁹ and speech before hostile audiences¹⁵⁰ all attempt to identify those speech acts that

146. I am speaking now only about arguments for invalidation based on the intrusion on the voluntariness of citizen choice, and not about other arguments for invalidation of government speech because of monopoly, ventriloquism, or anything else.

147. For a stab at defining coercion in the general setting of unconstitutional conditions, see Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1300-01 (1984) ("Threats are allocations that make a citizen worse off than she otherwise would be because of her exercise of a constitutional right. Offers merely expand her range of options, leaving the citizen better off."); compare RAZ, *supra* note 8, at 149 (stating that it is a condition of coercion that "Q believes that it is likely that P will bring about C if Q does A and that C would leave him worse off, having done A, than if he did not do A and P did not bring about C"). *But see* SUNSTEIN, PARTIAL, *supra* note 7, at 298-301 (finding it hard to know what someone is "otherwise" entitled to). Most scholars writing about unconstitutional conditions are ultimately forced to concede that no general doctrine exists, but rather that normative analysis in the setting of the various rights involved is needed. *See* EPSTEIN, *supra* note 89, at 16; SUNSTEIN, PARTIAL, *supra* note 7, at 229-30, 292; Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1005 (1995); Sullivan, *supra* note 89, at 1443-46.

148. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

149. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

150. *See* *Feiner v. New York*, 340 U.S. 315, 321 (1951).

are likely to lead to immediate physical harm without time for deliberation, for “more speech.” We allow the regulation of libel subject to various tests,¹⁵¹ but the core concern with libel is the harm from false, defamatory speech, which we believe inflicts a kind of harm that is not easy to repair. As is revealed sharply by the most recent cases granting nearly full protection for commercial speech,¹⁵² the fact that speech might be persuasive is not a valid ground for regulation. The Court considers that sort of argument improperly paternalistic. In sum, one of the basic principles underlying the strong protection of private speech is that the persuasive effect of speech is not a proper reason for regulation. Only when there is no time for counterargument, or when persuasion will not cure the original harm, do we permit regulation of speech.

We should think no differently about government speech.¹⁵³ Assuming that dissent is open, and assuming no monopolization, we should consider even quite persuasive government speech to be just that, quite persuasive, and hold fast the distinction between persuasion and coercion. It is one thing for government to make a compelling case for a position; it is another for it to say “do X or we’ll jail you.” If we were to assume, to the contrary, that citizens respond to persuasive speech the same way they respond to coercive speech, then the predicate for much free speech doctrine—a person’s ability to hear arguments and make up her mind—would be undercut.¹⁵⁴

Thus, I reject Jon Elster’s argument for treating (at least certain versions of) persuasion as similar to coercion. Elster writes:

Coercion takes place when an individual prefers x over y, and continues to do so even when someone (physically) coerces him into doing y. Voluntary choice [the opposite end of the spectrum] means that the individual initially prefers y over x, and does y for that reason. . . . Seduction [next after coercion] occurs when an individual initially prefers x over y, but comes to prefer y over x once he has been coerced into doing y Persuasion [next, and closest to voluntary choice] means, then, that an individual is led by a sequence of short-term improvements into preferring y over x, even if initially he preferred x over y. My contention is that persuasion is more similar to seduction than to voluntary choice. This, at least, holds when the persuasion is not

151. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 374 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

152. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

153. For general support of government persuasion while rejecting government coercion, see *MILL*, *supra* note 17, at 68-69, 141-46, 163. See also *GALSTON*, *supra* note 30, at 178, 249, 261-62; *HURKA*, *supra* note 17, at 158-60; *RAZ*, *supra* note 8, at 161 (“[N]ot all perfectionist action is a coercive imposition of a style of life. Much of it could be encouraging and facilitating action of the desired kind, or discouraging undesired modes of behavior.”); *id.* at 417, 420. For general support of the classic line between coercion and persuasion, not necessarily in the setting of government speech, see *BERLIN*, *supra* note 19, at 122.

154. See *Schauer*, *supra* note 144, at 380, 385.

accompanied by a statement of intention informing the individual that he is about to be manipulated. Exploiting intrapsychic mechanisms that are unknown to the individual can never be justified . . . [w]e must refuse Robert Nozick's contention that inducements are never coercive; they are if they are made for the purpose of leading the individual somewhere he might not want to go. There is no essential difference between coercion and seduction, nor between seduction and this form of persuasion.¹⁵⁵

On this argument, persuasion blends into coercion when the "persuader" does not disclose to her listener that she is seeking to bring the listener along to a certain conclusion. Using the term "manipulation" here seems to me unhelpful, and question-begging. Life is full of situations in which we try to get people to do things they initially do not want to do. Often, we are aware of the type of argument that will work with the listener in question, yet we do not reveal our rhetorical strategy. It seems odd to me—more than odd, in fact, actually a manipulation of ordinary meaning—to describe such everyday attempts at getting people to do what we want as tantamount to coercion.¹⁵⁶ I agree with one implication of Elster's argument, however. Failure to disclose material information can, in some instances, render the listener's choice not fully knowing.¹⁵⁷

Other scholars, perhaps recognizing the difficulty of collapsing the persuasion/coercion distinction, argue that government speech may be improperly persuasive. One version of this argument, suggested to me in conversation by Linda McClain,¹⁵⁸ suggests that on certain sorts of issues, such as those involving patriotism and citizenship, people will grant too much deference to the government. Another version, suggested to me in conversation by Kenneth Anderson, maintains that governmental invocation of expertise falsely lulls the citizenry into assuming a certain consensus. As Stephen Gardbaum puts the general argument:

With respect specifically to authority, the state is special because it cannot purport to act nonauthoritatively. A way of life that the state endorses and promotes, even through symbolic or persuasive means, is an "authorized" way of life. The concern is that individuals may defer to the state's authority, just as we normally wish them to do

155. ELSTER, *supra* note 25, at 81-83; *see also* McClain, *supra* note 8, at 47-48.

156. For another argument about manipulation, to which I have the same set of responses as I do to Elster, *see* RAZ, *supra* note 8, at 377-78 ("Manipulation, unlike coercion, does not interfere with a person's options. Instead it perverts the way that person reaches decisions, forms preferences or adopts goals. It too is an invasion of autonomy whose severity exceeds the importance of the distortion it causes"); *see also* WALL, *supra* note 2, at 136. *But see* SHER, *supra* note 17, at 63 (arguing one's response to nonrational manipulation can in fact be properly autonomous).

157. *See supra* Part III.A.1.

158. *See also* Carole I. Chervin, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 428-29 (1989).

in the case of general obedience to the law. Yet, adopting a valuable way of life out of deference to authority is counterproductive from the perspective of autonomy.¹⁵⁹

Although these scholars are surely right in suggesting that government speech might at times carry great weight, I do not see why we should be suspicious of such weight. So long as dissent is open and the relevant speech market is not monopolized, people can reject government arguments about patriotism and citizenship. If they do not, and in fact grant great deference to the government's position, perhaps that is because of a considered judgment, or one that fits their notions of citizenship. Similarly, when government speaks in reliance on expertise, attempting to persuade citizens that a matter is basically settled and that they should just join in, we should not deem this improperly persuasive so long as other voices may be aired in the relevant speech market. Those voices can challenge the government's assertions of expertise and consensus. Moreover, Gardbaum's argument implies that we sometimes make choices not heavily influenced by authority, and that choice out of deference to authority is not true choice at all. But neither point can be correct. No choice is made exogenously to the various authority structures in which one lives (e.g., government-citizen, parent-child, spouse-spouse, friend-friend, human being-God, etc.). We make choices under the influence of many whom we consider authorities, and we even make choices under the influence of subconscious authority. So unless we are to adopt an unrealistic, solipsistic notion of autonomy, we must accept choice in a web of power relations. We must deem nonautonomous only those choices made under the influence of particularly overbearing power, and not simply because of deference to authority, be it of the state or of any other person or corporate entity.¹⁶⁰

159. Gardbaum, *supra* note 8, at 398 (footnotes omitted).

160. Thus, I side firmly with Joseph Raz in his debate with Jeremy Waldron about whether government persuasion is improperly manipulative. Waldron writes that manipulation is problematic for autonomy, for "it may interfere with the mental and decisional capacities that autonomy requires. Artificial limits on powers of reasoning or imagination imposed specifically to make a person more likely to choose a certain option make it hard to say that a choice is indeed this person's choice rather than of the person doing the manipulating." Waldron, *supra* note 2, at 1118. He acknowledges that "[t]he difficulty of course lies in deciding what is artificial and what is not." *Id.* Later, he remarks, "[A]n autonomous decision may be undermined not only by overt coercion from the outside, but also by interfering with the way people form their beliefs about value . . . If it is done intentionally, it also takes on the insulting aspect of manipulation, for it treats the agent as someone incapable of making independent moral decisions on the merits of the case." *Id.* at 1145-46. Then, he adds that government shouldn't be making decisions about the merits of various activities; these are decisions "that each person should be making." *Id.* at 1149. He continues:

Is it not treating people like children to make that decision for them, and then adjust the payoffs so that they will accept it more easily. We must keep hold of one of the deepest insights in the liberal tradition: Governments are merely composed of people who happen

Here one must also be careful not to slip into the trap set by *Aboud-writ-large*.¹⁶¹ Recall that under such a principle, citizens have a first amendment right not to have their tax money fund government speech with which they disagree. Recall too that a central error of the *Aboud* logic is extending the general concern with government coercion (i.e., May the government legitimately collect taxes, as a general matter?) to insist on legitimacy defenses for each instance of government speech paid through tax dollars. Likewise, here we should not deem coercive (or improperly manipulative) various forms of government speech—either direct government speech that asks citizens to change their mind about something, or government funding of private speech to the same effect. Simply because the government has coercive power at its disposal to collect taxes generally does not render coercive the various instances where government hands out that money on the condition that the recipients advance certain messages and not others.¹⁶²

Finally, to determine whether instances exist of coercive, rather than persuasive, government speech (outside the paradigm case of “do X or we’ll jail you”), let’s look at some examples. When the government sponsors a massive “Just Say No to Drugs” campaign, is that coercive? It certainly asserts expertise and attempts to assert consensus, but if people deciding whether to use drugs give such a message heed, can we say they were coerced? Or consider *Rust* again. The monopolization problems are, as I discussed above, serious.¹⁶³ But is there a separate problem with coercion? Assuming other sources of information are available to the women in question, the fact that the government’s pro-childbirth message might be loud and insistent does not render a decision to forego abortion coerced, on any normal understanding of the term coercion. Finally, consider the standards of

to wield extraordinary power. Therefore, when a decision is made to subsidize an activity, one group of people is deciding a moral issue that ought essentially to be decided by other people acting on their own.

Id. Raz’s response seems to me unbeatable. Raz maintains that Waldron’s argument has a breath-taking generality. If valid it amounts to the rejection of all authority. All authority, if it is legitimate, decides on the merits, relying on dependent reasons, that is, ones which apply to its subjects, and takes action which changes the initial balance of reasons in order to secure better conformity with that initial balance than was likely but for the authority’s intervention. . . . [I]f authoritative interventions can effect such distortions, so, presumably, can other interventions. . . . Waldron’s argument relies on a notion of intrinsic merit and demerit which is independent of social conditions, and which in most cases is hard to sustain. . . . [T]here is no way of saying what is the authentic, natural, or uninterfered-with balance of costs and advantages.

Raz, *supra* note 17, at 1234-35.

161. See *supra* Part II.C.1.

162. See WALL, *supra* note 2, at 200-01.

163. See *supra* Part III.A.1.

decency provision at issue in *Finley*.¹⁶⁴ If some artists shift their work from indecent to decent, from dissenting to mainstream, should we say they were coerced into doing so? Even if their only source of funds was from the NEA, should we say that such economic pressure is tantamount to coercion? This seems an improper extension of the conception.

An instructive case for the coercion-persuasion line is *Bantam Books, Inc. v. Sullivan*.¹⁶⁵ Rhode Island established a "Commission to Encourage Morality in Youth."¹⁶⁶ On its face, the statute gave the Commission hortatory powers only. The police and the prosecutors would be the ones arresting and prosecuting offenders, and their actions could be properly challenged in court. In practice, the Commission notified a magazine distributor that some of its publications had been declared objectionable for sale to youths. The Commission did not follow the then-reigning Supreme Court test for obscenity, nor did it follow Court-approved procedures for review of published material. There is no question that if the Commission had ordered seizure of the periodicals, such an action would have been unconstitutional. But the statute didn't grant such power to the Commission. The notice to the distributor added, however, two statements that might reasonably be understood as steps toward compulsion: it stated that the Commission gave the police a list of the offending magazines with "the order that they are not to be sold . . . to youths," and added that "[t]he Attorney General will act for us in case of non-compliance."¹⁶⁷ These two statements appear to have been beyond the Commission's statutory power, and were the basis of the Court's conclusion that the Commission's directives were "not voluntary,"¹⁶⁸ and that they served as "instruments of regulation."¹⁶⁹ Justice Clark, concurring in the result, agreed that the "storm was brewed from certain inept phrases in the notices wherein the Commission assumed the prerogative of

164. See *supra* text accompanying notes 110-111.

165. See *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58 (1963).

166. *Id.* at 59. This was its statutory mandate:

It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, . . . and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes.

Id. at 60 n.1.

167. *Id.* at 62 n.5.

168. *Id.* at 68.

169. *Id.* at 69.

issuing an 'order' to the police."¹⁷⁰ He agreed with dissenting Justice Harlan, though, that the Commission was free to

publicize its findings as to the obscene character of any publication; to solicit the support of the public in preventing obscene publications from reaching juveniles; to furnish its findings to publishers, distributors and retailers of such publications and to law enforcement officials; and, finally, to seek the aid of such officials in prosecuting offenders of the State's obscenity laws.¹⁷¹

Given the unfortunate language in the Commission's notice to the distributor, it is understandable that the Supreme Court held that Rhode Island's "system of informal censorship disclosed by this record"¹⁷² violated the first amendment. But the Court's language went further, implying that the Commission's actions would be valid only if attempting to help distributors comply with the law, and not if intending to otherwise affect the distribution of magazines considered offensive, even if only as a result of the Commission's purely hortatory acts:

In holding that the activities disclosed on this record are constitutionally proscribed, we do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms. But that is not this case. The appellees are not law enforcement officers; they do not pretend that they are qualified to give or that they attempt to give distributors only fair legal advice. Their conduct as disclosed by this record shows plainly that they went far beyond advising the distributors of their legal rights and liabilities. Their operation was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress.¹⁷³

On the one hand, one could read this peroration as limited to the narrow facts of the Commission's overreaching, moving from hortatory powers to coercive ones. However, the Court also seemed to say that the Commission may not act with the intent of affecting the distribution of publications, even if it made clear that its powers were suggestive only. Justice Clark's concurrence in the result and Justice Harlan's dissent responded to this implication, and they were correct in maintaining that the Commission was constitutional as established, even if it acted beyond its powers (and unconstitutionally) in practice. The Court's suggestion that the Commission's actions would be prob-

170. *Id.* at 75.

171. *Id.*

172. *Id.* at 71.

173. *See id.* at 71-72.

lematic if (a) intended to stop some magazines from being circulated even if (b) clearly hortatory improperly assumes that viewpoint discriminatory intent is unconstitutional even absent any viewpoint discriminatory effects.¹⁷⁴ In sum, it should be considered perfectly constitutional for a state to say it disapproves of certain publications and wishes the citizens wouldn't read them. This is not a pretty use of state power, but so long as no monopolization is occurring and dissent is open, so long as the power is clearly hortatory and not coercive, and so long as the government isn't seeking to mask that it is the source of the view, then why should we not permit this expression of one, albeit contested, notion of the good?

C. Ventriloquism

Government speech is most defensible when it does not monopolize (i.e., it is one view among many and citizen choice is based on full knowledge), when it does not coerce (i.e., it is merely persuasive), and when it is clearly identified as that of the government. This last concern is the focus of this Section.

There are two principal concerns with governmental ventriloquism. First, clear identification of speech as the government's enhances accountability¹⁷⁵ by permitting the citizens to know what positions the government has taken and to reject them, if necessary, at election time. Imagine if all art funded by the federal government after *Finley* had to be identified as government-funded, subject to a standards of decency requirement. The public would have a much easier time assessing the pluses and minuses of the requirement, and holding the government accountable if necessary. The ability to identify the source of government speech or action as that of the government was central to the Court's opinion in *New York v. United States*.¹⁷⁶ The Court invalidated a federal statute requiring states to enact certain hazardous waste laws if they did not otherwise solve their hazardous waste problem. The Court's primary concern was that the federal government had "commandeered"¹⁷⁷ the state legislatures, and commandeering was deemed improper in part because of an accountability concern. Citizens in the affected states, reasoned the Court, would have a difficult time determining whom to blame under such a scheme, the federal government or their own states. It may be

174. Cf. FISS, *DIVIDED*, *supra* note 7, at 99-102 (rejecting the intent inquiry). *But see* sources cited *supra* notes 116-117.

175. See SUNSTEIN, *PARTIAL*, *supra* note 7, at 314; Kagan, *supra* note 7, at 55.

176. *New York v. United States*, 505 U.S. 144 (1992).

177. *Id.* at 175.

that the Court oversold the accountability argument, for it would not have been that tough to trace the ensuing state laws back to the federal mandate. But the underlying concern is the same as that in the government speech context. In both settings, legislation that masks the source of government speech or action is problematic.

Second, the transparent identification of speech as the government's helps to ward off monopolization. By knowing the source of speech, one can more readily assess its value and search for competing speakers and viewpoints. If the source of speech is masked, there is a risk that such value assessment and search for alternatives will be muted, not as sharp, the tasks not as clearly defined. For example, imagine in *Rust* if the regulations required signs in the public health clinic stating "You are now entering a government-funded facility. The information you are about to receive has been dictated by the U.S. government, and represents the viewpoint of the U.S. government only."¹⁷⁸ Although such a requirement would not permit abortion counseling or even referral, it would more clearly signal to the women using the clinic that the speech had a particular source and (by implication) that other views are available. We can safely assume that this would affect the decisions of some women, who would view the ensuing advice with greater skepticism than otherwise.¹⁷⁹

In other words, one of the problems with the standards of decency requirement in *Finley* and the gag rule in *Rust* is ventriloquism. The government advances certain messages or favored viewpoints through buying citizens to do its dirty work. There is, however, both a risk that the public will not see clearly enough the connection between law and resulting speech to hold the government properly accountable and a monopolization danger from failure to identify the source of speech. The funding cases pose this problem in a way that "pure" government speech cases do not.¹⁸⁰ If the government puts up "Just Say No to Drugs" billboards, the President makes a speech, or the Senate issues a resolution, the speech in each instance is clearly that of the government. Accountability concerns are lifted and monopolization dangers are eased.

178. See Chervin, *supra* note 158, at 428. Or imagine if the doctors giving advice were required to make a similar disclosure.

179. Redish and Kessler acknowledge the importance of transparency, but add, "[e]ven if it were somehow feasible to require the private parties to identify the existence of their government funding, the risk of 'consumer confusion' of partially attentive members of the public is very real." Redish & Kessler, *supra* note 7, at 570. They are wrong to dismiss the value of disclosure so easily, for as discussed in the text, disclosure can help ameliorate both accountability and monopolization concerns.

180. See SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 233-34.

Although proof of monopolization or coercion should render government speech unconstitutional, we should view the presence or absence of ventriloquism as a factor to be considered in evaluating these other two concerns, and as a point of political theory, but not as a sufficient ground on which to assess the constitutionality of government speech. In part this is because the government can easily remedy ventriloquism by disclosure; in part it is because citizens will often know speech is dictated by the government even if no disclosure is made; and in part it is because ventriloquism is more a concern of political theory than of constitutional law. If it is a concern of constitutional law, then it is best seen as a matter of ideal constitutional theory (to be followed by government officials and legislators) and not a ground for judicial invalidation of government speech. A particularly deft act of masking government speech, on the other hand, may well contribute to that speech being monopolizing or coercive, and thus courts can still account for ventriloquism in this way.

One particularly interesting type of ventriloquism is the use of scientific language to mask an underlying policy judgment.¹⁸¹ The earlier discussion of the possibly coercive effect of government speech relying on expertise¹⁸² can be recast as a concern with this sort of masking. The problem has arisen in the administrative law setting. In the *State Farm* case, the Court invalidated the National Highway Traffic Safety Administration's (NHTSA) rescinding of passive restraint regulations for automobiles, primarily on the ground that the agency had discarded prior studies without explanation.¹⁸³ Justice Rehnquist, in partial dissent, suggested that the majority had castigated the agency for bungling expertise when in fact the agency was relying on something quite different and not scientific at all, namely, the new deregulatory policy of the new Administration.¹⁸⁴ The distinction is an important one—if an agency is relying on expertise, then it must open its expertise to challenge on its own terms, and the arbitrary and capricious test of the Administrative Procedure Act will have bite here.¹⁸⁵ On the other hand, if an agency is willing to come clean and say, "We're relying on pure policy considerations," then, absent a clear statutory mandate to the contrary (and none was pres-

181. For an interesting discussion of science and value judgments, see LEO STRAUSS, *LIBERALISM ANCIENT AND MODERN* 220 (1968). See also HOLMES, *supra* note 19, at 197 (writing on the distinction between assent, "agreement to empirical or mathematical truths," and consent, "assumption of responsibility in a situation where outcomes are still unknown").

182. See *supra* text accompanying notes 158-160.

183. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983).

184. *Id.* at 58-59 (Rehnquist, J., dissenting).

185. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

ent in the *State Farm* case), courts should defer and leave critique to the political opposition and the citizens.¹⁸⁶ That NHTSA had not openly relied on this sort of claim means that the *State Farm* majority was correct to judge the agency's expertise on its own terms, but Justice Rehnquist's distinction is an important one to bear in mind. Indeed, Justice Scalia has twice relied on this distinction between agency invocation of expertise versus open agency reliance on policy.¹⁸⁷ Because techno-talk sometimes masks underlying policy reasons, opening agency reliance on expertise to an evaluation of such expertise will, in these instances, expose the underlying policy concerns as the true basis for the agency action, thus enhancing both accountability and, ultimately, rational agency decisionmaking.

There is an important connection here to the earlier discussion of viewpoint-based speech. Recall that for many scholars, government speech is most easily defensible if not apparently viewpoint-based, and that this often occurs when the speech appears noncontroversial.¹⁸⁸ Such speech appears simply to state "the way things are," and a prime example is, not surprisingly, scientific or technological talk. Government has an incentive, thus, under the approach advanced by these scholars, to mask policy decisions—and to mask what is actually entry into a viewpoint controversy—by using language that appears scientific and therefore, often, not viewpoint-based or controversial. But if we accept a wider berth for government speech to include entry into controversial issues, in which the government may properly and constitutionally advance a contested viewpoint, then the incentive for masking speech under the rubric of science will evaporate.

IV. THE FORUM-CHANGE PROBLEM

The most difficult cases of government speech involve government changing the nature of a forum from open to limited. A federally funded public health program, previously without restrictions on doctor-patient communications, now places abortion-related conversations off limits (*Rust*). The national arts funding program, previously focused on artistic merit, now refuses funding for indecent art (*Finley*). Responding to these and similar cases, scholars have developed vari-

186. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 865-66 (1984).

187. See generally *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 801 (1990) (Scalia, J., dissenting).

188. See *supra* text accompanying notes 118-132.

ous methods of defending free speech values such as pluralism, autonomy, and viewpoint neutrality, while still granting government some leeway to advance its own message. These scholars do not support, as I do, analyzing the facts of each case to see whether government speech vices are present. Rather, they offer a related set of explanations for why government should not be permitted to change forums from open to closed, at least in certain settings. The explanations differ to some degree, but have a common central point, namely, that the fact that certain forums have been understood as open is a good and perhaps dispositive reason for them to remain open. In Section A of this Part, I will canvas these scholarly views and contend that their reliance on extant open-forum practice fails to grapple adequately with the strongest evidence that such forums are no longer understood as open.

The is-ought move in this setting—from the existence of open forums to the normative point that it would violate principle to convert them to limited forums—is not wholly without justification, however. In Section B of this Part, I will discuss the connection between physical forums, such as streets and parks, and funding forums, such as public health facilities or the NEA. Just as some physical forums have attained the status of unalterably open, perhaps one could argue that some funding forums have attained similar status. This argument, although powerful, cannot succeed. This is a remarkably complex and underexplored area of first amendment law, however; my conclusions here will, of necessity, be somewhat tentative.

A. The Scholars' Case for Keeping Open Forums Open

The government speech scholarship has focused on conditions attached to government funding of speech. In particular, the scholars have argued against the government's changing speech forums from open (or relatively so) to less open, especially when done to advance a controversial viewpoint. Although their approaches differ, the scholars generally set forth tests to describe categories of speech or arenas of speech against which government has a heavy burden of justifying a forum change. In seeing the forums as fixed rather than as plastic, the scholars artificially establish a baseline of extant social practice against which government seeking a forum change appears deviant. But it is precisely in these cases that one should view extant social practice as plastic rather than as fixed. If we are to challenge such changes in the nature of the forum, it is better to do so case by case, by asking whether monopolization, coercion, or ventriloquism is occurring or is at serious risk of occurring.

1. David Cole

According to Cole, government must be able to speak to communicate and advance causes, to support speech generally to further diversity values, and to counteract the power of private speech.¹⁸⁹ But government speech sometimes skews the marketplace of ideas.¹⁹⁰ Case by case analysis of the virtues and vices of government speech is too hard to do.¹⁹¹ In its place, Cole offers the following “structural accommodation”:¹⁹²

Where neutrality is consistent with such an institution's function, strict neutrality should be required; where some non-neutral content decisions must be made, the first amendment should guarantee a degree of independence for the decision maker. Where, on the other hand, the institution does not play an important role in furthering public dialogue or individual autonomy, or where non-neutral government speech is necessary to further an important government function or first amendment values, government should be free to support speech non-neutrally. By requiring neutrality and independence in certain spheres of government funding and allowing departures from neutrality in others, the first amendment can structurally accommodate the inherently contradictory values and dangers of government-funded speech on an institution-by-institution rather than case-by-case basis.¹⁹³

Most important for present purposes is Cole's reliance on fixed rather than plastic notions of institutions. Institutions either do or do not “play an important role in furthering public dialogue or individual autonomy.” Other institutions either do or do not “further an important government function.” Cole's spheres would, to be sure, carve up the world between forums required to remain open and others allowed to be limited. But the spheres are based on Cole's notion of extant social practice, without consideration of the fact that cases are hard in this area precisely when government seeks to challenge such practice through a forum change.

Cole discusses three main spheres in which public dialogue reigns and in which forum changes to advance parochial, contestable government viewpoints should be invalidated. The spheres are the public forum, public education, and the press. I will discuss public forums (i.e., physical ones) in Section B, below. Cole's treatment of the press seems out of place here, since the cases he discusses invalidated selective taxation schemes that fit more comfortably with cases about regulation of private speech than with government speech

189. See Cole, *supra* note 7, at 702-03.

190. *Id.* at 704.

191. *Id.* at 715.

192. *Id.*

193. *Id.* at 716.

cases.¹⁹⁴ Regarding public education, after acknowledging that content neutrality is impossible in such a setting, Cole argues that, nonetheless, the first amendment “guarantees independence for those who make day-to-day content judgments.”¹⁹⁵ By analogy, he maintains that when funding scientific research, the government must leave room for independent expert decisions.¹⁹⁶ I have no quarrel with Cole’s propositions as a policy matter. As a first amendment rule, however, the fact that public education has been an institution (to accept Cole’s description of it) in which individual educators have had the freedom to make day-to-day content judgments cannot, by itself, be a reason for preventing government from altering that understanding. If a small town school board decides to experiment with providing detailed lesson plans and lectures to its teachers, the board reflects a new social understanding.¹⁹⁷ It is odd to interpose an understanding of public education based in the way things have been against a school board pushing a new way.

In a separate discussion, Cole argues for treating arts funding similarly to his three main spheres. Again, the argument is grounded in a notion of the uncontested, the background understanding, and the extant social practice. He writes that the arts are “central to the cultural and political vitality of democratic society,”¹⁹⁸ and that the “function of public art is not only consistent with, but is dependent upon, a neutrality mandate.”¹⁹⁹ Under this regime, artistic merit (the reigning model) is a valid criterion, but the standards of decency provision at issue in *Finley* is not.²⁰⁰ As discussed above,²⁰¹ however, without proof of monopolization we should not accept the idea that the first amendment requires the government to maintain a fixed conception of public arts funding.

2. Robert Post

Similarly to Cole, Post advances a conception of arenas in which open forum rules obtain and other arenas in which various

194. *See id.* at 731-36.

195. *Id.* at 727.

196. *See id.* at 727-28.

197. I put to one side public choice discussions about whether and when current representatives in fact reflect a current majority of their constituents on any given issue.

198. Cole, *supra* note 7, at 739.

199. *Id.* at 740.

200. *See id.* at 742-43.

201. *See supra* Part III.A.2.

forum limitations may be validly enacted. Post's central distinction divides up the relevant universe into the domain of public discourse and "managerial domains." "Within managerial domains," he writes, "the state organizes its resources so as to achieve specified ends Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon."²⁰² In such domains, "speech is necessarily and routinely constrained on the basis of both its content and its viewpoint."²⁰³ Post then considers whether the gag rule in *Rust* involves government forum limitation in a managerial domain.

"[T]he allocation of speech to managerial domains," he explains, "is a question of normative characterization [S]uch restrictions on speech can be justified only where those occupying the relevant social space actually inhabit roles that are defined by reference to an instrumental logic."²⁰⁴ The normal understanding of the doctor-patient relationship includes an openness of communication and an independence of medical judgment. The Court was thus wrong in *Rust* to treat the public health facility setting as a managerial domain in which the government could permissibly draw content and viewpoint restrictions.²⁰⁵ Post acknowledges that the doctor-patient relationship may be altered in a particular setting. Such alteration is unusual, though, and the "Court offers no evidence to support its claim that it has occurred within Title X clinics."²⁰⁶ He further acknowledges that the government may create special health clinics in which special roles are clearly manifested, e.g., in which it is made clear that physicians are state employees. "What the First Amendment forbids," though, "is the attempt to hire what all concerned understand to be physicians and then to attempt to regulate their speech as though they were merely employees."²⁰⁷

This final point is about ventriloquism.²⁰⁸ I agree with Post that a serious problem in *Rust* is the absence of clear notice to the indigent women using public health clinics that the government has sharply limited what the doctors may say. Of relevance to the forum-change problem at issue in this Part is Post's reliance on the roles that people "actually" inhabit and his assertion that there was no evidence

202. Post, *supra* note 4, at 164.

203. *Id.* at 166.

204. *Id.* at 171.

205. *See id.* at 173-74.

206. *Id.* at 173-74 n.127.

207. *Id.* at 174 n.128.

208. For further explanation, see *supra* Part III.C.

that a role alteration “has occurred” in the clinics.²⁰⁹ This language, I believe, betrays an underlying reliance on a baseline of the uncontested, the background, the extant social practice. What roles we “actually” inhabit are constantly in flux, and when those roles are shaped (at least in part) by government funding, there is no pre-existing essential role against which role changes must be judged. Furthermore, when government changes the nature of a forum, it represents the desire of the current majority, and it is a contradiction not easily resolvable to oppose such a desire with an alternative conception of extant practice, for the desire is at least some evidence of the demise of such practice.

In discussing the standards of decency provision in *Finley*, Post develops a separate distinction, that of conduct rules, directed at citizens, and decision rules, governing an agency’s internal operation.²¹⁰ NEA-supported art is clearly within public discourse rather than within a managerial domain, states Post, but that does not mean open forum rules must apply. Because the state is acting “in its own name,” rather than managing a forum with neutral time, place, and manner restrictions (or the funding equivalent), it must choose among values.²¹¹ The “grounds for distributing [government grants to private persons] . . . must be reasonable,” though, “by which we mean that they must be justifiable by reference to some common value.”²¹² Decency, the issue at stake in *Finley*, “is not a matter of partisan politics. It is a shared value, not a preference.”²¹³ Thus, Post would uphold the standards of decency provision.

I am perplexed both by Post’s standard and by its application. The standard—requiring justification of funding conditions by reference to some common value—is either tautological (i.e., any condition in a law will reflect a common value merely by virtue of its enactment) or another instance of the reliance on the uncontested, the background, the extant social practice. I assume Post intends the latter, and thus my criticism is the same as above: We cannot consistently

209. See also ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 253 (1995). Post provides a similar discussion of *United States Postal Service v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981). He states that government’s assertion of managerial authority “can only be sustained by the existence of antecedent social practices.” Post allows that government can “act in ways that alter social practices,” but he insists on sweeping forum alteration, which changes citizens’ expectations of forum openness, and he refuses to accept governmental acts that seek to change such expectations through changing the rules on expression in that forum. See POST, *supra*, at 253.

210. See Post, *supra* note 4, at 179.

211. *Id.* at 184.

212. *Id.* at 186.

213. *Id.* at 187.

demand that funding conditions reflect a pre-existing consensus on how a forum ought to operate and simultaneously respect the sometimes parochial and controversial conceptions of the good advanced by current legislative majorities. There might be independent reasons to check such majorities (i.e., monopolization, coercion, and ventriloquism concerns), but respect for common values as reflected in extant social practice is not such a reason. Post's argument is another instance of support for government speech when uncontested, but not when seen as viewpoint-based.²¹⁴ As to Post's application of his standard, it seems a stretch to suggest that limiting arts funding to decent as opposed to indecent art reflects a shared value. The thrust of plaintiffs' argument in the case is that in adding the standards of decency provision, the government was taking sides with those who favor orthodox art over those who are willing to fund non-mainstream, often quite challenging art. The standards of decency provision—coming as it did in the wake of the Mapplethorpe and Serrano controversies—decisively takes sides. It does not reflect a shared value.

3. Martin Redish and Daryl Kessler

Redish and Kessler elaborate a cumbersome lexicon of categories in assessing government funding conditions on speech. They would invalidate all "negative subsidies," i.e., money paid to shut people up.²¹⁵ Positive subsidies vary. Some are "limited government employee subsidies," which are permissible, covering instances of speech by government employees.²¹⁶ The speech restrictions are consonant with the employee's job description. "Appointment subsidies" are similar, for appointed officials.²¹⁷

Harder are "auxiliary subsidies." These fall into three sub-categories. "Categorical" subsidies are "viewpoint-neutral choices to fund particular categories, subjects, or classes of speech."²¹⁸ These are permissible. "Viewpoint-based" subsidies are, however, invalid.²¹⁹ Finally, subsidies of "judgmental necessity" are permitted if the original category is viewpoint-neutral and merely categorical, and decisions within such a category are "based on criteria 'substantially related' to the predescribed goals and purposes of the program pur-

214. I have critiqued this position above in Part III.A.2.

215. See Redish & Kessler, *supra* note 7, at 558.

216. *Id.* at 565.

217. See *id.* at 566.

218. *Id.* at 567.

219. See *id.* at 568.

suant to which the category of speech is funded.”²²⁰ Under this approach, Redish and Kessler argue, *Rust* was wrongly decided, because the initial category—barring the funds recipients from counseling about abortion or referring to abortion providers—was viewpoint-based and not categorical.²²¹ The standards of decency provision presents “the most difficult test for our approach,” they state.²²² Evaluating the provision under their judgmental necessity test, they contend that once Congress sets an artistic excellence standard, it may use viewpoint to judge among competing applicants, but only if relevant to artistic excellence. “There appears to be no basis,” they conclude, “on which a reviewing court could objectively determine that considerations of ‘decency’ are inherently unrelated to the quality of the art.”²²³ Considerations of decency, however, would be impermissible if introducing “extraneous normative moral, social, and lifestyle judgments.”²²⁴

More clearly than perhaps any of the other scholars, the Redish and Kessler approach relies on the extant social practice as a baseline for determining the constitutionality of government funding conditions on speech. In concluding that *Rust* was wrongly decided, they spend no time on the forum-change problem, relying instead on the blanket assertion that the gag rule was viewpoint-based and therefore invalid. Their discussion of the *Finley* issue is somewhat more nuanced, but the nuances betray the reliance on extant social practice. Viewpoint-based decisions within a category are valid only insofar as they are substantially related to the *predescribed* goals and purposes of the program. Standards of decency could be thought to be related to artistic excellence, the predescribed goal (this is debatable, but a reasonable position). But reliance on standards of decency would be invalid if introducing *extraneous* judgments. Altering a program to introduce a new set of judgments, to re-describe rather than rely on the predescribed, is anathema to Redish and Kessler, but it is the very stuff of changing governments, of new judgments by new majorities. To prevent such forum changes by adherence to current practice is clearly to rely on a contradiction about the proper metric of extant social practice.

220. *Id.* at 572.

221. *See id.* at 576-77.

222. *Id.* at 579.

223. *Id.* at 580.

224. *Id.*

4. Mark Yudof

Yudof argues that the government should be permitted to make content-based decisions in funding speech when the forum by its nature entails selections based on content. Otherwise, we should treat funded speech forums as open.²²⁵ He continues, in a critical paragraph:

The nature and extent of government communications . . . frequently result in the delegation of some or all editorial responsibility to a lower echelon government agency thought to have special expertise (e.g., psychiatrists in public mental hospitals, teachers in public schools, museum directors, and the editorial boards of journals). Such delegates are less likely to be influenced by partisan political concerns, and, in any event, their existence makes orchestration of a uniform government communication program more difficult, as the elements of centralization and hierarchy are absent. Where such delegation has voluntarily taken place, courts ought to treat its *ad hoc* withdrawal in order to censor particular communications as a violation of the First Amendment. Essentially, government agencies should be held to their own institutional arrangements in this sensitive area.²²⁶

Yudof adds, "barring a restructuring effort growing out of an effort to censor, government agencies are free to undo their delegations."²²⁷ As with the other scholars, Yudof relies on a conception of extant social practice to constrain government speech. In the case of supervising the speech of lower-level officials, Yudof is not contending that the supervisors are acting *ultra vires*. The contention, rather, is that so long as a delegation to make a certain type of content judgment has been made, the delegators must abide by the judgment of their delegates until the delegation is undone. Four points are relevant here. First, unless we are to turn agency law upside down, it is the principal's desire that should govern, not the agent's. We are not talking here about countermanding the terms of an extant regulation,²²⁸ but about a principal's overruling an agent in a particular instance. Second, although I share Yudof's ultimate concern with censorship, he does not explain how supervention of an agent's content decision is per se unconstitutionally censorial. Even if the principal's content decision disfavors certain viewpoints, this should not constitute a per se first amendment violation.²²⁹ Third, although I share Yudof's concern with decentralization, i.e., with the norm of multiple repositories of power, the centralization of messages within an agency does not violate this norm so long as dissent from the public is not blocked. Government speech can be one of many voices, even if the government

225. See YUDOF, *supra* note 19, at 240-45.

226. *Id.* at 243.

227. *Id.* at 244.

228. See generally *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

229. See discussion *supra* Part III.A.2.

speech in some instances represents a single rather than plural viewpoint from within an agency. Fourth, and reflecting the theme of this Part, if a public school teacher chooses a book that the school board disfavors, or if a public museum curator chooses to exhibit an artist whose work the museum board disfavors, it is the board in each case that reflects the current normative position of the government. To demand that the line-level agent's content choice govern until the general delegation is undone is to elevate extant practice (the agent's decision) over a later-in-time normative choice (perhaps controversial and parochial) of the government.

B. Physical Forums and Funding Forums: The Streets and Parks Analogy

The mere fact that certain funding forums have been understood as open cannot, by itself, provide an argument against government changing the nature of such forums to limited. The scholars discussed above rely, at least in part, on the argument or observation that certain forums have been open as a matter of practice and therefore that limiting such forums undercuts such practice. Cole speaks of whether institutions do or do not play an important role in furthering public debate; Post writes of the roles that people "actually inhabit";²³⁰ Redish and Kessler refer to a program's predescribed goals; Yudof would hold agencies to their subdelegations. But as I have explained, all of these scholars improperly rely on extant practice to trump a challenge to that practice, namely, the law in question that converts an open forum to a limited one. There is no "natural" openness to forums. Whether they have been open or not is a matter of practice; certainly current legislation is at least strong evidence of the decline of our challenge to open forum practice.

Although it is inappropriate to consider established open-forum practice as a trump on forum limitations, an argument by analogy to physical forums remains. For it is in that area of first amendment law that the Court has carved out some space for rights based in practice, and for concomitant limits on government's power to change the nature of a forum. As the Court explained in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, there are three types of physical forums.²³¹ Type One includes streets and parks, the traditional public forums, and here the government may not impose content-based rules, but must limit its governance to time, place, and manner considera-

230. See *supra* text accompanying note 204.

231. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

tions. Type Two is a forum opened for speech activity, such as a municipal auditorium. Here, too, government may regulate for time, place, and manner concerns only. Type Three is basically everything else; all forums limited in one way or another to a particular purpose are included here. Such limitations are subject to a reasonableness test, which is generally not difficult to meet. Although the Court has clearly limited government power in traditional public forums (and in Type Two forums that resemble traditional public forums), and although scholars accept this limitation without serious question,²³² the constitutional and theoretical source of the right to speak in streets and parks subject to time, place, and manner regulation only has never been fleshed out.

Two arguments seem available. The first relies on classical common law notions of rights established through practice. As Michael McConnell writes, custom as instantiated through the common law served as the backdrop for constitutionalism.²³³ In this way, the common law—"a collective product, a repository of many wise men's thinking about related problems over a long stretch of time"²³⁴—served as a bulwark against the tyranny of the monarch. Although the case for concretizing custom led to Parliamentary supremacy in England, in the United States custom and its manifestation in the common law trumped both executive and legislative power. Rights were understood as deriving "from a source that precedes positive law—whether from custom, from nature, or from God."²³⁵ Thus, one might argue that the Court has properly treated streets and parks differently from other forums by relying on the custom of streets and parks as open forums. The free speech right made real in these settings, therefore, requires deference to that custom, as evidence of the people's understanding of their rights over time.²³⁶

232. See, e.g., Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11.

233. See generally Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173; see also Kreimer, *supra* note 147, at 1359-62 (using history as an appropriate baseline from which to evaluate claims of unconstitutional conditions).

234. McConnell, *supra* note 233, at 181 (quoting Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke*, in *CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT* 25, 31 (Perez Zagorin ed., 1980)).

235. McConnell, *supra* note 233, at 192.

236. Lillian BeVier suggests that "[h]istoric openness supports a right of guaranteed access" to streets and parks "for a number of reasons." Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 106. Historical openness makes it hard for government to argue that speech is incompatible with a forum, thus courts don't have to make their own incompatibility assessment, and because of this presumptive compatibility, illicit motives might "lie behind the effort to exclude." *Id.* BeVier's argument does not grapple, though, with the hard question of how to respond to a government that desires to change the

The second argument for the Court's insistence that the government treat streets and parks according to open forum rules relies on the conception of protecting the commons. In theory, one could view property such as streets and parks as strictly under the control of the government.²³⁷ But in practice, such a view could lead to extraordinary limits on citizen speech, relegating citizens to private property in order to speak in a more robust fashion. For many, this would mean no real opportunity to influence public debate at all.²³⁸ Thus, insisting that streets and parks remain open forums, subject to time, place, and manner regulation only, insures a diversity of expression, including, importantly, the expression of those who otherwise would have no place to speak.

The Fiss/Sunstein argument for diversity of viewpoints²³⁹ follows here. On this argument, some forums must remain open to ensure such diversity. One need not rely on the baseline of extant social practice here; streets and parks could be seen as the best candidates for using government-controlled property to expand speech opportunity. In other words, we could accomplish ends similar to

nature of a previously open forum. For BeVier, historical openness is a proxy for compatibility of speech to a forum, but the very problem in the hard cases is a current governmental decision that the forum should be viewed a different way.

Robert Post rejects reliance on tradition in sustaining streets and parks as open forums. He writes that streets and parks are:

part of the experience of all citizens. We ordinarily use streets and parks in a wide variety of roles and statuses [such as traffic, parades, funerals, block parties, or festivals], and hence we subject them to an enormous diversity of competing demands and uses. No one of these uses has automatic priority . . . It is this fact, and not a tradition of public usage for expressive purposes, which underlies the Court's firm and correct conclusion that streets should be seen as public forums.

POST, *supra* note 209, at 252-53 (footnote omitted). How is this not an argument from tradition, though? Post points to how we "ordinarily use" streets and parks. His examples include classic instances of expression—parades, block parties, and festivals all have significant expressive components. Post's argument seems a blend of an argument from tradition (i.e., "this is how we view streets and parks") and an is-ought argument (i.e., "because this is how citizens have viewed and currently view streets and parks, their open forum status should be maintained"). Whether such arguments can provide coherent normative First Amendment principles is the issue, though, and it isn't clear to me how Post gets from the descriptive to the normative here.

237. See generally *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff'd*, 167 U.S. 43 (1897).

238. There is a separate but related question involving government efforts to grant some citizens access to the property of other citizens to expand the speech opportunities of the have-nots. For cases and discussion dealing with this issue, see generally *Hurley v. Irish-American Gay, Lesbian & Bisexual Group Inc.*, 515 U.S. 557 (1995); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), 520 U.S. 180 (1997); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Rod Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); see also Greene, *supra* note 46. I do not address these cases here.

239. See generally FISS, DIVIDED, *supra* note 7; FISS, IRONY, *supra* note 7; SUNSTEIN, DEMOCRACY, *supra* note 7.

those advocated by the scholars above, through a focus on limiting government, without attempting to secure any particular sphere or arena for open forum status based on its heretofore accepted characteristics (which are now challenged by government). This is a fairly attractive proposition, for the following reason: the virtues of a robust deliberative democracy are many,²⁴⁰ and without a rough measure of speech equality, such a democratic state will be hard to attain. One possibility, urged by Fiss and Sunstein, is to permit the government to redistribute speech power. Suggestions include overruling *Buckley v. Valeo*²⁴¹ regarding campaign financing, regulating pornography to overcome the silencing of women, regulating hate speech to counteract the silencing of various subjugated groups, and regulating mass media to ensure diverse access. Apart from some mass media cases,²⁴² the Court has been reluctant, though, to permit legislative redistribution of speech power.²⁴³ This reluctance is defensible; it fits with old-fashioned liberal principles regarding the public/private line, the action/inaction line, and a "no robbing from Peter to pay Paul" principle regarding rights (although this principle does not obtain regarding income). And regardless of one's views on the matter normatively, descriptively it is unlikely that the Court will soon become enamored with legislative redistribution of speech power. Accordingly, we must ensure a fair measure of speech equality through other means. There are, principally, two ways to do this. One is to police rigorously the regulation of private speech, to ensure that channels of dissent are available. The other might be to adhere to strict open forum and anti-viewpoint discrimination rules when government manages traditional forums such as streets and parks.

Both of these arguments for the Court's special treatment of streets and parks—the instantiation through custom of a right to such forums as open, and the insurance of robust and equal speech opportunity on government property—can be extended to funding forums that have in practice been open. Again, consider *Rust* and *Finley*. On the argument from custom, one could make the claim that citizens

240. *But see* Fried, *supra* note 144, at 226-27 (A "wide and uninhibited discussion of political matters" is merely an effect of liberty of expression, and not a core principle of the First Amendment.).

241. *Buckley v. Valeo*, 424 U.S. 1 (1976).

242. *See generally* *Turner Broad. Sys.*, 512 U.S. 622; *Red Lion Broad.*, 395 U.S. 367; *see also generally* *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

243. *See generally* *Hurley*, 515 U.S. 557; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Pacific Gas*, 475 U.S. 1; *Buckley*, 424 U.S. 1 (1976); *Miami Herald*, 418 U.S. 241; *see also* *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.).

have come to understand the doctor-patient relationship (*Rust*) and arts funding (*Finley*) as unencumbered by viewpoint restrictions, and that this understanding has concretized into a right. Here, one could move from “is” to “ought” with the help of a normative argument for the “ought,” and that normative argument could hearken back to the role of custom as a bulwark of freedom.

Regarding the argument from the need to preserve robust and equal speech opportunity, one could maintain that streets and parks cannot suffice, that other forums must remain open as well. Without relying on the argument from practice, one could make the case for some forums remaining open (in addition to streets and parks) while the government could maintain stricter controls over others. Whether the doctor-patient forum or the arts funding forum would be the ones chosen would remain subject to further discussion, but at least one can see the kind of argument (based in the Fiss/Sunstein logic described above)²⁴⁴ that would be made.

Although these are strong arguments for extending open forum treatment from streets and parks to (at least some) funding forums, in the end I believe the arguments fail. First, the tradition of treating streets and parks as open forums is a stronger one than any other open forum tradition. It would come as more of a surprise to most citizens if government limited speech in a public park to the right-to-life side of the abortion issue than if government funded public health clinics on those same terms. Perhaps, though, the question should be phrased differently. Perhaps the question should be: do most citizens expect their conversations with their doctors to be unencumbered by content rules on what the doctors may say? Surely the answer is “Yes,” and the hard question is whether that common expectation should be accorded the same constitutional status as the (perhaps) parallel expectation that streets and parks are open. We are used to limits on doctors’ speech, though, based in various regulatory concerns (regarding medication, alternative treatments, etc.). In the arts funding setting, although some arts funding is open (i.e., based on artistic merit alone; none is really open if by open one means by lot), much is not, but rather more limited in purpose. The argument from the concretization of practice, thus, seems strongest with streets and parks.

Second, the argument for allowing practice to concretize into constitutional law, although invoked here to expand rights, is often invoked to restrict them. For example, Justice Scalia’s has insisted on

244. See *supra* note 239 and accompanying text.

limiting rights to either what people in 1787 thought²⁴⁵ or to their narrowest possible articulation.²⁴⁶ If we are to understand custom as setting constitutional norms for the purpose of keeping forums open, can we then resist the pull for it to set constitutional norms for the purpose of limiting rights elsewhere? Another concern is that for many constitutional scholars, custom has little role to play in fleshing out the broad, vague phrases of the Constitution.²⁴⁷ For these scholars, the broad, vague phrases invite a broader interpretive practice, based primarily in moral argument and not in custom. To invoke open forum practice, thus, would seem inconsistent with the blind eye these scholars usually turn to considerations of custom.

It is harder to reject the Fiss/Sunstein type argument for preserving open forums in the funding setting. By avoiding reliance on practice per se, and by instead turning to the normative argument for preserving the commons as open, this sort of argument has a logical extension beyond streets and parks and to the other types of forums in which many citizens speak. The principal arguments against the Fiss/Sunstein view are these: First, it ignores the virtues of government speech. That is, it pays no attention to the role a distinctive government voice can play in some settings. So long as the settings are limited (i.e., so long as they do not include all currently open forums), monopolization concerns are eased.

Second, the Fiss/Sunstein view is difficult to work out over a set of cases. Which forums must be kept open, and which may be limited? In the setting of physical forums, a compatibility test might be of some assistance. Justice Kennedy has advocated replacing the watered-down reasonableness test currently employed to assess Type Three (limited) forums with such a test. He would require governments defending limited forums to pass a test of whether the asserted content restriction is necessary for management of the space in question.²⁴⁸ For example, in *International Society for Krishna Consciousness, Inc. v. Lee*, the government converted a previously open forum

245. See generally *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting).

246. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

247. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893 (1990).

248. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-95 (1992) (Kennedy, J., concurring in the judgment); *United States v. Kokinda*, 497 U.S. 720, 737-39 (1990) (Kennedy, J., concurring in the judgment).

airline terminal to a limited one, barring literature distribution and funds solicitation.²⁴⁹ Justice Kennedy would have upheld the solicitation ban and struck down the literature ban, both through application of a compatibility test rather than through a weak reasonableness test.²⁵⁰ The compatibility test is somewhat different from the various reliances on extant social practice discussed above. The compatibility test relies less on a current norm to combat a government seeking to alter such a norm, and more on the confidence that judges can determine what sorts of speech are inconsistent with objective properties of physical space. There is no easy analogy to the compatibility test, however, in the funding setting. In theory, funds could be stretched to enormously broad horizons (e.g., fund as much art as possible) or constricted quite tightly (e.g., no funding or narrow subject-matter programs such as “fund landscapes only”). There appears to be no analogue to the physical contours of space that make up post offices,²⁵¹ airports,²⁵² etc., for judges to engage in some reasonably constrained objective inquiry.

Finally, we do have an alternative to selecting some funding forums to remain open and then trying to figure out how to explain why others may be limited. As I detailed in Part III, we can examine each case for indications of monopoly, coercion, and ventriloquism. We can go directly at the vices of some government speech, and if none exists, then we can seek to preserve the virtues of such speech. The categorical approach advanced by the scholars discussed above improperly concretizes practice, cannot be defended as easily as can streets and parks by a normative argument from custom, and can serve only in a rather scattershot way to ensure the robustness and equality virtues of speech commons. The case by case approach focusing on the precise vices of some government speech is the better way to proceed.²⁵³

249. *Krishna Consciousness*, 505 U.S. at 675-76.

250. *See id.* at 693.

251. *See generally Kokinda*, 497 U.S. 720.

252. *See generally Krishna Consciousness*, 505 U.S. 672.

253. In addition to the case by case approach focusing on monopolization, coercion, and ventriloquism, we might adopt the idea that a speech condition wholly irrelevant to the nature of the program betrays a sole desire to punish and risks excessive government leverage into people's lives. So, although we might uphold the gag rule in *Rust* on the ground that it reflects the current government's normative view about promoting childbirth over abortion in the setting of government-funded health facilities, we would strike down a rule requiring that people not advocate abortions as a condition of receiving food stamps, or second-class mailing privileges, etc. *See* SUNSTEIN, *DEMOCRACY*, *supra* note 7, at 115; Cole, *supra* note 7, at 685; Redish & Kessler, *supra* note 7, at 572, 579; Shiffrin, *supra* note 18, at 641-42. These conditions do not plausibly advance any government message (i.e., there is a deep ventriloquism problem here). They appear therefore much more punitive and are less defensible as an affirmative exercise of government norm-advancement. Furthermore, the potential government leverage through such

V. CONCLUSION

Many scholars of political theory and the American Constitution have expressed unease with government using its powers of persuasion to steer the citizenry in controversial directions. These scholars generally support government seed money for undifferentiated citizen speech (e.g., setting up a park amphitheater or a municipal auditorium), and they generally support government speech promoting widely accepted values (such as "Don't Smoke"). But they generally oppose government attempts to use its powers of persuasion in matters of current social contest—say, abortion vs. childbirth, or decent vs. indecent art. Such efforts, the scholars argue, violate principles of liberal neutrality and, if clearly viewpoint based, the first amendment.

In this Article, I have offered a different point of view. Government both may and should promote contested conceptions of the good, through direct speech acts and through funding private speech

conditions is enormous. Much of the unconstitutional conditions literature focuses, properly, on the problem of germaneness and the leverage that nongermane conditions give to government. See, e.g., EPSTEIN, *supra* note 89, at 197; Epstein, *supra* note 89, at 61; Kreimer, *supra* note 147, at 1374; Schauer, *supra* note 144, at 994-95; see also Sullivan, *supra* note 89, at 1457-76 (limits of germaneness inquiry, but revealing its relevance, as well). Likewise, the caselaw involving the on-the-job speech rights of government employees can be seen as focusing on the germaneness/leverage problem. If the government's concern is truly about workplace discipline, the government has a good shot at winning; if the employee's speech is properly seen as on an issue of public concern, then the employee will probably win. See Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138, 140 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

The recent dispute between New York City Mayor Rudolph Giuliani and the Brooklyn Museum turned, at least in the initial phase of litigation, on a germaneness/leveraging concern. In response to a controversial art exhibit including a painting of the Virgin Mary made in part with elephant dung, the Mayor threatened to cut off the Museum's general operating subsidy and eject it from the City-owned land and building. The general operating subsidy covers "repairs and alterations, fuel, waste removal, wages of employees providing essential maintenance, custodial, security and other basic services, cleaning and general care, tools and supplies, and insurance for the building, furniture and fixtures." Brooklyn Inst. of Arts & Sciences v. City of New York, 64 F. Supp.2d 184 (E.D.N.Y. 1999). The District Court granted the Museum's motion for a preliminary injunction against the funds cutoff and ejection. But the court expressly did not rule on the City's power to refuse funding for this or any other particular exhibit. In dicta, the court gave great leeway to the City:

[T]here is no issue presented here about the City's right to itself take positions, even controversial ones. The Museum does not challenge the principle that government may choose, through its funding, to espouse a viewpoint on a matter of public concern without, as a result, being required to give equal time to an opposing view.

Id. at 201. The court then said that "the issue is not whether the City could have been required to provide funding for the Sensation Exhibit, but whether the Museum, having been allocated a general operating subsidy, can now be penalized with the loss of that subsidy, and ejection from a City-owned building, because of the perceived viewpoint of the works in the Exhibit." *Id.* at 202. On that question, the court ruled for the Museum.

with conditions attached. Liberal theory, properly understood, distinguishes governmental coercion from governmental persuasion. Arguments to the contrary—either extending the *Abroad* principle, offering a Rawlsian view of political liberalism, or proposing a thin rather than thick perfectionism—fail. Government speech has many virtues, and those virtues do not disappear if the speech is on a matter of current social contest. Furthermore, principles of American constitutional law render instances of government speech invalid only if the speech monopolizes a given speech market or coerces citizen choice. Additionally, if government ventriloquizes—i.e., if it insists on speech conditions in a funding program but masks the governmental source of the conditions—then courts should take that into account in determining whether monopolization or coercion has occurred.²⁵⁴ But apart from these concerns, there is no constitutional deficiency with government speech. And this is so even if the speech is clearly viewpoint based.

In short, government in a liberal democracy may, and should, promote notions of the good life. It should do so even when the notions are contested ones. It is a misunderstanding of both liberalism and American constitutionalism to suggest otherwise.

254. Legislators and government officials should protect against ventriloquism by insisting that government speech be transparent and not opaque as to its source.

