Copyright 2006 by Northwestern University School of Law
Northwestern University Law Review
Printed in U.S.A.
Vol. 100, No. 4

STATE ACTORS AS FIRST AMENDMENT SPEAKERS

David Fagundes[*]

INTRODUCTION 1637
I. BACKGROUND: PRECEDENT AND PRINCIPLES 1641
  A. *The Majority Rule: Categorical Denial of First Amendment Protection for Government Speech* 1641
  B. *Dissent from the Majority Rule* 1643
II. TEXT, HISTORY, AND STATE SPEECH 1647
  A. *Text: The Object-Neutral First Amendment* 1647
  B. *History: Constitutional Structure and Government Speech in the Revolutionary Era* 1651
III. FIRST AMENDMENT THEORY AND THE STATUS OF STATE SPEAKERS 1659
  A. *Current Law and the Need for a Complete Theory* 1659
  B. *First Amendment Protection for Government Speech: Three Approaches* 1664
IV. RETHINKING THE CONSTITUTIONAL STATUS OF GOVERNMENT SPEECH 1676
  A. *Synthesis: A New Framework for Analyzing Government Speech as a Subject of Constitutional Protection* 1676
  B. *Applying the Proposed Framework: Three Examples* 1678
CONCLUSION 1683

INTRODUCTION

Imagine that the Vermont Agency of Transportation uses state funds to erect a series of highway billboards critical of the Iraq War, and that the United States Congress—in an attempt to end the practice in Vermont and deter it elsewhere—responds by passing a law that levies substantial fines on any state that engages in such expression. Or, imagine that the Federal Department of Education, in an effort to curtail the teaching of "Intelligent Design," passes a regulation making its provision of funding grants to states conditional on the state board of education's mandating that only Darwinian

[*] Bigelow Fellow and Lecturer in Law, University of Chicago Law School. J.D., Harvard Law School. A.B., Harvard University. Thanks to Brad Abruzzi, Randall Bezanson, Susan Burkhardt, Adam Cox, Anuj Desai, Charles Donahue, Vicki Jackson, Jonathan Masur, Mike Mirarchi, J.J. Prescott, Erin Ryan, Fred Schauer, Mike Seidman, Paul Smith, Sonja Starr, Cass Sunstein, Rebecca Tushnet, Sam Vermont, Eugene Volokh, and Lesley Wexler for helpful comments, and to the Georgetown University Law Center for generous research assistance.

evolution may be taught as a theory of species development. These examples are hypothetical, but the idea that a state actor might have its expressive conduct commandeered by another sovereign is not. For example, a recent EPA regulation required that local governments communicate to their citizens a particular message about the pollution risks related to storm water drainage and the importance of proper waste disposal.[1]

If these scenarios had involved individual speakers—or even private corporate speakers[2]—they would have presented easy cases. The government cannot levy fines on expression, condition public benefits on engaging in (or refraining from) protected speech, or require that speakers deliver a particular message. But how does this analysis change when the speaker is a state actor? State actors can speak in much the same sense that private organizations do. State agencies issue reports and make public service announcements; public universities design curriculums and select student bodies; and municipal libraries exercise editorial discretion over the material presented to their patrons. Indeed, government speech represents an increasingly large percentage of the voices contributing to public discourse.[3] On the other hand, the Speech Clause is typically understood as a bulwark of protection against—rather than a source of rights for—government. This opposition points to a novel question: Government can speak, but is government speech a proper subject of constitutional protection? In other words, does the First Amendment protect government speech?

Recent cases have raised this question in two ways. In one group of cases, states and municipalities have challenged federal attempts to restrict their expressive conduct. For example, in *Environmental Defense Center v. EPA*, a group of municipal agencies argued that an EPA stormwater regulation requiring that they communicate with their citizens on a variety of environmental topics violated the municipalities' right to be free of coerced speech.[4] In the second category of cases, courts have considered whether statutes or common-law doctrines that are designed to protect constitutional speech interests apply to government speakers. For example, in *Nadel v. Regents of the University of California*, an individual sued the University of

---

[1] *See* Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 848–51 (9th Cir. 2003). I discuss additional cases in which this issue has arisen throughout this Article. In particular, see *infra* Part I and Conclusion.

[2] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) ("Corporations and other associations, like individuals, contribute to the [discourse] that the First Amendment seeks to foster."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."). *But cf.* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 661–65 (1990) (upholding state statute regulating political expenditures by business corporations).

[3] Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380–81 (2001) (observing that "the use of speech by government is expanding and taking new forms").

[4] 344 F.3d at 848–51.

California's Board of Regents for making allegedly defamatory statements.[5] This forced the court to consider whether a government actor such as a public university may invoke the public figure defense, which has its roots in the constitutional speech prerogatives of accused defamers.[6]

Courts have varied in their receptivity to the notion that the First Amendment may extend to government speech. The majority of courts have reflexively rejected the notion, relying on the assumption that the First Amendment can only restrict, not protect, state actors.[7] A minority of courts, in contrast, have arrived at different conclusions. Pointing to the increasing importance of government speech in the modern American polity, these courts have held that public entities' expression, like that of any other speaker, merits protection under the Speech Clause.[8] A small few have reached the narrower conclusion that the speech of a particular state or municipal agency merits constitutional status without taking on the broader implications of such a holding.[9]

The tension between these two strains of precedent invites examination. Neither provides an analytical framework that is sufficiently adapted to the distinctive problem of the constitutional status of government speech. The majority view correctly recognizes that the Speech Clause functions primarily as a bulwark against government abuse, but fails to consider whether this rationale provides a satisfactory resolution in cases where private individuals are not involved and the dispute centers on the federal government's attempt to restrict the speech of another sovereign. The minority view rightly reflects that government speech can possess positive social value that may warrant constitutional protection, but does not take account of the risks posed by government speech that may justify a narrower scope of protection than that accorded to the expression of people. The academic literature concerning government speech has rarely touched on this subject,[10] focusing largely on the converse question of whether the First

---

[5] 34 Cal. Rptr. 2d 188 (Cal. Ct. App. 1994).

[6] *Id.* at 189 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (establishing "constitutional malice" standard for defamation cases involving public figures)).

[7] *See, e.g.*, Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (en banc) (declaring that "[g]overnment expression" is "unprotected by the First Amendment").

[8] *See, e.g.*, *Nadel*, 34 Cal. Rptr. 2d at 197; County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989).

[9] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 225 (2003) (Stevens, J., dissenting) (asserting that municipal libraries should bear constitutional speech rights).

[10] Some commentators have expressed skepticism that the First Amendment can be broadly construed as a source of constitutional protection for government speech. *See* MARK I. YUDOF, WHEN GOVERNMENT SPEAKS 42–50 (1983); Bezanson & Buss, *supra* note 3, at 1508. One author has suggested a contrary conclusion. Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 33 (1999) (reflecting briefly on the plausibility of the First Amendment as a source of speech rights for state and local governments).

Amendment can be interpreted to restrict, rather than protect, the communicative conduct of state actors.[11]

The distinctive role played by government as both peril to and participant in the system of freedom of expression warrants a unique approach for analyzing its speech as a subject of constitutional protection. Such an approach must begin by acknowledging that government is an organizational, not an individual, speaker, and that its speech thus cannot be analyzed simply by adverting to distinctively human values such as autonomy or self-expression. Such an approach must also take into account that government, like any other speaker, possesses the capacity to contribute to the marketplace of ideas, but must also consider government's ability—and, some might argue, responsibility—to shape that marketplace by affecting citizens' ability and willingness to contribute to it. Finally, such an approach must be cognizant of government's capacity to degrade public discourse by dominating discussions and drowning out dissenting ideas. Government can speak, but its possession of coercive authority along with its ability to shape public discourse makes it unlike any other speaker. Any approach to the constitutional status of government speech should take each of these factors into account.

I thus suggest a framework for thinking about this issue that draws from two strains of First Amendment theory and proposes a pair of conditions that should obtain in order for a public entity to lay claim to constitutional protection for its speech. The first element of this proposed framework considers the institutional role and responsibilities of the government entity doing the speaking. Government speech merits constitutional protection only where the expressive conduct at issue is constitutive of the public function of the entity speaking, so that restricting expression would rob the speaker of a core purpose for which it was created. Whether a particular instance of government speech meets this standard requires asking whether the expressive conduct at issue touches on subject matter that the state actor is well suited to govern. The views of the county water department on a local sewage problem may merit protection from federal restriction; the views of the county coroner's department on the same problem likely do not.

This framework also considers whether the government speech at issue furthers the First Amendment value of democratic self-government. Examples of such democracy-enhancing expression include broadening access to material available at public libraries; diversifying curricula at public universities; and issuing reports or statements that enrich public discourse, in particular by publicizing an otherwise unpopular or unrecognized point of view on a matter of public concern. Thus, a public university's discretion to craft

---

[11] *See, e.g.*, Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530 (1967).

its own curriculum may be well within the scope of its institutional role, and thus may serve as a constitutional basis for resisting regulation restricting that discretion. But if a state university exercised that discretion in order to narrowly advocate the views only of one political party, courts should not afford its expressive conduct constitutional status.

Viewing the problem of constitutional protection for government speech through this dual prism would provide a framework that protects government speech where appropriate, while at the same time both assuring that state assertions of Speech Clause protection are commensurate with their constitutional and institutional responsibilities, and avoiding the abuse that could result if state speakers attempted to misuse their communicative power under the guise of the Bill of Rights.

This Article proceeds in four parts. In Part I, I outline the current state of precedent on the constitutional status of government speech, reflecting on both the majority and minority rules courts have crafted in response to this issue. In Part II, I look to constitutional text and history to determine what, if any, insight these sources can offer on this problem. In Part III, I consider three approaches to the First Amendment, acknowledging their merit but ultimately concluding that they are insufficiently tailored to address this issue. In Part IV, I propose my own framework for analyzing whether government speech merits protection under the Speech Clause and provide examples of how this framework would apply to and change the result of two recently decided federal cases that raised the issue. Finally, in the Conclusion, I reflect on the broader implications of my argument for the First Amendment, structural constitutional law, and legal status.

I. BACKGROUND: PRECEDENT AND PRINCIPLES

Courts and commentators alike have long dismissed the notion that the Speech Clause could serve as a source of constitutional protection for government speech. The result has been a mass of writing that uncritically embraces the majority rule that the First Amendment confers no protection on state actors. Yet a closer examination of judicial authority on this issue reveals a more complicated picture. Despite the judicial and academic conclusion that the majority rule reflects a consensus, a number of courts have paused to question that rule, and a few have rejected it outright. A fairer assessment of the cases regarding the constitutional status of government speech would have to acknowledge that despite the oft-repeated majority rule, there is a considerable—and often convincing—undercurrent of dissent.

A. The Majority Rule: Categorical Denial of First Amendment Protection for Government Speech

The principle that government entities cannot claim the protection of the First Amendment found its first judicial expression in Justice Stewart's

concurrence in *Columbia Broadcasting System v. Democratic National Committee* ("*CBS*"),[12] in which the Supreme Court reversed a D.C. Circuit opinion holding that the First Amendment required broadcasters to take advertisements from all who sought to place them.[13] Stewart concurred to emphasize the Court's rejection of the appellate panel's suggestion that the broadcaster's receipt of public funding meant that it was effectively acting as a part of the government. Stewart argued that treating publicly funded broadcasters as government entities would eliminate all restraints on the broadcasters' capacity to enforce limitations on who could be allowed to speak over their channels. If these broadcasters were government entities, Justice Stewart explained, they could not exercise constitutionally protected editorial discretion because the Speech Clause would be inapplicable to them.[14] In so doing, he hatched the notion that subsequent courts would rely on for the proposition that government entities could never claim the protection of the First Amendment (hereinafter "the *CBS* principle"): "The First Amendment," he declared, "protects the press from governmental interference; it confers no analogous protection on the Government."[15]

Justice Stewart's claim rested on two separate propositions about the First Amendment. First, Justice Stewart posited that "[g]overnment is not restrained by the First Amendment from controlling its own expression."[16] That is, the federal government is permitted to restrain its own expression using means that would be plainly unconstitutional if it were attempting to regulate another entity's expression. This is an unambitious claim. Justice Stewart suggested only that, just as an individual speaker is free to keep her mouth shut, so the government, as speaker, may do likewise. More provocatively, though, Justice Stewart also asserted that "[t]he purpose of the First Amendment is to protect private expression"[17] and that "it confers no analogous protection on government."[18] This second element of the *CBS* principle makes a more ambitious move by purporting to place an intentionalist limit on the substantive scope of the First Amendment. The original design of the Constitution, this argument implies, was libertarian: it served to safeguard only private parties' expression against government intrusion. On this view, First Amendment protection could operate in only one direction: against, but not in favor of, government entities.

---

12 412 U.S. 94, 139–42 (1973) (Stewart, J., concurring).

13 *Id.* at 132, *rev'g* Bus. Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 646 (1971).

14 *Id.* at 139 (Stewart, J., concurring).

15 *Id.*

16 *Id.* at 139 n.7 (citing N.Y. Times Co. v. United States, 403 U.S. 713, 728–29 (1971) (Stewart, J., concurring)).

17 *Id.* (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 700 (1970) (arguing that the First Amendment could not be invoked to prevent the government from restricting its own expression or that of its agents)).

18 *Id.* at 139.

The *CBS* principle has rarely been examined in detail by federal courts. On the contrary, when the question of whether the First Amendment applies to government speech has arisen, judges have typically acknowledged Justice Stewart's concurrence without critical reflection,[19] resulting in what one district court called "the well-settled point of law that the First Amendment protects only citizens' speech rights from government regulation, and does not apply to government speech itself."[20]

B. Dissent from the Majority Rule

Despite the frequent assertion that the First Amendment does not protect the speech of state actors, closer scrutiny of the cases extending the *CBS* principle suggests that case law is not as unanimous as it has often been described. For all the times federal courts have echoed Stewart's concurrence, they have invariably done so in descriptive asides, resulting in multiple incidents of dicta; but it has not been employed as the dispositive element of a holding.[21] Moreover, even though these cases parrot the notion that government entities' speech lacks constitutional status, they each end up vindicating, rather than restricting, the government's prerogative to speak,[22] and they emphasize the importance of government's contributions to the marketplace of ideas.[23]

Some courts have simply declined to follow the majority rule. One district court held (though without any reference to the *CBS* principle or its progeny) that a "municipal corporation . . . is protected under the First Amendment in the same manner as an individual."[24] Judge Posner gave more extensive consideration to this issue in *Creek v. Village of Westhaven*,[25] noting that it is not "out of the question that a municipality could have First Amendment rights."[26] Judge Posner suggested that a municipality's speech rights derive from the aggregated voice of its constituent

---

[19] *E.g.*, NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990); Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 482 n.10 (1st Cir. 1989); Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1048 (2d Cir. 1988); Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (en banc) (noting that "[g]overnment expression" is "unprotected by the First Amendment"); Aldrich v. Knab, 858 F. Supp. 1480, 1491 (W.D. Wash. 1994). Other cases have cited the progeny of the *CBS* principle for the proposition that state actors' speech is unprotected by the First Amendment. *See* Warner Cable Commc'ns v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990).

[20] Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 944–45 (W.D. Va. 2001).

[21] *See* cases cited *supra* note 19.

[22] *See, e.g.*, *Hunt*, 891 F.2d at 1566 (noting the legitimacy of government communication that does not infringe individual rights); *Muir*, 688 F.2d at 1038 (explaining that "government may participate in the marketplace of ideas," and "contribute its own view to those of other speakers" (quoting Cmty. Serv. Broad. v. FCC, 593 F.2d 1102, 1110 n.17 (D.C. Cir. 1978))).

[23] *See, e.g.*, *Student Gov't Ass'n*, 868 F.2d at 482 (stressing the importance of government as a "participant in the marketplace of ideas").

[24] County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989).

[25] 80 F.3d 186 (7th Cir. 1996).

[26] *Id.* at 192.

residents. "[T]hat a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment right of those residents."[27] More recently, in *American Library Association v. United States*,[28] a three-judge district court panel, in striking down a law requiring libraries to place filters on their Internet terminals as a condition to receiving federal funding, focused on the implication of the *CBS* principle that "municipalities and other arms of the state are not protected by the First Amendment from government interference."[29] Concluding that whether public entities are ever protected by the First Amendment remains an open question,[30] the court engaged in a thoughtful and extended consideration of the issue,[31] ultimately expressing deep reservations about the *CBS* principle: "[T]he notion that public libraries may assert First Amendment rights for the purpose of making an unconstitutional conditions claim is clearly plausible, and may well be correct."[32]

And while in federal court the notion that government speakers cannot claim constitutional protection still prevails as the majority rule, California's state courts have taken the contrary position—that the Speech Clause can serve as a source of protection for state actors—at least under some circumstances.[33] First, in a pair of cases, plaintiffs have brought defamation suits against government speakers, only to have the defendants counter with First Amendment-based defenses. The speakers claimed that their public figure status negated the standard presumption of falsity[34] and the heightened "knowing or reckless disregard of falsity" standard for showing mal-

---

[27] *Id.* at 193.

[28] 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003).

[29] *Id.* at 490 n.36.

[30] *Id.*

[31] In particular, the court noted that municipalities play an important role in the marketplace of ideas, particularly insofar as they serve as a source of collective criticism of federal policies; and that there is no textual basis for distinguishing municipalities from private corporations (which possess speech rights). *Id.*

[32] *Id.*

[33] Other state courts have touched on the *CBS* principle in passing without making a strong claim about it. The Massachusetts Supreme Judicial Court commented on the issue in the context of a challenge to a city's expenditure of public funds to advocate a particular result in a public referendum. Anderson v. City of Boston, 380 N.E.2d 628, 637 (Mass. 1978) ("By its terms and its traditional applications, the First Amendment has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination."). The Alaska Supreme Court mentioned but ultimately did not resolve the issue in a defamation action against public employees for displaying a petition accusing a taxicab operator of illegal sales of alcohol and drugs. Taranto v. North Slope Borough, 992 P.2d 1111, 1113–14 (Alaska 1999).

[34] Nizam-Aldine v. City of Oakland, 54 Cal. Rptr. 2d 781, 788 (Cal. Ct. App. 1996) (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–77 (1986)) (noting that "[t]he First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest").

ice.[35] The plaintiffs in each of these cases responded with arguments that paralleled the *CBS* principle, arguing that a government speaker could not invoke a First Amendment-based defense because the Speech Clause "exists not to protect government but especially to protect its dissenters."[36] Both courts rejected this argument, instead choosing to emphasize the importance of government voices in encouraging an unfettered exchange of ideas.[37] Second, California courts have rejected the *CBS* principle in a series of cases ruling that its anti-SLAPP (Strategic Lawsuits Against Public Participation) statute[38] applies even when the speech at issue originates from a government source.[39] In *Bradbury v. Superior Court*,[40] a plaintiff argued that the anti-SLAPP statute could not apply to its suit against the Ventura County Sheriff's Department because government entities have no First Amendment rights.[41] The court rejected this claim, pointing to the broadly worded language of the Speech Clause and stressing the First Amendment interests served by the particular government communication at issue (here, the value of government investigations into the veracity of allegations made in a report questioning the veracity of a deputy sheriff's warrant affidavit).[42] Subsequent cases have reaffirmed *Bradbury*'s holding that state entities may access the protection afforded by California's anti-SLAPP laws.[43]

Even the U.S. Supreme Court has expressed reservations about the *CBS* principle, stating that whether state actors can exercise First Amendment rights remains an open question.[44] Moreover, in a variety of instances

---

35 Nadel v. Regents of the Univ. of Cal., 34 Cal. Rptr. 2d 188, 197 (Cal. Ct. App. 1994) (citing *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 279–80 (1964), for the constitutionally inspired "actual malice" standard).

36 *Id.* at 192; *Nizam-Aldine*, 54 Cal. Rptr. 2d at 788.

37 *Nadel*, 34 Cal. Rptr. 2d at 194; *Nizam-Aldine*, 54 Cal. Rptr. 2d at 788.

38 CAL. CIV. PROC. CODE § 425.16 (2006). The statute provides a mechanism for early dismissal of suits brought primarily to suppress constitutionally protected expression.

39 Bradbury v. Superior Court, 57 Cal. Rptr. 2d 207, 212 (Cal. Ct. App. 1997) ("Petitioners [the state] had a First Amendment right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation.").

40 *Id*.

41 *Id.* at 211 n.3 (citing the *CBS* principle).

42 *Id.* at 212.

43 *See* Schroeder v. Irvine City Council, 118 Cal. Rptr. 2d 330, 337 n.3 (Cal. Ct. App. 2002) (so holding in ruling that a challenge to a state voter registration drive was a meritless attempt to suppress constitutionally protected speech); Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 77 Cal. Rptr. 2d 1, 10–12 (Cal. Ct. App. 1998) (noting that "[g]overnment has a legitimate, independent, statutory role to play in the consideration of [Environmental Impact Reports] and the approval of development proposals. As such, it should be protected in performing its role on matters of public interest, including purported inadequate performance of its role under [the applicable environmental reporting act]."), *overruled on other grounds by* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106 (1999).

44 City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 n.7 (1976) ("We need not decide whether a municipal corporation has First Amendment rights to hear the views of its citizens and employees."); *see* United States v. Am. Library Ass'n, 539 U.S. 194, 211 (2003) (noting this issue but stating that "[w]e need not decide this question").

the Court's jurisprudence implicitly contemplates speech rights for state actors. Justice Stevens' recent dissent in *United States v. American Library Association*, for example, relied on a strain of Supreme Court precedents that run counter to the *CBS* principle. His conclusion that the federal statute at issue unconstitutionally conditioned funding to municipal libraries on surrendering their First Amendment rights implied that the speech of municipal corporations (and their subdivisions, such as public libraries) enjoyed constitutional protection.[45] Justice Stevens' dissent avoided addressing this issue (indeed, it never even mentions the *CBS* principle, an issue that both parties fully briefed).[46] Instead, he narrowly defines the right at issue as a library's "broad discretion to decide what material to provide their patrons."[47] His conclusion that municipal libraries possess "significant First Amendment rights"[48] relies solely on the libraries' status as possessors of a distinctive sort of expressive discretion, a "discretion [that] is comparable to the business of a university,"[49] and that represents "a province into which we have hesitated to enter."[50] Yet this discussion, however meritorious it may be on its own terms, does not consider whether the library's status as a public entity robs it of the capacity to state a speech-based constitutional claim.

Justice Stevens thus argued for First Amendment-based protection for a public library's discretion to present material to its patrons while glossing over the tension this conclusion created with the *CBS* principle. And as his reference to "provinces that we have hesitated to enter" suggests, this approach is not novel. In *Regents of the University of California v. Bakke*, Justice Powell observed that the First Amendment guaranteed protection for the freedom of a university—private or public—to determine the composition of its student body.[51] And in *Grutter v. Bollinger*, the Court's conclusion that diversity in a student body amounts to a compelling state interest relied on Justice Powell's recognition in *Bakke* of "a constitutional dimen-

---

45 *Am. Library Ass'n*, 539 U.S. at 225–31 (Stevens, J., dissenting).

46 In the interest of full disclosure, I contributed to the Appellees' Brief in *Am. Library Ass'n*.

47 *Am. Library Ass'n*, 539 U.S. at 220 (Stevens, J., dissenting) (citing the plurality opinion to underscore his agreement with the plurality on this point).

48 *Id.* at 225.

49 *Id.* at 226 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

50 *Id.* at 225.

51 438 U.S. 265, 312 (1978) (Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."). Justice Powell elevated academic freedom to constitutional status not because universities are expressive associations, *cf.* Roberts v. Jaycees, 468 U.S. 609, 618–22 (1984), but rather because of universities' role in fostering democratic dialogue. *Bakke*, 438 U.S. at 312 (Powell, J.) (emphasizing the importance of a "robust exchange of ideas" on campus and concluding that that exchange "is widely believed to be promoted by a diverse student body" (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967))).

sion, grounded in the First Amendment, of educational autonomy."[52] While this approach appears to assume that public institutions—at least state universities—may access the protection of the Speech Clause, the Court has never noted the extent to which this assertion appears to undermine the *CBS* principle's proscription of First Amendment protection for state actors.[53]

At first glance, then, the *CBS* principle appears to be uncontroversial—a "well-settled legal principle" that flows naturally from the dominant interpretive approach to the First Amendment and finds support in Supreme Court precedent. But closer scrutiny reveals a picture complicated by the ambivalent, non-binding character of the major cases on this issue and the strains of dissent from courts that have challenged the majority rule. The notion that government speech should be categorically excluded from the First Amendment's protection warrants more examination than the cursory treatment it has received from courts and commentators.

II. TEXT, HISTORY, AND STATE SPEECH

A variety of factors—the brevity and ambiguity of the First Amendment, the paucity of sources concerning its ratification, and the relative novelty of the contemporary notion of government speech—counsel caution when relying on text and history to interpret the First Amendment as a source of institutional speech rights.[54] But any doctrinal analysis of the Speech Clause must at least start with these essential sources, so with the above caveats in mind, I turn to them to begin my inquiry.

A. Text: The Object-Neutral First Amendment

The subject of the First Amendment's protection is clear. It safeguards "the freedom of speech" from government suppression. But to ask whether the speech of state actors merits constitutional protection is to ask a question about the object of the Speech Clause—not what speech, but whose

---

[52] Grutter v. Bollinger, 539 U.S. 306, 329 (2003). *Cf.* Rumsfeld v. FAIR, 126 S. Ct. 1297, 1307 (2006) (assuming that both public and private law schools can assert First Amendment rights). For a thorough discussion of the First Amendment implications of both *Bakke* and *Grutter*, see Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461 (2005).

[53] The Court's categorical denial of speech protection to state actors seems all the more strange in light of its interpreting the term "person" in other statutory and constitutional contexts to include state actors. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (treating municipalities as persons for the purposes of Fourteenth Amendment liability); Moor v. County of Alameda, 411 U.S. 693, 717–18 (1973) (treating municipalities as persons for the purposes of diversity jurisdiction). *But cf.* Miles v. City Council of Augusta, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (rejecting claim that local ordinance violated the speech rights of a talking cat because the cat "cannot be considered a 'person' and is therefore not protected by the Bill of Rights").

[54] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xiv (1993) ("[T]here is much ambiguity in the seemingly clear text."); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) (noting that one "cannot solve [Speech Clause] problems simply by reference to the text or to its history").

speech it protects. On this score, the notoriously brief text remains inscrutable because it is object-neutral. While the First Amendment plainly seeks to safeguard speech, it does not identify any limitations on the identities of the speakers on whom that safeguard is bestowed: "Congress shall make no law . . . abridging the freedom of speech."[55] The only object limitation contained in this clause defines the entity that it restrains: Congress.[56] And in contrast to the Speech Clause, other First Amendment protections appear to have some limitation on the objects to which they apply: the rights of assembly and petition are not object-neutral, but pertain to "the people."[57]

The First Amendment's object-neutrality distinguishes it from other substantive constitutional protections, which do specify the entities on which they confer rights. For example, section one of the Fifteenth Amendment and section two of the Fourteenth Amendment grant voting rights and privileges and immunities safeguards, respectively, but only to "citizens of the United States."[58] The Sixth Amendment's speedy-trial and other rights extend only to "the accused" in "criminal proceedings."[59] Section one of the Fourteenth Amendment confers federal citizenship only on "persons born or naturalized in the United States."[60] And the Tenth

---

55 U.S. CONST. amend. I. The Eighth Amendment's prohibitions on excessive bail and fines and on cruel and unusual punishment also fail to specify a subject of their protection. U.S. CONST. amend. VIII. But while the Supreme Court has held that the excessive-fines clause applies to corporations, *see* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 285 (1989), it has not considered the clause's applicability to public entities.

56 The First Amendment has since been interpreted to operate against the federal government generally and against states. Gitlow v. New York, 268 U.S. 652, 666 (1925); *see* LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 234 (1963) (pointing to indications from James Madison and James Wilson that by "Congress" the framers intended to refer to government generally).

57 U.S. CONST. amend. I. While it is not clear that a right that pertains to "the people" as an abstraction is also limited in its application to natural persons, these clauses are at least susceptible to an argument that they are not object-neutral; the Speech Clause gives no such indication.

58 *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]").

59 *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation[.]").

60 *Id.* amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); *id.* ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Relatedly, some other amendments confer rights on the similar but more abstract subject, "the people." *Id.* amend. II ("[T]he right of the people to keep and bear arms, shall not be infringed."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]").

Amendment identifies "states . . . or people" as the entities that retain the prerogatives not conferred on the federal government by the Constitution.[61]

But what are the doctrinal implications of the Speech Clause's object-neutrality? Though it is important not to read too much into this single textual feature, one implication might be that the First Amendment should be understood as a safeguard that applies to an artifact (speech) rather than an actor (speakers). The Supreme Court has on one occasion embraced this view. In *First National Bank of Boston v. Bellotti*, the Court held that business corporations could claim First Amendment protection for their speech.[62] In so doing, the Court asserted that the Speech Clause's object-neutrality rendered the identity of the speaker irrelevant for constitutional purposes: "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."[63] While the Supreme Court has since backed off of this expansive understanding of the First Amendment articulated in *Bellotti*,[64] other federal courts have echoed the case's original point.[65]

Moreover, the Court has been willing to cast aside language that plainly excludes public entities as an object of constitutional protection. For example, the Just Compensation Clause states only that the federal government cannot confiscate "private property."[66] But in *United States v. 50 Acres of Land*, the Court held that "it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is

---

61 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the states respectively, or to the people.").

62 435 U.S. 765, 777 (1977).

63 *Id.* This idea was presaged to some extent by *N.Y. Times Co. v. Sullivan*, where the Supreme Court's conclusion that the protection of the newspaper's speech hinged on the content of the speech suggested a First Amendment analysis that focused more on speech than speaker. *See* 376 U.S. 254, 260–61 (1964).

64 Later decisions colored *Bellotti*'s expansive holding. In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court invalidated restrictions on the speech of a private organization, but suggested that the holding was limited to corporations formed for political purposes that posed no risk of distortion to the political process through excessive spending. 479 U.S. 238, 264 (1986). *Austin v. Michigan State Chamber of Commerce* explored the negative implications of this holding. 494 U.S. 652, 662 (1990). The Court declined to invalidate state regulation of a private organization that was formed primarily for non-ideological purposes and consisted of members whose wealth threatened to skew public discourse in their favor. *Id.* While *Bellotti* remains good law, *see* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1003 (1998) (surveying the law on corporate speech under the First Amendment and so concluding), the subsequent two holdings may limit *Bellotti*'s broad suggestion that speech enjoys equivalent constitutional protection regardless of the speaker's identity.

65 Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 490 n.36 (E.D. Pa. 2002) (broadly construing the object of the Speech Clause because "the First Amendment is not phrased in terms of who holds the right, but rather what is protected"), *rev'd*, 539 U.S. 194 (2003).

66 U.S. CONST. amend. V.

condemned by the United States."[67] *50 Acres* raises interesting implications for the Speech Clause. At the very least, it suggests that the Court simply does not take even unambiguous textual limitations on the objects of constitutional protection very seriously. *50 Acres* could also be read more ambitiously as an indication that, where appropriate, the protections of the Bill of Rights—whether of speech or property—apply as much to state and local governments as they do to natural persons.[68]

To the extent that commentators have addressed this issue, they have unanimously resisted the notion that the First Amendment's text might be construed as a protection of—rather than a safeguard against—state actors. Randall Bezanson and William Buss have argued that such a position would lead to incoherent results. The authors posit that on such a view, speech-restrictive laws would be regarded as instances of government expression, and would warrant constitutional protection.[69] But this claim falsely assumes that extending First Amendment rights to government entities would result in every action taken by a government entity being regarded as an instance of expressive conduct. This also ignores both the body of doctrine limiting what counts as expressive conduct[70] and the narrow ambit of the kind of government conduct that would merit constitutional protection (at least according to the framework I suggest in this paper).[71]

A more thought-provoking objection to the understanding of the First Amendment as object-neutral relies on the text's distinction between "freedom of speech" and "of the press." As Randall Bezanson has argued, that the framers found it necessary to single out a particular institutional actor—the press—implies that they understood the phrase "freedom of speech" in itself to exclude institutional speech.[72] This reading of the text, while plau-

---

67 469 U.S. 24, 31 (1984).

68 Nor is the Speech Clause the only element of the First Amendment that could be interpreted as protecting certain state prerogatives. Historians of religion have shown that the Establishment Clause was crafted not just to protect individuals from federal establishments of religion, but also to preclude the federal government from imposing on states a single established religion (under the long-abandoned theory that states should be free to choose their own established religions). LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 80–81 (1986).

69 Bezanson & Buss, *supra* note 3, at 1504 ("The argument, in effect, would have to be that the First Amendment means that 'Congress shall make no law abridging speech's freedom, but offering its own speech is not a law.' This is, at best, a convoluted reading."). Mark Yudof has advanced a similar argument. *See* YUDOF, *supra* note 10, at 39–56.

70 *See, e.g.*, Spence v. Washington, 418 U.S. 405, 410–11 (1974) (developing a standard for distinguishing speech acts from mere acts by looking to whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it"); United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"); *cf.* Rumsfeld v. FAIR, 126 S. Ct. 1297, 1307 (2006) (holding that a statute requiring universities to provide access to military recruiters did not infringe speech rights because it "neither limits what . . . schools may say nor requires them to say anything").

71 *See infra* Part IV.A.

72 Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 810 (1995).

sible, ultimately fails to convince. First, it proves too much. On such an interpretation, only two kinds of speech should enjoy constitutional protection: individual speech and speech by the press. Yet as Bezanson concedes, the First Amendment can and should be interpreted to include the speech of institutions under limited circumstances, such as corporations, partnerships, unions, and other private organizations.[73] Second, and more importantly, the First Amendment's separate identification of the press probably indicates an attempt to underscore the centrality of the press as an element of the Constitution's speech protection. Due to the crucial and relatively novel role played by the press during the American Revolution, which included resisting numerous attempts at suppression by the British crown, the framers understood freedom of the press to be among the primary goals of the Constitution's speech protection.[74] The First Amendment's specific reference to the press best reads as a form of emphasis on speech protection for the press in particular rather than as exclusion of institutions in general.

Textual scrutiny of the First Amendment reveals its distinctive object-neutrality, but this feature can support only negative propositions. The Speech Clause indicates no objects at all, whether natural persons, artificial persons, or government entities. While this militates against a doctrinal rule that categorically excludes any speaker from the ambit of the clause's protection, it remains necessary to look to other sources in order to make sense of the constitutional status of government speech.

B. History: Constitutional Structure and Government Speech in the Revolutionary Era

Looking at the Speech Clause in isolation provides some rudimentary insight into whether the Constitution's free-speech guarantees might apply to the expression of state actors. Analysis of the history surrounding the framing of the First Amendment must not fall victim to the erroneous assumptions that the framers themselves were of a single mind with respect to the clause's meaning,[75] or that the framers could imagine anything like the modern notion of government speech that exists today.[76] Nevertheless, the

---

[73] *See id.* at 793.

[74] *See* LEVY, *supra* note 56, at 176–248.

[75] *Id.* at 236 ("It is not even certain that the Framers themselves knew what they had in mind; that is, at the time of the drafting and ratification of the First Amendment, few among them if any at all clearly understood what they meant by the speech-and-press clause, and it is perhaps doubtful that those few agreed except in a generalized way and equally doubtful that they represented a consensus.").

[76] *See* Bezanson, *supra* note 72, at 758, 809 (noting that "[i]n the late eighteenth century the idea of speech without a speaker was unthinkable," and that "it would be surprising to find direct historical reference to institutional speech" due to the rarity of such speech during the late 1700s). However, even Bezanson concedes that it is possible to draw at least some conclusions about institutional speech from the Revolutionary Era evidence. *Id.* at 758 ("[T]he lack of direct historical support does not imply the absence of any historical basis for the distinction between institutional and individual speech.").

available historical evidence does aid in understanding the problem at hand, both by shedding some additional light on the object-neutrality of the First Amendment and by revealing that the framers did possess some understanding of government speech and expected such speech to play a significant role in the nascent constitutional republic.

1. The Framing.—The debates over the Bill of Rights provide no direct evidence indicating whether the framers intended government speech to be included in the Constitution's speech protections. There is, however, evidence suggesting that the object-neutrality of the Speech Clause was no accident. When James Madison first proposed what is now the First Amendment to the House of Representatives,[77] the most plausible reading of the clause would have limited its application to natural persons: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments[.]"[78] After it emerged from the Committee of Eleven, though, the amendment had been revised to exclude any such limitation: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievance, shall not be infringed."[79] In fact, the Committee of Eleven rejected a proposal that would have rephrased the Speech Clause to express freedom of speech in terms of "natural rights" that inhere in humans.[80] The House, moreover, made its decision not to specify an object of the speech rights conferred by the clause in the face of numerous entreaties to the contrary from state constitutional conventions[81] and de-

77 What eventually became the First Amendment began as a variety of different proposals submitted by Madison and amended by congressional committees. In their original form, they separately addressed the components of the current amendment—religion, speech, press, assembly, and petition. These disparate elements were merged into a single "article" proposed to the states for ratification. This article was third upon submission to the states, but became what we now know as the First Amendment upon the failure of the original first and second articles to be ratified. *See* GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 290–93 (Lexington Books 2005) (1971).

78 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834) ("The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. The people shall not be restrained from peaceably assembling and consulting for their common good[.]").

79 *Id.* at 759. The Committee of Eleven version bears close similarity to the current First Amendment, at least with respect to its Free Speech Clause. If anything, the version that resulted through the ratification process is even more limited than its immediate predecessor, which did not limit its restrictions to Congress. *Cf.* 1 Stat. 21 (1789), *reprinted in* THE COMPLETE BILL OF RIGHTS 92 (Neil H. Cogan ed., 1997) ("Congress shall make no law . . . abridging the freedom of speech[.]").

80 PROPOSAL BY SHERMAN TO HOUSE COMMITTEE OF ELEVEN (1789), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra note* 79, at 83 ("The people have certain natural rights which are retained by them when they enter our society[.] Such are the rights . . . of speaking, writing and publishing their Sentiments with decency and freedom[.]").

81 Many states ratified the Constitution with the expectation that it would later be amended to include a Bill of Rights. Several of those states specifically suggested that the protection of speech be limited to natural persons. *See, e.g.*, DISSENT OF THE PENNSYLVANIA MINORITY (1787), *reprinted in* THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS 309 (Gordon

spite the fact that many state constitutions placed such limitations on their own protections of freedom of speech.[82] Though not unequivocally probative, the Committee's repeated refusal to include object-specific language in the First Amendment permits more interpretive weight to be placed on the Speech Clause's object-neutrality.[83]

Finally, the ratification debate reveals that at least one of the original members of the House of Representatives assumed that the freedom of speech protected by what is now the First Amendment would extend to state governments. During the floor debate over the version of the Bill of Rights that would be sent to the states, the majority of the discussion concerning the current First Amendment focused on whether it should be amended to include a right in the people "to instruct Representatives."[84] Toward the end of debate about the instructions amendment, Representative Livermore rose to argue that there was "no occasion" for the resolution.[85] Livermore explained that he was indifferent because the "whole amendment" (i.e., the modern First Amendment) already operated to protect state legislatures. States' prerogatives to express grievances to the federal gov-

---

Lloyd & Margie Lloyd eds., 1998) ("[T]he people have a right to the freedom of speech, of writing, and of publishing their sentiments. Therefore, the freedom of the press shall not be restrained by any law of the United States."); PROPOSALS FROM THE STATE CONVENTIONS, NORTH CAROLINA (1788), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 79, at 93 ("That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of Liberty, and ought not to be violated."); PROPOSALS FROM THE STATE CONVENTIONS, RHODE ISLAND (1790), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 79, at 93 ("That the people have a right to freedom of speech and of writing and publishing their sentiments, that freedom of press is one of the greatest bulwarks of liberty, and ought not be violated.").

82 *See, e.g.*, PA. CONST. of 1776, ch. I, § XII, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 79, at 95 ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); PA. CONST. of 1790, art. IX, § VII, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 79, at 95 ("The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for abuse of that liberty."); VT. CONST. of 1777, ch. 1, § 14, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 79, at 96 ("[T]he People have a Right to Freedom of Speech, and of writing and publishing their Sentiments; therefore the Freedom of the Press ought not to be restrained.").

83 *Cf.* Pa. R.R. Co. v. Int'l Coal Co., 230 U.S. 184, 198–99 (1913); SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (Hand, J.) ("The amendments of a bill in committee are fertile sources of interpretation."); James Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 889 (1930) ("Successive drafts of the same act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such a choice.").

84 *See generally* 1 ANNALS OF CONG., *supra* note 78, at 761–78 (debating the instructions amendment).

85 *Id.* at 770 (statement of Rep. Livermore) ("Mr. Livermore was not very anxious whether the words were inserted or not, but he had a great deal of doubt on the meaning of the whole amendment; it provides that the people may meet and consult for the common good. Does this mean a part of the people in the township or district, or does it mean the representatives in the State Legislature? If it means the latter, there is no occasion for a provision that the Legislature may instruct the members of this body.").

ernment were thus already protected, obviating any need for an additional right to instruct.[86] Livermore's comment passed without discussion or response, but even on its own it does give some indication that at least one member of the First Congress assumed the modern First Amendment applied to the speech of states as well as the speech of persons.

2. *The Early Republic.*—While the ratification sheds light on the narrow issue of the object of the Speech Clause's protection, other evidence from the early republic provides insight into a broader question: What, if any, sense of government speech existed during this period? Though scholars have generally claimed that the notion of institutional speech—including government speech—did not exist in post-revolutionary America,[87] the evidence illustrates that the speech of state governments played a central role in the constitutional scheme in two ways. First, state speech aided the establishment of an open system of freedom of expression by maintaining an informed populace. Second, the speech of state actors exemplifies the "special structural role of freedom of speech in a representative democracy"[88] insofar as state legislatures' vocal opposition to the federal government checked potential abuse of centralized authority. Thus, the Bill of Rights emerged not only out of concern for individual liberty, but "as a protection for collective self-government,"[89] and, as the following discussion indicates, the First Amendment in particular performs a structurally oriented "federalism-protecting function"[90] that operates in tandem with its protection of individual speech rights.

a. *State speech as a precondition of individual speech rights.*—
The speech of states was a critical part of the constitutional scheme in part because it helped to maintain an open, information-rich polity in which ideas could be exchanged freely, thus enabling citizens to exercise their First Amendment rights. As Alexander Hamilton pointed out, state-governmental speech was crucial to informing the populace, because citizens "must . . . depend on the information of intelligent men."[91] This dependence made the speech of state legislatures crucial in maintaining a knowledgeable electorate:

> The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those

---

86 *Id.*

87 *See* YUDOF, *supra* note 10, at 42–50.

88 AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 25 (1998).

89 Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 1004 (1999) (reviewing AMAR, *supra* note 88).

90 *Id.* at 1005.

91 THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> who represent their constituents in the national councils, and can readily communicate the same knowledge to the people.[92]

The particular concern here was not counteracting majoritarian tyranny (though that is a related issue).[93] Rather, Hamilton hoped that state speech could counteract legislative "self-dealing"—the fear that the federal electorate would become unresponsive to individual citizens, particularly in light of the population dispersal over the large distances that characterized the young republic.[94] The key to avoiding this problem was assuring that voters were sufficiently well informed that they could engage in public debate regarding the quality of their federal representatives' performance. Hamilton argued that state legislatures—which represented smaller units of the population and whose interests were not necessarily identical to those of United States representatives—provided the information that was crucial to counteract legislative self-dealing.[95] Once sufficiently informed about the conduct of federal representatives, Thomas Jefferson expected that the populace would check self-dealing by the federal legislature by voting out insufficiently responsive representatives.[96] This informational process also worked in the opposite direction within the constitutional scheme, as state legislatures' protected speech prerogatives assured that they could respond to "applications flowing immediately from the people"[97] and communicate that expression of popular will directly to the federal government.[98]

---

[92] *Id.* at 516; *see also id.* NO. 26, at 168 (Alexander Hamilton) ("[T]he State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people[.]"); Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 319 (1994) (noting that Jefferson "assumed that institutions of state government were accountable to states' citizens, had primary responsibility to secure rights over which the federal government had no power, and were authorized to voice the people's collective determinations").

[93] *See infra* Part II.B.2.b.

[94] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1150 (1991).

[95] THE FEDERALIST NO. 84, *supra* note 91, at 516 ("It is equally evident that the same sources of information would be open to the people in relation to the conduct of their representatives in the general government, and the impediments to a prompt communication which distance may be supposed to create, will be overbalanced by the effects of the vigilance of State governments.").

[96] Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* 11 THE PAPERS OF THOMAS JEFFERSON, at 49 (Julian P. Boyd ed., 1955) ("The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of public liberty. The way to prevent the irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.").

[97] James Madison, Report to the General Assembly of Virginia (Jan. 7, 1800) [hereinafter Madison's Report], *reprinted in* THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON'S REPORT OF

b. State speech as an instrument of federalism.—State and local government speech also played a crucial structural role in the nascent dual-sovereign regime established by the Constitution. Most importantly, state speech was intended to keep the federal government in check by vigilantly policing its operations and speaking out about any federal attempts at over-reaching. Though this role could be exercised by state legislators speaking on the floor of a state representative body, it was not limited to individual speakers. The speech of state legislatures acting as collective bodies would also play a crucial role in this scheme by communicating directly with the federal government. Such communication could take a variety of forms: Madison imagined that the Constitution enabled state legislatures to "make a direct representation to Congress, with a view to obtain a rescinding of the offensive acts" by "represent[ing] to their respective senators in Congress, their wish" that an explanatory amendment to the Constitution be passed; or by communicating with other states to convene a state constitutional convention to achieve the same result.[99]

The Kentucky and Virginia Resolutions exemplify this kind of speech. Drafted by Jefferson and Madison in response to the Alien and Sedition Acts of 1798, the resolutions were passed by the state legislatures of Kentucky and Virginia to express the opinions of those states that the Acts violated both the First Amendment rights of individuals and the Tenth Amendment right of states to make their own laws regarding seditious speech. After the resolutions were distributed to other states for comment and to gather support, they were transmitted to the federal government as a formal protest to the 1798 Acts.[100] While the submission of the Resolutions did not lead to a repeal of the Alien and Sedition Acts, the states' vocal opposition to them did play a role in the popular resistance to the Federalist

---

1799, at 15, 79–80 (Va. Comm'n on Constitutional Gov't Ed. 1960) [hereinafter KENTUCKY-VIRGINIA RESOLUTIONS].

[98] *Id.* ("And if the other States had concurred in making a like declaration, supported too by the numerous applications flowing immediately from the people, it can scarcely by doubted, that these simple means would have been as sufficient, as they are unexceptionable.").

[99] *Id.* at 80 ("It is no less certain, that other means might have been employed, which are strictly within the limits of the Constitution. The legislatures of the States might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or they might have represented to their respective senators in Congress, their wish, that two thirds thereof would propose an explanatory amendment to the Constitution; or two thirds of themselves, if such had been their option, might, by application to Congress, have obtained a convention for the same object."); Moore, *supra* note 92, at 335 ("Madison referred to expectations during the founding period that state legislatures would act as intermediaries between the people and the federal government.").

[100] Kentucky Resolutions (Nov. 10, 1798), *in* KENTUCKY-VIRGINIA RESOLUTIONS, *supra* note 97, at 6 (resolving that "the preceeding [sic] Resolutions be transmitted to the Senators and Representatives in Congress from this Commonwealth, who are hereby enjoined to present the same to their respective Houses, and to use their best endeavors to procure at the next session of Congress, a repeal of the aforesaid unconstitutional and obnoxious acts").

government that resulted in its being ousted from office in the elections of 1800.[101] All sections of the Acts either expired or were repealed by 1802.[102]

The framers also imagined that protection of state-governmental speech would not only facilitate communication with the federal government, but that it would also foster interstate dialogue. The Kentucky and Virginia Resolutions exemplify this facet of state-governmental speech as well. Indeed, Madison thought that state criticism of federal policy depended in part on the consensus that would be reached by "communicating the declaration to other States."[103] The resulting interstate dialogue produced more diversity of opinion than either Jefferson or Madison expected. Madison, at least, had hoped that the states would give quick assent and designate Virginia or Kentucky to speak to the federal government on behalf of all the states.[104]

But rather than providing this swift assent, the state legislatures' responses to the Kentucky and Virginia Resolutions varied widely. Some states refused to sign on, while others offered criticisms and made their agreement to the resolutions contingent on various amendments. The variety of reactions to the initial draft of the resolutions prompted Madison to issue his 1798 Report to the Virginia House of Delegates in which he amplified his attacks on the Alien and Sedition Acts by responding to the various state legislatures' criticisms of the original Virginia Resolutions.[105] But while the Kentucky and Virginia Resolutions did not spark the state unanimity that their drafters sought, they did produce the very kind of interstate dialogue that the Constitution was meant to facilitate.

The speech of state legislatures facilitated not only formal inter-sovereign communication, but also played an informal role in the federal system by informing the populace generally about possible overreaching by the federal government and, when necessary, organizing opposition to it. Hamilton imagined that this informal function would depend largely on the expressive and communicative capacities of state legislatures:

---

[101] *Cf.* Amar, *supra* note 94, at 1150 ("[A] popular majority adjudicated the First Amendment question in the election of 1800, by throwing out the haughty and aristocratic rascals who had tried to shield themselves from popular criticism.").

[102] *See* Robert J. Lukens, *Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189, 208 n.101 (1997).

[103] Madison's Report, *supra* note 97, at 78 (noting that state criticism of the federal government depended in part on "communicating the declaration to other States"); *see also* Kentucky Resolutions, *supra* note 100, at 6 (resolving that "the Governor of this Commonwealth be, and is hereby authorized and requested to communicate the preceding Resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States").

[104] *See* Moore, *supra* note 92, at 326 ("Madison drafted the Virginia Resolutions for adoption by the state's legislature rather than a state convention. He presumed, as had Jefferson, that state legislatures could speak on behalf of the respective states.").

[105] *See generally* Madison's Report, *supra* note 97.

> [a]s often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.[106]

Indeed, state governments were regarded as uniquely capable of performing this hortatory function because of their relatively greater proximity and accessibility to the populace.[107] State legislatures in particular were seen as a safe haven for galvanizing criticism of the federal government because of the protection individual legislators enjoyed as a result of the legislative immunities provided by state constitutions.[108]

* * *

As I noted at the outset of this Part, any conclusions about the Speech Clause based on its text or history must avoid overstatement. It is not, for example, possible to say that either of these sources unequivocally proves that the First Amendment must apply to the speech of state actors (indeed, the framers left posterity with precious little to determine what or whose speech should be covered by the clause). That said, however, the foregoing discussion moves along an understanding of the constitutional status of government speech in two ways. First, the object-neutrality of the First

---

[106] THE FEDERALIST NO. 26, *supra* note 92, at 168 (Alexander Hamilton); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1501 (1987) ("At the first sign of a national abuse of power, [state legislatures] could sound a general alarm, communicating information and advice to their constituents and thereby winning their favor."); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 504 (1991) ("[S]tate governments in 1798–99 played a role similar to that of the institutional press or the opposition party today: monitoring the conduct of officials in power, and coordinating opposition to central policies deemed undesirable.").

[107] Moore, *supra* note 92, at 341 ("In addition to having regulatory powers of their own, these governments were uniquely situated to influence public opinion. State officials could also serve one of the same crucial functions that federal structures had been designed to achieve: to recall public opinion to fundamental principles and to encourage the people and their representatives to rise above passing factionalism.").

[108] *See, e.g.*, N.H. CONST. art. XXX ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever."); *see also* Amar, *supra* note 94, at 1151 ("After congressional enactment of the Sedition Act, where could opponents vigorously voice their criticism of the Act without fear of prosecution under the Act itself? In state legislatures, of course.").

Amendment militates against an interpretation that would limit its free speech guarantees to any group of speakers. Contemporary evidence suggesting that the clause's object-neutrality was a conscious artifact of its framing buttresses this conclusion. Second, other sources from the post-revolutionary period suggest not only that the framers had some rudimentary notion of government (or at least, state) speech, but also that they regarded this speech as central to the constitutional scheme both in terms of substance (informing and enriching the system of freedom of expression) and structure (providing an additional bulwark of protection against possible federal overreaching).

III. FIRST AMENDMENT THEORY AND THE STATUS OF STATE SPEAKERS

A. Current Law and the Need for a Complete Theory

Text and history help to frame the issue at hand by casting doubt on object-exclusive interpretations of the Speech Clause and by illuminating the role of state government speech in the early republic. These sources, however, fall well short of providing a completely theorized approach to thinking about government speakers as objects of First Amendment protection. Such an approach must take account of government's potential to serve both as contributor and antagonist in the American system of freedom of expression, and must provide a way of determining the circumstances under which the speech of state actors warrants, and does not warrant, constitutional status.

The majority rule does provide an analytical framework that is complete in the sense that it resolves all instances in which this issue arises. It accomplishes this by categorically excluding government speech from the ambit of First Amendment protection. Completeness notwithstanding, however, the majority rule cannot bear scrutiny. Both the object-neutrality of the Speech Clause and the apparent importance of state speech in the early republic cast doubt on the rule's unconditional statement that government speech can never enjoy constitutional status.

The most damaging flaw of the majority rule, though, is that the basic notion that animates it—the *CBS* principle—rests on inadequate theoretical foundations. The *CBS* principle reflects a familiar reading of the First Amendment: that the Speech Clause operates to protect individual liberty against government oppression. That this notion reflects an essential truth about the First Amendment is undeniable. Although historians have questioned[109] Justice Stewart's assertion in *CBS* that the Speech Clause was cre-

---

[109] LEVY, *supra* note 56, at ix–xxvi (showing that the framers of the Bill of Rights frequently advocated the punishment of speech thought to be damaging to government).

ated with a solely libertarian purpose,[110] preventing government restriction of individual speech was doubtlessly among the elements of its original design.[111] And the notion that the clause should be understood largely as a bulwark of personal autonomy against state suppression has become a dominant—if not the dominant—interpretive approach among commentators.[112] Owen Fiss has characterized the understanding of freedom of speech that derives from this assumption as the "Free Speech tradition"[113]—a moniker that indicates the centrality of this understanding in the free speech literature.

The *CBS* principle goes wrong in assuming that because the First Amendment serves a libertarian function, it must be interpreted in an exclusively libertarian manner. That the Speech Clause protects only individual liberty ignores another, crucial purpose: to create and maintain a robust system of freedom of expression.[114] The First Amendment's systemic function coexists (sometimes in tension) with its libertarian function, and can be traced to the origin of the amendment itself. Just as the libertarian overtones of the original Speech Clause are typically attributed to contemporary intellectual influences such as John Locke,[115] so too does the systemic valence of the clause have its roots in eighteenth-century political theory. The work of James Harrington was also influential on the framers.[116] In contrast

---

110 Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The purpose of the First Amendment is to protect private expression . . . ." (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 700 (1970))).

111 Madison noted in urging the House of Representatives to send the Bill of Rights to the states for ratification, "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 3 ANNALS OF CONG. 934 (1794).

112 Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) ("Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others. Autonomy is the foundation of all basic liberties, including liberty of expression."); *see also* Greenwood, *supra* note 64, at 996 ("To grant a tool a right against the citizens who use it is a form of political idolatry that ought to be abhorrent to any democratic regime. Rights are for people, not for their instruments.").

113 Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

114 *See* Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1172 (1993) (arguing that a conception of the First Amendment based purely on autonomy reflects "an inaccurate and inadequate understanding of our First Amendment jurisprudence").

115 *See* Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 629 (1982) ("For over a hundred years the world of scholarship agreed that Locke was the patron saint of Anglo-American ideology in the eighteenth century and that liberalism with its stress on individuality and private rights was the dominant ideal in that enlightened and revolutionary era. . . . Colonial Americans, it was assumed, were also schooled in Locke and became, in fact, his most self-conscious disciples.); *cf.* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26–27 (1992) (describing the contributions of a wide range of Enlightenment thinkers in addition to Locke as an influence on the Constitution's framers). *See generally* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955) (expounding the view that the framers were influenced primarily by Locke).

116 *See* Kramnick, *supra* note 115, at 630.

to Locke's emphasis on autonomy and individual self-government, Harrington argued that freedom could be maximized by and through active engagement in democratic society. An essential feature of what Harrington called a "virtuous" democratic government was a robust system of freedom of expression that enabled practical deliberation and dialogue about the common good.[117] The state in this view was not merely an antagonist—as the libertarian view would have it—but rather a body that could enhance individual rights through democratic participation.[118]

Locke and Harrington each illustrate distinct ideological influences on the framing of the Constitution, and can be seen as forebears (though not direct historical causes) of the libertarian and systemic views of the First Amendment.[119] But while these views seem to lie at odds with one another, courts have alternately invoked each strain where appropriate, rather than insisting that one or the other represents a single acceptable way to understand the Speech Clause. The Supreme Court in particular has embraced the systemic rationale in a number of familiar instances. Invalidating a statute that mandated destruction of foreign Communist propaganda received through the U.S. mail in *Lamont v. Postmaster General*, the Court explained that the law was unconstitutional because it weakened the American system of freedom of expression, and was thus "at war with the 'uninhibited, robust, and wide open' debate and discussion that are contemplated by the First Amendment."[120] Similarly, in *Red Lion Broadcasting Company v. FCC*, the Court upheld the FCC's now-defunct fairness doctrine, which required private broadcasters to cede some of their time to the public in order to encourage ideological diversity. It explained that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in

---

[117] Frank I. Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 47 (1986).

[118] *Id.* at 48 ("In Harringtonian thought the sovereign state, as a government of rulers separated from the ruled, is objectionable as alien authority, denying self-government. In Opposition thought the executive state, with its concentration of means and influence, becomes suspect as excessive power, endangering the interests and rights of subjects. For Harringtonians, sovereignty is conceptually the antithesis of political liberty. For the Opposition, government is operationally the antagonist of individual position, wealth, and right."); *see also* Kramnick, *supra* note 115, at 630–32.

[119] The distinction on which I rely in this section between libertarian and systemic interpretations of the First Amendment is a familiar one and has often been cast in other terms—e.g., individualist versus communitarian, or deontological versus utilitarian. And it also bears mentioning that this binary on which I rely for the purpose of simplifying this discussion does not do justice to the vast and rich literature on First Amendment theory. For a good overview of the major strains of thought in this field, see GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 9–18 (2d ed. 2003).

[120] 381 U.S. 301, 307 (1965) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The Court has emphasized the importance of maintaining access to information as a First Amendment value in a number of cases. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 505 (1946) (stating that "the preservation of a free society is . . . dependent upon the right of each individual citizen to receive such literature as he himself might desire.").

which truth will ultimately prevail."[121] The Court's efforts to administer the system of freedom of expression have been reserved. There are fewer attempts to affirmatively design a system of public debate pursuant to an ideal standard than there are efforts to maintain the degree of access and participation in public debate that exists in the status quo.[122] Regardless, this strain of cases belies the assertion that the sole purpose of the First Amendment is to protect individual autonomy.

The *CBS* principle thus fails because it falsely assumes that an important First Amendment value is the only First Amendment value. Certainly the Speech Clause operates to protect individual autonomy, but to assume that its purpose ends there is to sell the amendment very short. The majority rule proscribing constitutional status for government speech thus fails to account for a scenario in which the federal government wrongly attempts to restrict the speech of another sovereign, or where government speech merits application of a statute or common law doctrine that is designed to safeguard constitutional speech interests. In each of these scenarios, government speech may merit First Amendment protection not because individual liberty is at risk, but for the different but no less important reason that protection of the state expression in each instance furthers the Constitution's systemic goal of maintaining a free and open marketplace of ideas.

Neither do the various minority rules propounded by courts provide a satisfactory framework for thinking about government speakers as objects of First Amendment protection. These cases tend to be more consistent with what indications can be gleaned from the Speech Clause's text and the history of its framing, and they rightly recognize government's potential to play a constructive role in the marketplace of ideas. These features notwithstanding, though, the cases that resist the *CBS* principle provide nothing in the way of a general principle that defines the circumstances that warrant extension of constitutional status to government speech.[123] Cases

---

[121] 395 U.S. 367, 389–90 (1969) ("It is the right of viewers and listeners which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the FCC." (citations omitted)); *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) ("Corporations and other associations, like individuals, contribute to the [discourse] that the First Amendment seeks to foster."). The Court has occasionally returned to this theme, particularly in the context of cable television and the Speech Clause. *See, e.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 657 (1994) ("The First Amendment's command that government not impede freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

[122] *See* Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1172–73 (1993).

[123] A noteworthy exception is *Creek v. Village of Westhaven*, in which Judge Posner's concurrence suggests that states and municipalities should bear constitutional speech rights when their speech repre-

that broadly assert that the speech of government should be treated as constitutionally equivalent to the speech of individuals[124] rely on an overly optimistic vision of government's role in the system of freedom of expression, stressing the capacity of government speech to contribute without taking due note of its potential to dominate public debate and thereby distort democratic discourse. On the other hand, cases asserting only that a particular instance of government speech merits constitutional protection under a narrow set of facts[125] provide no doctrinal guidance to resolve future cases in which this issue arises.

What is needed, then, is a fully theorized approach to thinking about government speech as a subject of constitutional protection, an approach that recognizes government's importance as a participant in the system of freedom of expression but carefully delimits its speech rights to suit government's particular role and to guard against potential abuse. The case of constitutional protection for government speech, then, calls for a limiting principle. While the First Amendment may compel us to put up with all kinds of speech from individuals out of concern for human autonomy, that rationale does not apply in the case of government, whose power must be carefully confined out of concern for individual liberty. In the remainder of this Part, I look to three schools of thought—what I will term "derivative rights," "institutional rights," and "substantive rights" approaches—each of which provides a distinct way to think about the speech of organizations in light of the Constitution's free speech guarantees. After briefly outlining each approach, I imagine how it might provide a way of thinking about government speech as a subject of constitutional protection, and then review the plausibility of each model. Although each of these approaches has its advantages, I ultimately conclude that none of them on its own terms can provide a coherent theory for thinking about this issue.[126]

---

sents the aggregated expression of their constituent members. 80 F.3d 186, 192–93 (7th Cir. 1996). I discuss this derivative rights approach in more detail below. *See infra* Part III.B.1.

124 *E.g.*, County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989).

125 *E.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 231 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

126 This discussion assumes that the Bill of Rights operates to protect individuals from objectionable government treatment rather than to render invalid particular rules. *Compare* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996) (presenting the former, claimant-centered view) *with* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3–12 (1997) (presenting the latter, rule-centered approach). I have chosen to focus on the claimant-centered view because it remains the dominant approach in the cases and the literature, and my aim is to comment on how state actors may be regarded as speakers under current doctrine rather than under an alternative view.

The rule-centered approach would still be consonant with regarding state actors as First Amendment speakers under certain circumstances. Objections to speech-restrictive rules that focused exclusively on government intent would operate without regard to the identity of the speaker, *see* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562 (1989), and would be invalid as applied to the speech of state actors as well as private individuals. However, space does not permit a more detailed consideration of how the rule-centered approach applies to the problem at hand.

B. First Amendment Protection for Government Speech: Three Approaches

1. Derivative Rights.—I begin by considering a derivative rights approach to thinking about attributing speech rights to organizations. On this theory, organizations bear rights only to the extent that the organization's rights can be traced to those of its members.[127] Derivative rights thus does not assert that organizations possess rights in and of themselves. Rather, the collective body is an object of concern only insofar as it operates as a means for expressing and vindicating the rights of its constituent members. Meir Dan-Cohen has discussed this notion in the context of private organizations' speech and the First Amendment, positing that constitutional speech rights can extend to organizations, but only to the extent that the organization's speech can be regarded as an expression of the beliefs of its individual members.[128] Organizations that would be able to stake a stronger claim to constitutional speech rights under this theory would have to possess a strongly representative quality, such as a cause-based association like the National Rifle Association or NARAL Pro-Choice America, where the fact of membership itself implies certain ideological beliefs on a particular subject matter. Small, unusually homogeneous communities such as the Pennsylvania Amish might also meet this standard.[129]

Courts have embraced this theory of organizational rights on a number of occasions. In *Austin v. Michigan Chamber of Commerce*,[130] the Supreme Court cabined its earlier expansive statement that corporations possess the full panoply of First Amendment rights.[131] It did so on a derivative rights theory, declining to extend constitutional protection to the speech of an organization that was not traceable to the speech of the organization's members.[132] This notion appears too in Justice Stevens' *Boy Scouts of America v. Dale* dissent, which rejects the notion that the Boy Scouts can be regarded as an anti-homosexual organization due to the absence of a sufficient indication that such an opinion was actually held by the organization's

---

[127] Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1233 (1991) ("A right may be recognized in A out of concern for A himself. In such a case, A has what I shall call an original right. A right in A may also result from a concern not for him but for B. In this case, A will be said to have a derivative right.").

[128] *Id.* at 1234 ("[F]irst amendment protection can extend to someone other than the original speaker out of concern for that speaker if granting such protection to the other person promotes or protects the original speaker's self-expression.").

[129] *See id.* at 1258.

[130] 494 U.S. 652 (1990).

[131] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (holding that "[t]he inherent worth of . . . speech . . . does not depend on the identity of its source, whether corporation, association, union, or individual.").

[132] *See Austin*, 494 U.S. at 661–62.

members or leaders.[133] The derivative rights view has even been articulated in the context of government speech. Judge Posner's concurrence in *Creek v. Village of Westhaven* suggests that the speech of state and municipal government could merit constitutional status where it serves as a "megaphone amplifying voices that might not otherwise be audible."[134] The megaphone metaphor invoked here suggests that the voice of a state speaker may be accorded First Amendment protection, but only when its speech derives from that of its constituent members.

But how might one give content to Judge Posner's megaphone metaphor? In real terms, what would it mean to extend constitutional status to state and local speech only where that speech reflects the aggregated expression of its individual residents? One approach would be to require that an instance of state or local government speech represents a majority of the population's views in order to merit constitutional protection. At the outset, this approach raises a basic problem of workability: how to determine congruence between the popular will and government speech? Is it possible to psychoanalyze the constituents of a unit of government in order to accurately determine whether an instance of government speech actually reflects the aggregated opinion of its residents? As a practical matter, it seems highly unlikely. Such an effort would require not only a thorough canvass of an area's residents but a test of memory, as the relevant question would be whether members of the populace were in agreement with the instance of government speech at the time it was uttered.

Though the practical problems facing this kind of determination justify the high degree of academic skepticism on this point,[135] we might for argument's sake presume that such a measurement could be taken by a simple opinion poll. But even if such measurement were possible, this kind of approach would do nearly as much to damage as to vindicate the rights of the citizens represented by state and municipal speakers. For example, if data indicated that 65% of a city's population agreed with a given point of view, then the city government's speech on that topic would, on this view, merit constitutional protection. But while this may enhance the voices of the majority of the city's denizens, what of the dissenting 35%? This approach would relegate their ideas to a subordinate position merely because of their minority status, and would unconstitutionally attribute to them a point of view with which they disagree.[136] It may not be problematic for government to simply express views with which its citizens disagree; after all, no

---

[133] 530 U.S. 640, 685–86 (2000) (Stevens, J., dissenting).

[134] 80 F.3d 186, 193 (7th Cir. 1996).

[135] Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 207 (2003) ("[J]udicial efforts to psychoanalyze associations are misguided because they miss the institutional complexity of associations' representations of their members.").

[136] *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) (holding that the First Amendment prevents students from being required to recite the pledge of allegiance).

government can perfectly represent the ideas of all of its represented members, and voters always have a chance to eject from office governments whose policies—communicative or otherwise—they dislike. But here, government is not merely speaking, but asserting a right—a free-speech claim derived from the constitutional rights of its citizens. Such a derivative right can never be coherent, because government's attempt to lay claim to a majority of its citizens' speech rights necessarily entails violating the constitutional prerogatives of a significant minority of its citizens by associating them with an idea that misrepresents their beliefs.[137]

A different way to give content to derivative rights would be to extend constitutional speech rights to government speakers only when their speech reflects the virtually unanimous opinion of their citizens. For example, poll results indicating at least a 95% consensus on the issue at hand could be a precondition for granting the speaking state or local entity First Amendment rights on the topic. While this unanimity requirement would solve the problems of the alternative approach discussed above because it would not attribute beliefs to individuals who did not possess them, it would likely prove impossible to meet. Individual states—even Rhode Island and Delaware—are too large and heterogeneous to constitute the kind of affective community that could make this kind of a claim to like-mindedness.[138] The same rings true for local governments as well. Even though these units of government tend to be smaller than states and thus possess a greater likelihood of unanimity, these bodies also often represent communities that are insufficiently homogeneous to meet this kind of standard.[139]

On a number of issues, though, and in a small enough area, it is possible to imagine this degree of consensus. One can safely assume, for example, that canvassing the residents of the fundamentalist Mormon enclave of Colorado City, Arizona, as to whether polygamy should be tolerated by local law enforcement would produce a virtually unanimous, affirmative re-

---

[137] Recognizing this objection, Dan-Cohen has suggested that where a minority of citizens disagrees with the protected speech of the governmental unit to which they belong, those dissenters could be afforded a correlative right to express their disagreement with the government's expression. *See* Dan-Cohen, *supra* note 127, at 1261. But this suggestion fails to recognize that these individuals already possess a right to disagree with the government in their capacity as individual speakers. Thus, not only does a "dissenters' right" add nothing, but it makes the situation for ideological minorities only slightly better by presenting them with the choice between unwanted ideas attributed to them, or having to engage in an onerous effort to remove a burden on their constitutional speech prerogatives that should not have been placed on them at all.

[138] Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994).

[139] *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 389 (1990) ("Local governments can be heterogeneous microcosms of the larger society or class-segregated residential enclaves.").

sult.[140] But even though there may exist instances where it would be possible meet this standard, a serious question remains as to whether it would be desirable to reward the speech only of extremely small, unusually like-minded units of the population with constitutional status.[141] Such a result lies squarely at odds with the goals of diversity of opinion and richness of debate that the Speech Clause seeks to achieve.

Whether one understands it in terms of a majority-rule or unanimity requirement, then, the derivative rights model fails to provide a satisfactory framework for thinking about government speech as a subject of First Amendment protection. Each of these two attempts to give substance to Judge Posner's megaphone metaphor raises serious questions about the workability of an approach that attempts to determine the constitutional status of state speech by looking to the First Amendment rights of its citizens. The derivative rights theory has an additional problem. It assumes that when government speaks, it does so in a representative capacity. This may be a valid assumption when, for example, the speech of an elected representative body—such as a city council—is at issue. However, in the majority of cases that have raised the applicability of the Speech Clause to government speech, the speaker was not a representative body but a state agency, such as a municipal library,[142] public university,[143] or police department.[144] Agencies are not expected to function in a purely representative capacity, but typically act according to their expertise regarding the subject matter over which they have authority. To determine the constitutional status of their speech by reference to its congruence with the beliefs of the local population would simply be using the wrong measuring device. Thus, even if there were a workable way to put into practice the derivative-rights approach, it would still provide a poor fit with the bulk of the speakers at issue.

2. *Institutional Rights.*—The derivative rights approach discussed above looks at the rights of an organization's members to determine whether that organization should bear a particular right. The institutional rights theory, by contrast, looks instead to the purpose and character of an institution to determine if it makes sense to extend to that institution a given right. In discussing the rights of private organizations, Roderick Hills has argued that "rights ought to be understood as rules giving powers to institu-

---

140 *See* JON KRAKAUER, UNDER THE BANNER OF HEAVEN 259–74 (2003) (discussing unanimity—though possibly under duress—of the Colorado City population regarding the social acceptability of polygamy).

141 Hills, *supra* note 135, at 166 ("The[] implication that the most illiberal and oppressive private organizations deserve the greatest degree of constitutional protection is so intuitively undesirable that this is reason enough for rejecting this theory.").

142 United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

143 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

144 Bradbury v. Superior Court, 57 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997).

tions based on their likelihood of making decisions appropriate to the social sphere in which they operate."[145]

Because this theory was developed primarily to account for the rights of private organizations, it requires an analogical move to apply it to public entities. Yet such a move can readily be made. In the private context, this theory suggests that where an institution is well suited to exercise jurisdiction over a particular subject matter, that exercise should be protected by constitutional right. Thus, as applied to the government context, this would mean that where the government speaker's exercise of a particular expressive capacity was central to its character and the purpose for which it was created, its freedom to engage in that expression should be the subject of constitutional protection. Two factors to which a decisionmaker might look to determine whether a state speaker meets this standard are the speaker's original design (whether the government's expressive conduct is congruent with the purpose for which the institution was created) and its substantive expertise (whether the public entity possesses distinctive expertise regarding the subject matter at issue).

The institutional rights approach that I discuss here is consequentialist.[146] The expressive capacities of various institutions contribute to the system of freedom of expression by facilitating the development of informed viewpoints on subject matter of public importance. Thus, deferring to the expert judgment of state agencies—whether preserving the ability of a state communications commission to determine the content of local programming, or safeguarding the prerogative of a municipal public defenders' office to make decisions regarding the management of its clients' cases—furthers the systemic aims of the First Amendment. Allowing the federal government instead to dictate content in these instances would impoverish public debate.

Though the Supreme Court has never explicitly invoked the institutional rights theory as a basis for thinking about the speech rights of organizations—private or public—it has on several occasions rendered decisions that relied on very similar reasoning. In *Arkansas Educational Television Commission v. Forbes*, for example, the Supreme Court held that a state broadcasting commission could exclude participants from televised political

---

[145] Hills, *supra* note 135, at 144, 175–76.

[146] One can also imagine a non-consequentialist rationale for an institutional rights approach. Some property scholars have argued that there are functions so central to the human identity that the state should not allow people to alienate them. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1477–86 (1989) (discussing general theories of inalienability). This might explain why there are laws banning trade in vital organs. *See id.* at 1486. A state actor's expressive conduct might also be understood in this light. Municipal libraries, for example, exist to a large extent in order to exercise discretion over the material they present to their patrons. To subject these institutions' communicative prerogatives to the command and control of another sovereign would be to alienate the functions that provide a rationale for their existence.

debates at its discretion.[147] Though framed in the language of the public forum doctrine, the majority opinion appeared to rely more on the functional importance of deferring to the expertise of the state commission, characterizing the commission's exercise of discretion as "journalistic judgment" rather than state action.[148] Much the same deference to the expressive freedom of an institution was immanent in *NEA v. Finley*, in which the Court refused to invalidate NEA funding decisions that were based in part on a "general standards of decency" criterion.[149] While the majority purported to rely on other grounds, the opinion expressed a desire to avoid interference with the decisionmaking of "experts in the relevant field of the arts."[150] The Court's affirmative-action decisions illustrate the same point. In both *Bakke* and *Grutter*, the Court characterized a public university's prerogative to determine the content of its student body as a First Amendment value. In each of these cases, the Court's elevation of educational autonomy to constitutional status relied on public universities' compelling interests in selecting diverse student bodies that would facilitate a "robust exchange of ideas."[151]

So given that it has received at least the *sub rosa* approval of the Supreme Court, institutional rights may hold promise for providing a workable framework for thinking about the constitutional status of government speech. Perhaps courts should determine whether government speech merits First Amendment protection by asking whether the public entity at issue is both substantively and institutionally well suited to engage in the speech at issue.[152] Formally, there is an appealing congruence between the institutional rights model and government as a speaker. An interpretive approach that emphasizes autonomy—an essentially human quality—maps poorly

---

147 523 U.S. 666, 683 (1998).

148 *Id.* at 671–73; *see* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 90 (1998) (pointing out that the Court's decision relied more on deference to journalistic expertise than on public forum analysis).

149 524 U.S. 569, 577 (1998) (quoting 20 U.S.C. § 954(d)(1) (1998)).

150 *Id.* at 573; *see* Schauer, *supra* note 148, at 95 (pointing out the Court's reliance on concerns for the NEA's artistic expertise despite its asserted reliance on other grounds).

151 Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J.)); *see also* United States v. Am. Library Ass'n, 539 U.S. 194, 225, 231 (2003) (Stevens, J., dissenting) (treating discretion to select material available to patrons as inalienable constitutional right of public libraries); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*,*"* 99 YALE L.J. 251, 257 (1989) (discussing *Bakke*'s introduction of "a concept of constitutional academic freedom as a qualified right of the institution to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn"); Horwitz, *supra* note 52, at 563–87 (discussing public universities as First Amendment institutions); *cf.* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 239 n.5 (2000) (Souter, J., concurring in the judgment) ("[I]t is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis objections to student fees.").

152 *Cf.* Hills, *supra* note 135, at 218 (discussing applications of this approach to private institutions).

onto artificial persons like government entities (as we have seen with the promising but ultimately unworkable derivative rights approach).[153]

Another major advantage of this approach is that it provides a good fit between the identity of the speaker and the speech at issue. It streamlines the speaker's identity and speech, so that an institutionally appropriate expressive act—such as the local school board's choice to include particular material in their curriculum—would be protected, while non-germane communication—such as the same school board's opinion about who should win the next presidential election—would not. By contrast, approaches that look to the substance of speech rather than the identity of the speaker[154] run the risk that government speakers may be able to claim constitutional protection for speech that bears no relationship to the purpose for which the public entity at issue was created.

On the other hand, the major drawback of the institutional rights approach is that it fails to provide any limit on the substance of government speech. With respect to persons, we tolerate this. Indeed, the notion that outrageous or offensive speech must be tolerated is often held out as a hallmark of the breadth of the American tradition of free speech.[155] But when the state speaks, we must remain wary of the capacity of that speech to distort public debate. As Mark Yudof has argued, an excess of government expression may be "fatal" to democratic values and could "destroy[] the ideal and reality of the self-controlled citizen."[156] This argument relies on a particular vision of government's place in the marketplace of ideas, in which government possesses such a disproportionately large degree of power compared to the voices of individuals that its speech runs the risk of drowning out individual voices and dominating public discourse.[157] This threat, despite prompting the spillage of much ink, has never really materialized. And with both the increased capacity of individuals to publish criti-

---

153 *See supra* Part III.B.1.

154 See, for example, the public rights approach that I discuss *infra* Part III.B.3.

155 *See* Waters v. Churchill, 511 U.S. 661, 672 (1994) ("The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate.'" (quoting Cohen v. California, 403 U.S. 15, 24–25 (1971))).

156 YUDOF, *supra* note 10, at 51–52.

157 *Id.* at 155-56 (contemplating a situation in which "[t]he government itself commands sufficient means to propagandize so much, so continuously, and so loudly in support of one view that private voices feebly piping below the government's noisier din are scarcely heard. A government need not directly curtail the activities of private pamphleteers, for instance, if it can effectively displace them by subsidizing the 'friendly' press or, better still, by establishing an inexhaustibly more powerful press committed exclusively to its own view." (quoting William Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530, 533 (1966))); *cf.* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658–59 (1990) (noting that the state-created advantages corporations enjoy permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace").

cal and dissenting views on the Internet[158] as well as a general uptick in the public's suspicion of government generally,[159] the claim that government speech poses an overwhelming threat to democracy seems overstated.

Still, there is truth to the argument that—at least where government controls the access to the means of communication—the speech of state actors possesses the capacity to distort the marketplace of ideas. Indeed, a deep and abiding distrust of government's proclivity to corrupt public debate animates much of the Court's First Amendment jurisprudence.[160] Thus, applying the institutional rights approach as the exclusive rubric for determining when government speech merits constitutional protection raises the risk that government will abuse this prerogative. For example, imagine that a public library is run by political extremists, and that they crowd the bookshelves exclusively with materials advocating their partisan views in an attempt to convert local residents to their point of view. Because decisions to determine the content of material presented to patrons lie at the core of a public library's institutional role and expertise, this expressive conduct would, under an institutional rights theory, enjoy First Amendment protection. Yet the effect of this policy—excluding patrons from reading a diversity of views and thereby narrowing and distorting public debate—does violence to public discourse. Thus an institutional rights approach offers some promise, but the risk of abuse it poses makes it inadequate as a sole means of determining when government speech merits constitutional status.

3. Public Rights.—The interpretive approaches I discussed in the two previous sections looked either to an organization's individual members or to the organization's institutional purpose and character in order to determine whether that organization should bear a particular right. The third and final approach differs from the first two in that it looks to the impact of speech on public discourse in order to determine whether it merits constitutional protection. The roots of this public rights[161] interpretive approach

[158] Charles Fried, *Speech in the Welfare State: The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 252 (1992) ("Considering the facts of the American world, the whole drownout thesis is patently absurd. It simply is not the case that no one will publish unpopular views.").

[159] Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 380 (1983) (book review) (arguing that the public may be more rather than less likely to be suspicious of government speech); John Samples, *Americans Don't Trust Big Government on Home Front, Says ABC Poll*, CATO INST., Jan. 31, 2002, http://www.cato.org/dailys/01-31-02.html (reporting that only 38% of poll respondents indicated that they trusted the federal government to "do what is right").

[160] *See* Stone, *supra* note 122, at 1173 (noting that in the Court's First Amendment jurisprudence, "[T]he baseline that is sought to be preserved is the actual distribution of views that exists in the real world, and that is not the product of intentional government intervention. The reason for this concern is not a naive belief that this distribution is necessarily ideal but, rather, a distrust of government efforts that have the purpose or effect of altering that distribution.").

[161] *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1972–91 (2003) (introducing the term "Public Rights" to describe the view of the First Amendment taken by Meiklejohn and the civic republicans).

may be traced to seventeenth-century political theory,[162] but find their first expression as a way of thinking about our Speech Clause in the work of Alexander Meiklejohn. Writing in the 1950s and '60s, Meiklejohn argued that the First Amendment should be understood not as a source of protection for individual self-expression, but rather as securing an effective system of freedom of expression by enabling and encouraging participation in democratic processes. He wrote partly in opposition to what he called the "excessive individualism" of Oliver Wendell Holmes, whose influential view portrayed the Constitution's framers—in Meiklejohn's words—"as if they had no fundamental community of purpose at all."[163]

Resisting Holmes' view of the First Amendment as nothing more than a bulwark against violations of individual autonomy, Meiklejohn argued instead that "[t]he principle of freedom of speech springs from the necessities of the program of self-government."[164] On this view, the First Amendment should not be regarded as primarily protecting individuals' right to think freely for their own sake, but rather as ensuring a system of expression that maximizes opportunities for democratic participation. In other words, it was "written to clear the way for thinking which serves the general welfare"[165]—emphasizing the content and structural purpose of speech rather than the identity or autonomy of the speaker.

Several decades later, a school of constitutional interpretation—civic republicanism—emerged that shared this emphasis on the structural purposes of the Constitution and its role in encouraging democratic dialogue. Civic republicanism's animating principle is civic virtue—"the willingness of citizens to subordinate their private interests to the general good."[166] This emphasis on civic virtue led to a hermeneutic that looked to democratic self-government as its lodestar. On this view, the Constitution should be understood primarily as a document that was designed to enable individuals throughout society to engage in a constructive dialogue through which decisions are reached for reasons that are "law-like" (presumably, based on neutral principles) and after deliberation that entails "conscious, critical reflection on our identities (or natures) and social situations."[167]

Central to understanding civic republicanism is "pluralism," the opposing view against which the civic republicans defined themselves. Essentially a variant of classical liberalism, pluralism regarded "the political system as, ideally, designed to serve the self-defined private interests of individuals or groups, fairly represented in political forums, where they com-

---

162 *See supra* Part III.A (discussing Harrington and systemic interpretations of the Bill of Rights).

163 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 71, 72 (1st ed. 1948).

164 *Id.* at 26–27.

165 *Id.* at 45–46.

166 Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

167 Michelman, *supra* note 117, at 26.

pete under fair rules for fair shares of the outputs of public policy."[168] Civic republicans criticized the pluralist approach—which is embodied by, for example, the thought of John Hart Ely[169]—as defining the democratic process as a series of deals between competing interest groups, and in so doing reducing existing background entitlements to mere exogenous variables.[170] Thus, in contrast to the pluralist model in which humans were seen as essentially driven by self-interest, civic republicanism expressed the belief that through discussion, citizens could transcend their private interests and act in pursuit of the common good.[171]

This tension between pluralism on one hand and Meiklejohn and the civic republicans on the other illuminates how the public rights approach would provide a way of thinking about the speech of state actors as a subject of First Amendment protection. The public rights approach rejects autonomy as a central value in interpreting the First Amendment, instead seeing the Speech Clause in terms of its systemic aim of maintaining a robust system of freedom of expression. The importance of individual self-expression is not lost in this model; it is just that autonomy is protected not for its own sake, but rather as "a means or instrument of collective self-determination."[172] Thus rejecting the pluralist notion that the First Amendment should operate merely as a guarantee of neutrality of various competing interest groups vying for the attention of listeners,[173] the public rights view understands the clause as charging government with the affirmative responsibility to create a robust, open system of freedom of expression.[174] The public-rights view thus abandons the familiar constitutional benchmark of content-neutrality[175] and instead embraces the substantive criterion that "free speech disputes should be resolved with reference to the Madisonian

---

[168] *See id.* at 21.

[169] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[170] Cass R. Sunstein, *Symposium: The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539, 1543 (1988) ("The pluralist approach takes the existing distribution of wealth, existing background entitlements, and existing preferences as exogenous variables.").

[171] Sunstein, *supra* note 166, at 30–33.

[172] Fiss, *supra* note 113, at 1409–10.

[173] SUNSTEIN, *supra* note 54, 50–51 (elaborating on the public rights view as a turn from free speech as an unregulated marketplace of ideas to a system dedicated to deliberative democracy).

[174] *Id.* at 37 (reasoning that the constitutional question posed in First Amendment cases should be "[d]o the rules promote greater attention to public issues" and "[d]o they ensure greater diversity of view?").

[175] The Supreme Court has frequently declared that a basic principle of the First Amendment is that the government cannot regulate speech based on its content. Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1, at 902–10 (2d ed. 2002) (discussing the role of content-neutrality in Speech Clause jurisprudence).

claim that the First Amendment is associated above all with democratic self-government."[176]

This idea has far more adherents in academia than in the judiciary.[177] Courts have been chary of adopting the public rights view, and the pluralist commitment to content-neutrality still retains its centrality in Speech Clause jurisprudence.[178] The public rights view, nevertheless, has promise as a way of thinking about the First Amendment as a source of protection for government speech. If we are to determine whether speech merits constitutional protection by reference to a substantive rather than a formal conception of expressive freedom—that is, by looking at whether the speech at issue tends to "facilitate the public debate required for self-government"[179]—then the speech of government, as much as of individuals or private organizations, may further this goal and thereby attain constitutional stature.

The interpretive touchstone of the public rights approach—enhancing democratic participation—is nebulous (though it is difficult to find an interpretive framework for the First Amendment that could not be so described). Several criteria can help give content to this standard, at least as it applies to the issue I address here. First, the public rights approach favors speech that corrects a disparity in the marketplace of ideas, for example by publicizing an underrepresented idea that would not be aired in the absence of government intervention.[180] Second, expressive conduct that tended to expand the availability of speech for third parties—such as the provision of access to the Internet or newspapers—would be constitutionally protected under the public rights approach.[181] Third, public rights includes a concern about the capacity of powerful speakers to dominate public debate and would thus

---

176 SUNSTEIN, *supra* note 54, at xx; *see also* Cass R. Sunstein, *Exchange; Speech in the Welfare State: Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992) [hereinafter Sunstein, *Free Speech Now*] (arguing that "the First Amendment is best understood by reference to the democratic process").

177 Among the primary expositions of a civic republican approach to interpreting the First Amendment are Fiss, *supra* note 113, and Sunstein, *Free Speech Now*, *supra* note 176.

178 Justice Breyer represents somewhat of an exception. In his academic writing, Justice Breyer has expressed suspicion of strict adherence to content-neutrality in First Amendment cases, arguing instead for an approach that looks back to the "Constitution's more general objectives," Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 256 (2002), and considers whether a particular speech regulation serves "the ability of some to engage in as much communication as they wish and . . . the public's confidence and consequent ability to communicate," *id.* at 253. This context-sensitive approach is evident in some of Justice Breyer's opinions on campaign finance regulation and commercial speech. *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405, 424–25 (2001) (Breyer, J., dissenting); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399–405 (2000) (Breyer, J., concurring).

179 Magarian, *supra* note 161, at 1983.

180 *Cf.* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 107 (1996) (suggesting that the public rights view may result in allocation of government subsidies in content-specific ways to "further the sovereignty of the people by provoking and stirring public debate").

181 *See* SUNSTEIN, *supra* note 54, at 37 (suggesting that a central criterion in First Amendment analysis should be whether the rules at issue promote greater attention to public issues).

carefully attend to whether a given instance of speech tended to make it less likely that a range of voices would participate in that discourse.[182] And finally, the public rights approach prioritizes political speech, extending a higher degree of protection to such "core" speech.[183]

The appeal of public rights as a framework for approaching government speech as a subject of constitutional protection is twofold. As with institutional rights, there is an appealing formal congruence between the public-rights approach—which does not emphasize human autonomy as a rationale for constitutional speech protection—and the character of government as a speaker to whom this rationale cannot apply.[184] Moreover, the public rights approach determines the constitutional status of state actors' speech in a way that is consistent with government's First Amendment obligations. The institutional rights approach had the downfall of casting the net of constitutional protection for government speech broadly enough that it would protect even speech that degraded rather than enhanced the system of freedom of expression. The public rights theory would not permit this result. To illustrate, a public library that attempted to narrow its holdings in order to further the one-sided political views of its staff could not claim constitutional protection under this approach, because such conduct would diminish rather than enhance public debate.[185]

The drawback of public rights as a way of thinking about First Amendment protection for government speech is that it lacks the fit between the content of the speech and the identity of the speaker at issue that was provided by institutional rights. Imagine, for example, that a county is experiencing a severe public housing shortage, and that the Federal Department of Housing and Urban Development has sought to fine the county for expressing criticism of proposed federal solutions to the problem. One might imagine that under such circumstances, the speech (such as policy statements or press releases) or other expressive conduct (such as legislative resolutions in response to the crisis) could reasonably merit constitutional protection under the public-rights approach, provided that they were the kind of democracy-promoting speech that met the approach's substantive criterion. Yet the public-rights view would also extend constitutional protection to the speech of any other state actor who met this substantive criterion, creating a world in which the county coroner's office or even a city sanitation department from another state could not only weigh in on the

182 *See id.* (suggesting that a central criterion in First Amendment analysis should be whether the rules at issue ensure a greater diversity of viewpoints).

183 ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–28, 79–80 (1948); Magarian, *supra* note 161, at 1987–88.

184 *See supra* notes 150–51 and accompanying text (discussing similar formal congruence in the context of institutional rights).

185 *Cf.* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 857 (1982) (reviewing constitutionality of a school board's removal from a library of books that it regarded as "anti-American, anti-Christian, anti-Semitic, and just plain filthy").

housing shortage (as they might even in the absence of constitutional protection), but claim First Amendment protection for their speech on the topic. This lack of germaneness may not be regarded to be as equivalently fatal as the flaws of the derivative and institutional rights theories. After all, how likely is it that government entities would want to comment on a crisis that is unrelated to them? Nevertheless, it is difficult to imagine a warrant for extending constitutional protection to the speech of state actors regarding a topic that lies outside the scope of their substantive authority and about which they lack expertise. Thus the public rights approach too possesses some promise but is on its own inadequate.

IV. RETHINKING THE CONSTITUTIONAL STATUS OF GOVERNMENT SPEECH

A. *Synthesis: A New Framework for Analyzing Government Speech as a Subject of Constitutional Protection*

Government speaks, but its twin capacities to both enrich and imperil the system of freedom of expression, along with its coercive authority, make it unlike any other speaker. A completely theorized account of the constitutional status of government speech must take this duality into account. So far, this paper has reviewed a variety of approaches to thinking about government speech as an artifact of constitutional stature, only to conclude that they are all inadequate. Current precedent fails to provide a suitably rich analytical framework; text and history give some direction but cannot resolve the issue on their own; and even extant First Amendment theories that bear promise fail to provide a complete rubric for approaching this issue. Derivative rights fails conceptually because it proves impossible to determine the constitutional status of government speech by looking at its citizens' speech rights. Institutional rights sensibly delimits the scope of government speech protection by looking to the character and purpose of the speaker, but fails to provide any substantive limit on this speech. And public rights provides a substantive criterion—democracy promotion—for analyzing constitutional speech protection that aligns well with government's constitutional duties, but would extend such protection to an overly broad range of government speakers.

Mindful, though, of the promise of these latter two methods, I suggest an analytical framework for approaching government speech that draws from each of them (hereinafter "the proposed framework"). Whether the First Amendment protects government speech may be determined by looking to a pair of structural criteria. First, the government speaker must be institutionally well suited to engage in the speech in question. That is, where the expressive conduct at issue is so central to the identity and purpose of the public entity that to allow it to be overborne by the will of another sovereign would undermine the reason for allocating institutional discretion to

that speaker in the first instance, then constitutional status for that speech may be appropriate.[186] Criteria that illuminate this standard are the state speaker's original design, the scope of its institutional authority, and its substantive expertise. That is, the likelihood that a state actor is well suited to engage in a given instance of expressive conduct depends on the extent to which that expression is congruent with the original purpose for which it was created; falls within the ambit of its delegated or original authority; or represents a subject matter over which the speaker possesses distinctive expertise.[187]

Second, in order to merit constitutional status, government speech must also have the effect of furthering the values of democratic self-government that underlie the First Amendment. Government cannot engage in just any speech and expect the Constitution to come to its aid. In particular, the law must remain attuned to the possibility that state actors may abuse their constitutional speech prerogatives. Thus, in order to garner First Amendment status, state actors' speech must enhance public debate by, for example, publicizing an otherwise underrepresented point of view, enhancing access to information, or assuring that the marketplace of ideas is accessible to all speakers.[188]

The logic of this proposed framework is that each of its two parts possesses a shortcoming that is cured by the other. The public rights approach provides just the substantive limit on government speech that institutional rights lacks, while the institutional rights approach in turn delimits the kinds of state speakers who may state a claim to speech rights in a way that public rights cannot. The hybrid of institutional and public rights approaches, then, creates a rubric for analyzing whether state actors' speech merits constitutional protection that squares with both the function and character of government speakers. Looking at the speech of public entities through this prism acknowledges that constitutional protection for such speech must be more limited than the protection afforded that of individual speakers, just as government itself is a creature of limited powers in a democratic society. The proposed framework also sidesteps the problematic assumption that the

---

186 *See supra* Part III.B.2.

187 This discussion points to a related question: Would analysis using existing structural constitutional principles prove sufficient to protect states' speech prerogatives? At least in light of current doctrine, this seems unlikely. The revival of federalism that took place under the Rehnquist Court in the 1990s failed to result in a robust body of doctrine limiting federal action vis-à-vis states. *See* Thomas E. Castleton, *A Matter of Expectations: Interpreting the Statutory Preemption of Local Assistance to Federal Firearms Regulators*, 15 ALASKA L. REV. 345, 348 n.16 (1998) (noting lower federal courts' resistance to extending the "New Federalism" cases). This failure points to the more general problem that the Tenth Amendment's open-textured phrasing and distinctively political character is incapable of supporting a body of doctrine characterized by clear, predictive rules. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2257–58 (1998) (suggesting that the "fundamentally political character of federalism" warrants "limited aspirations" for "judicial enforcement of its limits on congressional power").

188 *See supra* Part III.B.3 (discussing the contours of the public rights approach in more detail).

expressive conduct of state actors must (or even can) be analyzed in terms of inapposite values like human autonomy, and instead evaluates the constitutional merit of government speech in terms of both the identity (institutional rights) and ideal aims (public rights) of state actors. And finally, using the proposed framework provides a means of identifying the risks that government speech may pose to public debate, and provides a dual means for hemming in such risks.

In order to demonstrate how the proposed framework would operate in practice, in the next section I apply it to three controversies in which the issue of speech rights for state actors has arisen. These three cases show when government speech would—and would not—enjoy constitutional status in light of the approach I have introduced, and how application of the proposed framework would change the analysis used and the results reached by previous courts.

B. Applying the Proposed Framework: Three Examples

1. United States v. American Library Association.—In 2001, the federal government passed the Children's Internet Protection Act (CIPA), a statute that granted funding to municipal libraries on the condition that the libraries use a particular filter on their Internet terminals.[189] The requirement affected not just computers paid for with federal funds, but any computers in the library, even those that had been acquired exclusively by the library.[190] The American Library Association ("ALA") thus argued that the statute was unconstitutional because it restricted the rights of its patrons to freely access information and because it impermissibly required public libraries to relinquish their freedom to select the material presented to their patrons in order to receive federal funds. The ALA's latter argument rested not only on the unconstitutional conditions doctrine,[191] but also on the proposition that the expressive conduct of public libraries (here, their freedom to select the material presented to their patrons) was of constitutional magnitude even though the rights claimant was a state actor.

The Supreme Court never reached this issue, instead resolving the case on the grounds that the restriction was constitutionally inoffensive, and therefore could violate no one's speech rights, private individual or public agency alike.[192] Justice Stevens, however (as we have seen above[193]),

---

[189] 20 U.S.C. § 9134(f) (2000).

[190] *See* 20 U.S.C. § 9134(f)(1)(A)(i) (2000); 47 U.S.C. § 254(h)(6)(B)(i), (C)(i) (2000).

[191] This doctrine has been subjected to substantial skepticism by both courts and commentators. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting) (referring to the doctrine as "suffer[ing] from notoriously inconsistent application"); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620 (1990). However, because the unconstitutional conditions doctrine is only tangential to the topic at hand, I need not go into its merits here.

[192] United States v. Am. Library Ass'n, 539 U.S. 194, 207–08 (2003).

briefly touched on it in his dissent, averring that public libraries' expressive conduct—at least in this instance—merited constitutional protection.[194] Although application of the proposed framework yields the same result reached by Justice Stevens, it provides a much richer explanation of why this is the right result.

We begin by asking whether the institution seeking constitutional status for its speech (here, a municipal library) is well suited to engage in the expressive conduct at issue (the freedom to determine the content of material they present to their patrons). Certainly such an issue lies within the institutional design and authority of a public library; libraries are established in large part to exercise editorial discretion with respect to the material that is presented to their reading public. A local library also possesses the expertise to make judgments about what material should be presented to its patrons, both because it is presumably composed of individuals with education or at least experience in library work, and because it is closer to and thus more in tune with the tastes and needs of its local community (as opposed to the Federal Congress, whose members possess neither the same degree of training in library sciences nor any connection to the local communities at issue). It thus seems an easy call to say that local libraries are well suited (and certainly better suited than the federal government) to engage in the expressive conduct at issue.

We must next inquire whether the government speech here has the kind of beneficial effect on democratic discourse required to meet the public rights component of the proposed framework. The tension between the federal government's position and the ALA's again makes the answer clear. CIPA restricts access to information by filtering the content available at public Internet terminals. The discretion that the libraries sought would have expanded public access to information—and thus enriched democratic discourse—by providing a wider array of material to its patrons.[195]

Application of the proposed framework to ALA thus reveals that this is a straightforward case for extending constitutional protection to the state actors at issue. In seeking to exercise full discretion over the material they present to their patrons, the municipal libraries are acting well within the scope of their original design and expertise, and the expressive conduct for which they sought constitutional protection would positively affect public discourse by increasing the amount of information available to the reading public.

---

[193] *See supra* pp. 1645–46.

[194] *Am. Library Ass'n*, 539 U.S. at 235–39 (Stevens, J., dissenting).

[195] It is true that the filters the federal government sought to impose via CIPA were intended to filter only pornography, and thus might be regarded as preventing access to only low-value, harmful speech not worthy of constitutional protection. This characterization of the filters, though, ignores that the filters operated so broadly that they excluded not only "low-value" material like pornography, but also much other non-obscene material that would be fully protected by the First Amendment. *Id.* at 234–35 (Souter, J., dissenting).

2. Nadel v. Regents of the University of California.—The proposal of the Regents of the University of California to build volleyball courts on the site of Berkeley's "People's Park" (a public site the Regents jointly co-managed along with the City of Berkeley) prompted local residents to protest the development. As the protests became more disruptive, the Regents sought injunctive relief to stop the demonstrations, and with their application for a temporary restraining order issued a press release and other statements identifying Nadel (among others) as having engaged in violent and destructive conduct, prompting Nadel to sue for defamation.[196] At trial, the Regents argued that protest ringleader Nadel was a public figure, and thus needed to show "constitutional malice" (i.e., knowledge of falsity or reckless disregard for the truth) in order to prevail. Nadel failed to meet this high evidentiary bar, but on appeal argued that the trial court's application of the constitutionally inspired "actual malice" standard[197]—designed by the Supreme Court to protect the First Amendment interests of accused defamers[198]—was error because the Regents, as state actors, could not lay claim to constitutional speech rights.[199] The California Court of Appeals disagreed, pointing to the importance of government speech in the marketplace of ideas and concluding that because the goal of the First Amendment was to encourage an unfettered exchange of ideas, the identity of speakers was irrelevant.[200]

Application of the proposed framework reveals a more complicated case than the *Nadel* Court acknowledged. In terms of the institutional rights component of the framework, it is not at all clear that the speech at issue—public comments on an off-campus demonstration—lay at the core of the U.C. Regents' institutional role. To be sure, the Regents possessed administrative authority over People's Park due to a peculiarity of local law that made them co-managers of the property, and the volleyball court proposal had erupted into a major local issue that involved the Regents in that capacity. Yet in comparison to, for example, the discretion to determine the content of a student body that the Court granted constitutional status in *Bakke*,[201] the Regents' public comment on the People's Park demonstration seems difficult to characterize as a constitutive element of their mission as an educational institution.[202]

---

196 Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 189 (Cal. Ct. App. 1994).

197 The standard requires that public figure plaintiffs in defamation suits must show that the defendant acted with "knowing or reckless disregard" of the statement's falsity, and must make this showing with evidence of "convincing clarity." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80, 285–86 (1964).

198 *See id.* at 282 (referring to the privileges of "the citizen-critic of government").

199 *Nadel*, 34 Cal. Rptr. 2d at 191.

200 *Id.* at 196–97.

201 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J.).

202 Whether the Regents had any "expertise" concerning the issue seems less relevant in this case. The purported defamation was based on several press releases and related statements that characterized

The public rights component of the proposed framework further illustrates the difficulty of this issue. Can the U.C. Regents' statements characterizing the People's Park protesters be characterized as enriching discourse on the issue? Perhaps. The statements contributed to public dialogue in the sense that they presented the Regents' side of things, explaining their opinion that the protesters did not represent the views of all Berkeley residents, and that the protesters' tactics had grown so violent and rancorous that they destroyed any chance for a reasonable, productive discussion on the issue.[203] On the other hand, the Regents' statements might be construed as suppressing public dialogue regarding the People's Park volleyball courts. They were, after all, issued along with an attempt to seek state-sanctioned quiescence of public demonstrations, which seems—however violent the protests may have been—a classically speech-suppressive action, and one that could also have the effect of deterring future protests. Nor is it clear that the Regents, as a state actor, would feel deterred from expressing their opinion if the constitutional malice standard were not available to them. Unlike the reporters the standard was designed to protect, the individuals issuing statements on behalf of the Regents need not be concerned with personal liability.

Analyzing *Nadel* in light of the proposed framework does not provide a clear resolution to this hard case, but suggests that, in contrast to the result reached by the California Court of Appeals, application of the First Amendment-based constitutional malice standard to the speech of the U.C. Regents would likely be inappropriate. The Regents' statements do not represent an exercise of authority that lies at the heart of a public university's mission, and while the statements may have enriched public debate in some ways, they detracted from it in other ways as well. At the very least, the proposed framework reveals that *Nadel* is a much harder case than the court's opinion made it seem.

3. Environmental Defense Center v. EPA.—In 1999, the U.S. Environmental Protection Agency passed regulations designed to control the ecological problems raised by storm water drainage. The regulations required, among other things, that municipal providers of storm water drainage systems educate their citizens about the environmental dangers of storm

---

Nadel and other demonstrators as "violent." *Nadel*, 34 Cal. Rptr. 2d at 190–91. These statements were not made in the Regents' capacity as university administrators but rather in support of their actions to stop the protests surrounding the volleyball developments at People's Park.

[203] *See Nadel*, 34 Cal. Rptr. 2d at 91 ("During the past several months, a small group of individuals has maliciously endangered public safety through continuing acts of violence intended to destroy University property and injure or intimidate people who use University facilities. . . . This small band of individuals, dissatisfied with the current plans for People's Park, are using fear and violence in an attempt to impose their will on the community. . . . The University believes that the imposition of legal sanctions against these parties will help to diminish the threat posed by tactics of intimidation, and will protect not only the safety of the public, but perhaps more importantly, the rights of *all* the people." (quoting public statement of Daniel Boggan, Jr., Vice-Chancellor of the University of California)).

water drainage and the hazards of improper waste disposal.[204] A group of municipalities sought review of the regulations on a number of grounds that included a claim that the regulations violated their First Amendment rights by compelling them to communicate political messages that they might not otherwise have wished to deliver.[205] The court put aside the question whether municipalities could assert constitutional speech rights.[206] The court instead rejected the Speech Clause claim on the ground that requiring municipalities to disseminate information regarding a particular topic was not commensurate to compelling them to disseminate a particular ideological message, and was therefore constitutionally unobjectionable.[207]

Though the court did not attempt to resolve the constitutional status of state speech, *Environmental Defense Center* ("*EDC*") nevertheless raises an interesting case for application of the proposed framework. Before looking at the case from an institutional rights perspective, it is first important to identify the expressive conduct at issue. The municipalities raised a compelled-speech claim, objecting to the EPA regulation's requiring them to speak about the risks of storm water drainage and improper waste disposal. The institutional rights analysis thus revolves around the municipalities' discretion *not* to inform their citizens about these issues.[208] Is this discretion intrinsic to the institutional identity of municipal providers of storm water drainage systems? This is a close question, but the answer is likely yes. These municipal agencies possess the authority to inform (and thus the discretion not to inform) their citizens about any subject matter within the scope of their governance—including, where relevant, drainage issues. Engaging (or not engaging) in such educational campaigns seems a necessary incident of their institutional role as administrators of local drainage systems. And, like municipal libraries, the individual drainage system providers likely have superior expertise regarding the exercise of this discretion. Their familiarity with the local community provides them with a better sense than the federal government of whether this kind of education is necessary. In a city or county where storm water drainage presents no significant environmental risks, or where the population is already sufficiently

---

[204] 40 C.F.R. § 122.34(b) (2005).

[205] Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848–51 (9th Cir. 2003).

[206] *Id.* at 849 n.23.

[207] *Id.* at 849–50.

[208] Can a negative choice like this be regarded as speech at all? In *Rumsfeld v. FAIR*, the Supreme Court held that law schools' choice not to extend equal status to military recruiters simply did not count as speech. 126 S. Ct. 1297, 1307 (2006) (holding that a statute requiring universities to provide access to military recruiters did not infringe speech rights because it "neither limits what . . . schools may say nor requires them to say anything"). The Court's rationale was that the underlying act that the law regulated—professional recruiting—was conduct, not speech. *Id.* In *EDC*, by contrast, the cities had a better claim because the regulations they challenged burdened an act that seems to be speech rather than conduct—their communication with their citizens on a matter of public importance. *See* 344 F.3d at 848–49.

well-informed regarding that subject matter, municipal funds spent on education would likely be redundant—a judgment the EPA's blanket regulation failed to make.

Despite this, however, the municipalities' claim in *EDC* probably does not warrant constitutional protection, and the public rights element of the proposed framework illustrates why. The EPA's storm water regulations would have ensured a public understanding of environmental issues by providing education about the dangers of storm water drainage and the risks of improper waste disposal. Indeed, the educational portion of the regulation was passed because the public remains sorely underinformed on these issues. The regulations, then, aimed to correct a disparity in the marketplace of ideas by publicizing an inadequately publicized point of view. The right that the municipalities sought to exercise, by contrast, would have had precisely the opposite effect. Refusal to engage in education on this topic would have permitted this disparity in the marketplace of ideas to remain, thereby reducing the instances in which crucial information was available to the public and thus impoverishing public debate on this issue. The public rights element of the proposed framework requires that asserted instances of government speech expand, not constrict, the scope of information available to the public. In particular, that government speech must correct—not perpetuate—disparities in the system of freedom of expression. So just as the public rights view favored the libraries' attempt to increase access to information in *ALA*, it disfavors the municipalities' attempt to decrease access to information in *EDC*.

Neither as easy a case as *ALA* nor as difficult as *Nadel*, *EDC* illustrates that the standard set by the proposed framework is stringent. It is not enough to show that the public entity is well suited to engage in the government speech at issue. This conjunctive framework will contemplate constitutional protection only for government speech that has a salutary effect on public discourse as well.

CONCLUSION

The inexorable growth of government speech in American public life[209] has led to two primary scholarly reactions: concern about whether the First Amendment may be deployed as a limitation on government speech,[210] and debate about what constitutes government speech in the first instance.[211]

[209] *See* Bezanson & Buss, *supra* note 3, at 1380.

[210] *See* sources cited *supra* note 10.

[211] The frequency with which the Supreme Court has visited the issue illustrates the point. *See* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055, 2062–65 (2005) (holding that requiring fruit growers to subsidize government-created advertisements did not violate growers' First Amendment rights because the ads were government speech, not growers' speech); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469–70 (1997) (reaching same result in context of government ads subsidized by fruit growers); United States v. United Foods, Inc., 533 U.S. 405, 411–17 (2001) (holding that requiring mushroom growers to subsidize government advertisements did violate First Amendment because it

Yet the focus on these issues has left unaddressed some problems raised by government speech.[212] In this Article, I have attempted to address this gap in the judicial and academic literature by thinking about whether the Speech Clause can serve as a source of protection for government speech.

This issue arises in an increasing number and intriguing variety of cases. Courts must consider the constitutional status of government speech when the federal government attempts to restrict the speech of another sovereign either by legislation (as in *ALA*)[213] or agency regulation (as in *EDC*).[214] This issue also arises outside the intersovereign context. Whether state speakers are an object of First Amendment protection comes up in the context of general constitutional inquiries, such as the Court's discussion of public universities' discretion to determine the composition of their student bodies;[215] common law defenses designed to protect constitutional interests, such as the constitutional malice standard;[216] and statutes designed to safeguard free speech rights, such as California's anti-SLAPP law.[217] Each of these instances has called upon courts to consider whether the First Amendment protects government speech, and the response has been a conflicting and conflicted body of precedent.

Pending controversies suggest that this issue will continue to arise. The Supreme Court recently upheld Department of Defense regulations that

---

impermissibly compelled growers to express a particular message with which they may not have agreed).

This aspect of the issue has interesting implications for my topic as well. Although some forms of government conduct—e.g., a legislative resolution—are exclusively expressive in character, others present harder cases. Does the expressive component of any legislative act make it a speech act? I have, in the interest of economy, chosen not to address the issue in detail here, but I do not think it would present major difficulties in thinking about constitutional protection for government speech. Even though all human conduct has a communicative element, courts have managed to distinguish ordinary conduct from conduct that communicates. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968). The same kind of inquiry could likely be adapted to government speakers.

212 Another interesting valence of the issue is to what extent the First Amendment rights of government workers protects them from being terminated based on their speech. *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006). I have chosen, however, not to address the implications of this issue here, primarily because I want the focus of this paper to remain on government institutions as collective speakers rather than individual speakers as representatives whose speech counts as that of the government.

213 United States v. Am. Library Ass'n, 539 U.S. 194, 239 (2003) (Stevens, J., dissenting).

214 Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848–51 (9th Cir. 2003).

215 Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

216 Nizam-Aldine v. City of Oakland, 54 Cal. Rptr. 2d 781, 788 (Cal. Ct. App. 1996) (permitting government speaker to take advantage of constitutional defamation defense and noting "government's legitimate role in the interchange of ideas"); Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 197 (Cal. Ct. App. 1994).

217 *See* Schroeder v. Irvine City Council, 118 Cal. Rptr. 2d 330, 337 n.3 (Cal. Ct. App. 2002); Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 77 Cal. Rptr. 2d 1, 9–12 (Cal. Ct. App. 1998), *overruled on other grounds by* Briggs v. Eden Council for Hope & Opportunity, 81 Cal. Rptr. 2d 471 (1999); Bradbury v. Superior Court, 57 Cal. Rptr. 2d 207, 212 (Cal. Ct. App. 1997).

require universities to admit military recruiters as a precondition for receiving federal funding.[218] Although the Court did not explicitly address the issue of state actors' First Amendment rights, its decision proceeded on the premise that both public and private universities possess constitutional speech rights. Also, a recent federal funding appropriation to the District of Columbia was conditioned on the District's not using the funds to protest its lack of representation in the federal congress.[219] And a 2004 proposal by the Berkeley Peace and Justice Commission sought to strip all organizational speakers—including, presumably, state actors such as the Commission itself—of First Amendment rights.[220]

The primary goal of this Article is doctrinal. I have sought to illustrate the current murkiness of the law on this topic and to provide a framework for thinking about this issue that determines the constitutional status of government expression. This framework looks to both the institutional character and the substantive content of that speech and is thus carefully adapted to government's distinctive dual role as both peril to and participant in the system of freedom of expression. Yet the implications of this discussion extend beyond the boundaries of doctrine in several ways.

First, this discussion may be seen as analogous to some of the Supreme Court's "new federalism" cases. In *New York v. United States*, the Court invalidated a federal law requiring that state governments "take title" to radioactive waste produced within their borders.[221] In *Printz v. United States*, the Court invalidated a federal law requiring the chief law enforcement officers of local governments to conduct background checks on handgun purchasers.[222] Each of these cases relied on the Tenth Amendment for their conclusions that the federal government could not "commandeer" state legislatures or state executives. While courts have yet to fully delineate the doctrinal implications of these cases,[223] they appear to represent an approach to federalism that demarcates inviolable spheres of state autonomy in terms of state government functions rather than by looking at the particular subject matter governed by the law at issue. This Article points to a third kind of state government function that may be regarded as off-limits to federal

218 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1306–07 (2006).

219 Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 407, 118 Stat. 3 (2004) (conditioning its funding to the District under the Home Rule Act on the District's not using the funds for "publicity or propaganda" or lobbying for "statehood for the District of Columbia or voting representation in Congress for the District of Columbia").

220 Proposed Resolution of the Peace and Justice Council of City of Berkeley, California (June 15, 2004), *available at* http://www.ci.berkeley.ca.us/citycouncil/2004citycouncil/packet/061504/2004-06-15%20Item%2027a.pdf; *see also* Eugene Volokh, Does the City of Berkeley, and the Peace and Justice Commission, Have the Right to Free Speech? (June 14, 2004), http://volokh.com/archives/archive_2004_06_13-2004_06_19.shtml#1087256227 (commenting on the resolution).

221 505 U.S. 144, 173 (1992).

222 521 U.S. 898, 922 (1997).

223 *See* Jackson, *supra* note 187, at 2205–13 (discussing open questions left by *Printz*).

commandeering. That is, just as states cannot be forced to use their executive or legislative branches to suit federal ends, neither should they be forced to use their expressive capacities to act as ventriloquists for the U.S. government's viewpoint. Although states have not used their communicative abilities to check the federal government in the robust way that the framers intended,[224] they have taken a more modest role in this respect, using legislative resolutions to urge[225] and to criticize[226] federal action. And as the very notion of federalism grows increasingly hazy and is often assailed as an anachronism,[227] the expressive capacities of state and local governments may become a particularly important way for these entities to assert their institutional identities and opinions vis-à-vis the federal government.[228]

Second, just as this Article lies at the intersection of speech and federalism, it also lies at the nexus of speech and legal status. The Speech Clause itself may be object-neutral, but our First Amendment jurisprudence is nevertheless premised on implicit status distinctions among various speakers. The present approach divides access to the First Amendment along public versus private lines. Courts presumptively deny constitutional protection to the speech of public speakers, whether federal, state, or local, but presumptively extend constitutional protection to the speech of private actors, including both natural persons and private corporations. The assumption that all private speakers should be treated equally for constitutional purposes has produced an awkward doctrine, one that is shot through with both conceptual and doctrinal problems as courts have struggled to treat these two fundamentally different kinds of actors as similar for First Amendment purposes.[229]

---

224 *See supra* Part II.B.2 (discussing the framers' original hope that states would serve as vigilant guardians of the federal system, particularly through the use of state speech).

225 *See* Cook v. Gralike, 531 U.S. 510, 529 (2001) (Kennedy, J., concurring) ("[I]t must be noted that when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action. . . . From the earliest days of our Republic to the present time, States have done so in the context of federal legislation."); *see also* 2000 Ala. Laws 66 (requesting targeted relief for Medicare cuts); 2000 Kan. Sess. Laws ch. 186 (urging Congress to allow state-inspected meat to be shipped in interstate commerce); 22 ANNALS OF CONG. 153–54 (1811) (reprinting a resolution by the General Assembly of the Commonwealth of Pennsylvania requesting that the charter of the Bank of the United States not be renewed).

226 *See* Vermont Continues the Trend: Becomes Third State to Speak Out Against Federal Abuses Under USA PATRIOT Act, http://www.aclu.org/safefree/patriot/17230prs20030529.html (noting that 117 state and local governments passed resolutions critical of the implications of the USA PATRIOT Act on civil liberties) (last visited Feb. 26, 2004).

227 Rubin & Feeley, *supra* note 138, at 933.

228 Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1325 (2000) (discussing the importance of the communicative capacities of state and local governments).

229 An expressive association—composed of members who would likely not have joined it except to further the association's political agenda—can more credibly argue that its speech reflects that of its individual members than can a private corporation, whose shareholders share a financial, but not neces-

Yet the fact that courts have attempted to distinguish between different speakers is unobjectionable. After all, status distinctions—adult versus minor, individual versus organization, American versus non-citizen—are common and necessary in legal analysis. The concern is not that status distinctions exist at all in the background of First Amendment analysis, but rather that the wrong distinctions have been invested with constitutional significance.[230] Rather than looking to the public versus private distinction as the baseline inquiry in First Amendment cases, courts would do better to begin by dividing speakers on the basis of their status as individuals or collective entities. Individual speech lies closer to the heart of the First Amendment, and is animated by concerns for personal autonomy as well as for enhancing the system of freedom of expression. Institutional speakers like private corporations and government entities have much more in common with one another than they do with individuals, at least insofar as speech is concerned. One feature they share is a tenuous relationship with the expression of their constituent members,[231] which suggests that their speech can be better understood in relation to the First Amendment's systemic aims. This does not mean, however, that the speech of all organizations should be treated equally for constitutional purposes. Rather, courts should look to the distinctive features of an institution to determine whether its speech merits Speech Clause protection. For instance, expressive associations, which exist to make a certain political point, may have a better case for meriting constitutional protection than business corporations, which exist primarily to put dollars in their shareholders' pockets.[232] Approaching status along an individual versus organization rather than public versus private axis, then, would open up the possibility of an "institution-specific First Amendment"[233] that closely scrutinizes an organization's social role in determining the constitutional status of its speech, rather than resolving this question by quick reference to inapposite categories. The rubric that I have suggested for analyzing the constitutional status of government speech in this Article provides one example of how such an institution-specific approach could work.

---

sarily a political, interest. *See generally* Greenwood, *supra* note 64 (critiquing the extension of speech rights to corporations on the theory that artificial persons and natural persons are similar).

[230] *See* Horwitz, *supra* note 52, at 566 (arguing that current First Amendment doctrine "carries the risk that the Court, in attempting to shape actual disputes to fit the Procrustean bed of content neutrality or other generally applicable rules, will often miss the facts and policies that counsel different approaches in different cases").

[231] Greenwood, *supra* note 64, at 1034–40 (pointing out disjunction between a corporation's actions and individual shareholder beliefs).

[232] *See id.*; *see also* Dan-Cohen, *supra* note 127, at 1244 (suggesting that expressive organizations may present an exception to the general rule that "no organization enjoys active original speech rights designed to protect individual self-expression").

[233] Schauer, *supra* note 148, at 111 (discussing possibility of an "institution-specific" First Amendment). *See generally* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

Finally, this Article points to a problem that pervades much of the judicial and academic literature on government speech. As my review of cases addressing the constitutional status of state actors' speech illustrates,[234] approaches to this issue tend to fall on one or another end of an all-or-nothing dichotomy. Cases relying on the *CBS* principle presume that government can function only as an antagonist in the system of the freedom of expression,[235] and commentators have contributed to this view with pessimistic depictions of government speech as a grave threat to American democracy.[236] Other cases take an equally one-sided view of government's ability to contribute to the marketplace of ideas in extending its speech constitutional protection,[237] and another strain of scholarship supports these cases with an approach that looks to government as an innocuous regulator of and contributor to public debate,[238] without taking sufficient account of the risks that government can pose to that discourse. In my view, each of these approaches fails to acknowledge that government speech is neither a pure threat nor an unequivocal good, but rather a Janus-like phenomenon with the capacity to be either antidemocratic peril to or beneficial participant in the system of freedom of expression. In light of its increasing presence in the American polity, it thus becomes ever more important to think about government speech not in categorical terms but rather—as I have attempted to do here—in a manner that matches its distinctive duality.

---

234 *See supra* Part I.

235 *E.g.*, Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1037 (5th Cir. 1982) (en banc) (stating that "[g]overnment expression" is "unprotected by the First Amendment").

236 *See generally*, *e.g.*, YUDOF, *supra* note 10.

237 *See, e.g.*, County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1389 (E.D.N.Y. 1989); Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 197 (Cal. Ct. App. 1994).

238 *See generally*, *e.g.*, FISS, *supra* note 180; Fiss, *supra* note 113.