When Governments Speak: Toward a Theory of Government Expression and the First Amendment

Mark G. Yudof*

Despite the immense practical importance of government expression in modern communications networks, legal scholarship has only begun to address the role of government speech within the framework of the first amendment. Governments at all levels possess considerable power to inform and lead the polity and thus to contribute to the development of a democratic consensus. But that same power is potentially destructive of the citizenry's independence of judgment and may threaten the processes of democratic consent. Professor Yudof examines this dual nature of government speech and suggests the proper role for legitimate concerns about excessive government expression within the context of first amendment analysis.

Table of Contents

I. Government Speech and the First Amendment Framework
   A. First Amendment Rights for Governments ..................... 865
   B. Government Speech: Direct and Indirect Limitations in the First Amendment Framework ...................... 871

II. The Traditional Vindication of Individual First Amendment Rights: An Indirect Limitation on Government Speech ... 873
   A. The First Amendment and Captive Audiences in Public Schools ............................................. 874
   I. The School Prayer Cases ............................................. 875

* John S. Redditt Professor of Law and Associate Dean for Academic Affairs, The University of Texas. B.A. 1965, LL.B. 1968, University of Pennsylvania. The research for this Article was funded through grants from the Spencer Foundation, the Ford Foundation, and the University of Texas Law School Foundation. The author wishes to thank the following persons for their many helpful criticisms and suggestions: Professors David Anderson, Philip Bobbitt, David Kirp, Sanford Levinson, Robert Means, Robert Mnookin, Scot Powe, William Powers, George Schatzki, and Laurence Tribe. I am particularly grateful to Professor David Filvaroff for his close reading of this paper and his countless suggestions for improvement. Professor Roy Mersky and his staff at the Tarlton Law Library at the University of Texas School of Law were immensely helpful in obtaining research materials. My research assistants, Danna Fischer, Douglas Gordon, David Jameson, and Olin McGill did yeoman's service in assisting my efforts. This Article is excerpted from the manuscript of a forthcoming book, M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (manuscript at the University of Texas School of Law).
Over the past few years, public attention has increasingly focused on the power of government officials and entities at all levels to communicate and thus to assist in shaping public opinion. Institutions such as schools, prisons, hospitals, and military installations serve legitimate governmental purposes, yet they possess a considerable capability to shape the attitudes and beliefs of those they serve. Government secrecy may make informed debate impossible, and thus may itself be thought of as a powerful mode of public communication. Yet legal scholarship has largely ignored the ramifications of government speech. Students of the Constitution debate endlessly over whether Nazis may march in a Jewish neighborhood, but virtually ignore the march of government, an immensely more powerful communicator than a small group of malcontents. One looks in vain beyond the brief comments of the great first amendment theorists, Chafee and Emerson, and a recent book by Joseph Tussman, for a sustained and coher-

5. J. Tussman, Government and the Mind (1977). The scope of Professor Tussman's work is considerably broader than an analysis of government communication in the framework of the system of freedom of expression. See also L. Tribe, American Constitutional Law
ent treatment of the impact of government communications on the theory and practice of free expression. Recognition of the dangers inherent in government communications calls for theories and concepts of speech in a liberal democracy that reach beyond government regulation of private speech to governments’ own involvement in modern communications networks. This Article, intended to be suggestive and tentative, is concerned with the creation of a framework for scholarly discussion of the role of governments as participants in “the system of freedom of expression.”

Part I places government speech in perspective in the first amendment framework, arguing against the creation of first amendment rights for governments, while recognizing that legitimate concerns about excessive government expression call for direct and indirect constitutional limitations on government speech. Part II proposes that these concerns should inform traditional first amendment decisions that indirectly limit government speech. Part III examines the legitimacy and feasibility of direct attacks on government messages and communications programs, and suggests that an ultra vires approach to government expression is particularly appropriate.

I. Government Speech and the First Amendment Framework

A. First Amendment Rights for Governments

Government expression is critical to the operation of a democratic polity, but the power of governments to communicate is also the power to destroy the underpinnings of government by consent. The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime. Like coercion, persuasion can be employed for many different purposes, some more acceptable than others. The paradoxical nature of government speech complicates its treatment within a first amendment framework. Emphasizing the


6. I will develop the reasons for concern about government expression more thoroughly in a forthcoming book entitled When Government Speaks: Politics, Law, and Government Expression in America (manuscript at The University of Texas School of Law). The book expands and in some instances modifies many of the ideas tentatively developed in this Article.

7. See generally T. Emerson, supra note 4, ch. I.

8. See text accompanying notes 188-203 infra. The phrase “ultra vires” has its origins in corporate law: an ultra vires act is one outside the scope of the powers conferred by the legislature. See generally A. Conrad, CORPORATIONS IN PERSPECTIVE § 17 (1976). Part III suggests courts should look to the legislature for guidance in determining whether a particular type of government expression should be proscribed, and should declare offensive communications ultra vires absent explicit legislative authorization.
affirmative side of government communication, one might argue that
government speech is entitled to the same protection as the expression
of private persons and organizations. Perhaps the recent holding in
First National Bank v. Bellottit should be expanded to include munici-
pal corporations and other government entities as well as private cor-
porations.10 Although they do not serve individual values of self-
expression and dignity, the communications emanating from such insti-
tutions do provide information necessary to the exercise of the citi-
zenry's judgment about political issues and candidates.

Additional considerations support the recognition of first amend-
ment rights for government. Government speech can amplify the
voices of individuals attempting to participate in debates dominated by
the press, corporations, and other large, organized interest groups. In a
sense, Supreme Court decisions on the right of association to conduct
first amendment-protected activities provide a parallel.11 Government
speech may also provide a necessary check on the power of corpora-
tions, with their tremendous resources, to dominate the communica-
tions networks, a power enhanced by the Bellotti decision. If the first
amendment were construed to protect government expression, presum-
ably those who would curtail government speech would bear the bur-
den of demonstrating some overwhelming necessity to do so, and such
limits would be upheld infrequently.13 This model comports not only

Laws Ann. ch. 55, § 8, that prohibited corporate advocacy for the purpose of influencing a refer-
endum vote unless the issue materially affected the property, business, or assets of the corporation.
In City of Boston, the city, its mayor, and several elected officials applied to Justice Brennan, as
Circuit Justice, to stay a judgment of the Supreme Judicial Court of Massachusetts enjoining the
applicants from expending city funds in support of a referendum proposed on the ballot of an
upcoming general election. Justice Brennan granted the application and issued a stay order, 439
U.S. 1389 (1978) (Brennan, Circuit Justice); the Court subsequently, and without opinion, denied
a motion to vacate Justice Brennan's stay order, 439 U.S. 951 (1978). Appealing from the decision
of the Supreme Judicial Court of Massachusetts, Professor Tribe emphasized the similarity in
content and context of the municipal advocacy in City of Boston and the corporate speech in
appeal was nonetheless dismissed for want of a substantial federal question. City of Boston v.
11. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Thomas v. Collins, 323
granting application for stay of mandate of the Massachusetts Supreme Judicial Court); First
13. This situation is the reverse of that found in traditional first amendment cases. Usually it
is the government that must justify under strict constitutional standards the restraint it wishes to
impose on speech. When government speech is in issue, this burden of justification is placed on
the individuals challenging the speech.
with the notion that government communication is legitimate and serves important democratic functions, but also with the idea that excessive government speech is difficult to identify and even more difficult to remedy.

However, the considerations favoring the constitutionalization of a government right to speak are neither persuasive nor attractive. The historic purpose of the first amendment has been to limit government, not to serve as a source of government rights.\(^4\) The Supreme Court has similarly limited other constitutional rights to private individuals and groups.\(^5\) Nor does the beguiling symmetry apparent in the notion of treating government entities as the constitutional equivalents of private corporations find much support in constitutional decisions.\(^6\) This treatment correctly responds to the problem of government speech. Although I have no precise calculus for divining such things, my sense is that government expression threatens the system of communications more than corporate or union expression.\(^7\) The extension of first amendment rights to private institutional entities should not require a constitutionalization of government expression to counter the resulting "distortion" of free speech. Governments, particularly the federal government, are not fledgling communicators in need of protection from the community's excesses. There may be policy reasons to protect gov-

14. See generally Van Alstyne, supra note 5, at 530-36; id. at 531 ("'The problem of freedom of speech in the constitutional sense simply does not arise when the government itself is doing the speaking.'") (quoting J. WHITTON & A. LARSON, PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS 242 (1964)).

15. "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933). See, e.g., City of Boston v. Anderson, 439 U.S. 951 (1978) (Stevens, J., dissenting from order denying motion to vacate Mr. Justice Brennan's order to stay mandate); City of Trenton v. New Jersey, 262 U.S. 182 (1923); New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891) (a city cannot assert rights under the contract clause against the state); City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976) (a city is not a "person" under the Civil Rights Act).

Nor can a municipality assert constitutional rights against the federal government. South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966), held that a state could not raise a due process claim against the federal government. Since a city is but an arm of the state it follows that a municipality cannot raise this type of claim either. But see Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973) (claiming in dicta that Katzenbach left open the question of whether cities may for some purposes be "persons" entitled to protection under the fifth amendment).

However, municipalities have been allowed to assert equal protection, due process, and privacy rights in some very restricted circumstances: when the city is acting in a proprietary capacity, Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N.E. 695 (1893); when the city is asserting the rights of its citizens rather than its own constitutional rights, Town of Huntington v. New York State Drug Abuse Control Comm'n, 84 Misc. 2d 138, 373 N.Y.S.2d 728 (Sup. Ct. 1975); or when the city is raising the constitutional claim against another state, Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968).

16. See note 15 supra.

17. See 2 Z. CHAFEE, supra note 3, at 732-34; T. EMERSON, supra note 4, at 712-16. But see C. LINDBLOM, supra note 12.
ernment speech for the good of all, but it is inconceivable that governments may assert first amendment rights against the interests of the larger community.\textsuperscript{18}

Constitutional protection for government speech might be premised not on the rights of government as a speaker, but on the right of the public to receive information, to be informed, "to know," in the modern jargon.\textsuperscript{19} In \textit{Bellotti} the Court asserted that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."\textsuperscript{20} The Supreme Court has recognized the right of nonprisoners to receive uncensored mail\textsuperscript{21} and the right of consumers to be informed through advertising,\textsuperscript{22} but the right to know may be little more than artistic camouflage to protect the interests of the willing speaker. In any event, it may be that governments must be permitted extensive communications powers to preserve the right of the public to be informed. The government is sometimes uniquely situated to acquire and disseminate particular information, and in some cases government may be the only actor with the willingness and the resources to present a particular side of a public issue.

\textsuperscript{18} A rights approach to government speech also presents serious definitional problems. If a congressional committee writes a report and votes to publish it, and the entire membership of the House of Representatives votes not to make the report public, is this a "prior restraint" giving rise to a first amendment claim? And what if the President orders a cabinet member not to appear on a television show or not to release a documentary film? The difficulty is that all government decisions entail hierarchies of authority, and it seems inconceivable that the commands of those at the top—at least when official government communications are concerned—should be countermanded by the courts on first amendment grounds, absent compelling circumstances. A rights approach may be appealing if one branch of government were to forbid another branch to engage in communication activities, or if the federal government were to forbid state or local governments from engaging in certain sorts of expression. A separation of powers or federalism approach, however, would provide a more appropriate remedy than a distortion of the first amendment. \textit{See}, \textit{e.g.}, \textit{National League of Cities v. U.Sery}, 426 U.S. 833 (1976) (the federal government's attempt to include state employees within the Fair Labor Standards Act conflicted with the tenth amendment and principles of federalism).


\textsuperscript{20} 435 U.S. at 777.


When Governments Speak

The majority, as represented by its elected officials, has a right to speak.

This conclusion makes sense as a matter of policy, but it does not dispose of the more difficult constitutional question. The Court has noted the importance of public expenditures to "facilitate and enlarge public discussion," and this concern may have been a critical factor in the demonstrated judicial reluctance to interfere with such speech. Conversely, when government declines to reveal information vital to the formation of intelligent political judgments by citizens, a constitutional or statutory right to know may be decisive in the absence of compelling reasons to withhold the information. But these implications of a public right to know do not justify a constitutional right for governments to engage in extensive communications activities. The right to know formulation simply obfuscates the analysis of how and why governments should have rights against the community under a first amendment adopted to limit government power. Perhaps a stronger case exists for local governments, which are less menacing communicators than vast federal agencies. Their voices would be only a few among the many, and would be unlikely to drown out other centers of communication. Local governments generally raise a large proportion of their revenues from local taxes and often possess broad powers under home rule charters or similar statutory devices. They have a strong, independent stake in legislative decisions and in voter approval or disapproval of state constitutional amendments, bond issues, and referendums. Thus, local governments naturally seek to influence these decisions by resorting to legislative lobbying or public advertising to persuade or inform the public about the most advantageous outcome of the political processes. Indeed, many states specifically allow lobbying activities by local governments. But the constitutional question is whether a state law, as interpreted by the judiciary of that state, is unconstitutional if it forbids municipalities from devoting local or state resources to public relations and advertising activities.

24. Professor Emerson has suggested that "[t]he most potentially significant application of the right to know lies in the area of obtaining information [from governmental sources]." Emerson, supra note 19, at 14.
27. See Anderson v. City of Boston, — Mass. —, 380 N.E.2d 628 (1978), appeal dismissed, 439 U.S. 1060 (1979) (want of substantial federal question). The most common type of judicially imposed ban relates to government-sponsored speech during the pendency of an election or referendum. California, though, expressly permits some government-sponsored communications on
Despite the peculiar characteristics of local governments, courts should not extend constitutional protection to their expression under the guise of the first amendment rights of listeners. Judges would be forced to manipulate slippery distinctions between government speech that monopolizes a segment of the communications network or distorts the political processes and speech that does not. Moreover, if the expression of local governments is protected, federal and state expression, or local speech of a more dangerous nature, may also be protected. Finally, because of the inherent danger in certain forms of government speech, self-imposed limitations on government communication activities should be upheld. While differences in degree may exist, local governments are as much creatures of the state as federal administrative agencies are creatures of Congress. They should be subject to the same hierarchical controls.

Finally, there is no assurance that governments truly represent majorities in the absence of informed consent to governmental policies. A legislative ban on local government advertising and public relations activities is a reasonable prophylactic measure to insure that the processes of consent are not distorted, when the constitutionality of the ban and not the alleged unconstitutionality of the expression is at issue. In any given case municipal governments may express the views of public officials who are attempting to create a majority, rather than represent one, in pending policy debates. Perhaps this is also true when local government leaders present facts and opinions to the legislature, but legislatures need not ban all communications rather than only those they deem most harmful.

Legislators may view lobbying by municipal officials and employees more as an assertion of the latter's private rights of expression than as official government communication. This may be the strongest argument against constitutionalizing a right of government expression, the referendum ballot itself. California's Election Code provides for ballot arguments concerning any city, county, district, or state proposal to be placed on the sample ballot and mailed to the voters. This form of government speech is not necessarily objectionable given its informational nature and the "equal time" provisions in the California Code. Arguments for and against the proposal are included in the ballot. In addition, citizen participation in submitting and writing the arguments is encouraged. Cal. Elec. Code §§ 3525-3567, 3570, 3578, 3714, 4015, 4015.5, 4018, 5012-5016, 5157, 5157.5 (West 1977 & Supp. 1979).

28. See note 17 supra.
29. See text accompanying notes 188-203 infra.
When Governments Speak

even at the local level. Public officials remain free to express themselves, their views may carry considerable weight in the political processes, and generally, they will have access to the mass media simply because their opinions are news. As long as the first amendment rights of these officials are preserved, one important point of view will continue to be expressed, and information about the policies under consideration will remain available to the electorate. To take the dangerous and unprincipled position that local governments are constitutionally entitled to allocate large sums of public monies to advertising campaigns in order to vindicate the citizens' interests in receiving information is simply unnecessary.

B. Government Speech: Direct and Indirect Limitations in the First Amendment Framework

A construction of the first amendment that affirmatively protects the rights of governments to speak would be a grave error. Legislative bodies are perhaps the most sensitive to the negative implications of government communication in a democratic society, and they should not be restrained in their efforts to limit the communications powers of government by a tortured judicial reading of the first amendment. On the other hand, the collective interest in government participation in communications networks, the difficulties in isolating a category of unconstitutional government expression and in formulating rules of general application, and the problem of separating official government expression from the private expression of government officials, argue strongly for great caution in creating first amendment rights to restrain the voices of governments.

How, then, should courts account for the added dimension of government participation in communications networks within the first amendment framework? Broadly speaking, two types of cases may raise concerns about government speech. First, a litigant may directly attack a government message or communications program by alleging, for example, that the speech distorts the intelligence functions of citizens, advocates undemocratic or unconstitutional values, violates the litigant's right as a citizen not to pay taxes in support of expression that he or she finds objectionable, or drowns out opposing messages by virtue of the government's ability to capture the litigant as a member of the listening audience. Usually, the government communication would

31. See text accompanying notes 188-203 infra.
32. See text accompanying notes 128-60 infra.
not uniquely injure the litigant. Instead, the individual would attempt to vindicate the interest of all citizens in maintaining a pluralistic marketplace of ideas, in ensuring that government does not rule by manipulating public consent and judgment, in protecting the integrity of the electoral process, and in preventing government from spending money unconstitutionally. The litigant would draw on background constitutional provisions, precedents, statutes, the democratic purposes underlying constitutional texts and government structures, and widely held moral views on the nature of majority rule and democratic participation.

Second, in deciding traditional first amendment cases in which individuals seek to vindicate some speech or associational right against the state, courts could consider the need to strengthen centers of communication that will counter or check the persuasive powers of governments. In the typical first amendment calculus most judges decide whether the state has abridged some protected speech or associational activity of a private person or organization, and if so, whether a compelling state interest, a clear and present danger, or some other great necessity justifies the abridgment.\textsuperscript{33} Courts are of course attentive to the idea that individuals and groups may have rights against the state that are at times inconsistent with the good of all, and that in other cases may work to the advantage of the general polity. All of us have an interest in the free flow of information and opinions; only a communications structure that permits this flow is conducive to democratic processes, majority rule, the verification of consent, and what Meiklejohn describes as self-governing speech.\textsuperscript{34} So important are these values that courts have protected the expression of private institutions such as unions and corporations,\textsuperscript{35} which cannot assert the interest in dignity possessed by real persons. If courts, in adjudicating first amendment claims of individuals, should value the objective of fostering private communications to governments and other citizens, then they should also take into account the need to limit the power of governments to falsify consent, to distort citizens' judgment, and to overwhelm all other communications centers.

The remainder of this Article discusses some of the issues raised when these two types of cases are viewed as vehicles to establish direct and indirect limits on government expression.

\textsuperscript{33} See generally L. Tribe, supra note 5, ch. 12.
\textsuperscript{34} Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 255.
II. The Traditional Vindication of Individual First Amendment Rights: An Indirect Limitation on GovernmentSpeech

Societal and individual interests in freedom of expression have long been integrated in first amendment analysis. The question here is how the fear of government communications excesses should be factored into that analysis. At one level the answer is quite simple. Any judicial decision protecting the rights of private individuals, groups, or organizations to speak strengthens their ability to communicate, and thus to counter the power of government expression. The greatest threat to the system of freedom of expression emanates from the welfare state, not from a multitude of corporate, mass media, union, and other voices; that is one reason to approve the Bellotti decision. Of course, not all participants are equally powerful, nor will the objectives of corporate persuasion necessarily conflict with those of the government. But the potential for pluralism lies in strengthening all elements of private sector communication. Danger lurks in allowing governments to pick and choose among private communicators, because governments may choose to silence the strong or critical voices. In this sense, concerns about government domination of public discussion simply reinforce individual first amendment rights by increasing the reluctance of courts to find countervailing state interests.

Concerns about government expression crucially influence first amendment cases concerning freedom of association, the right of the press to gather information for publication, and the rights of individuals and organizations to compel government disclosure of information. The vindication of each of these rights further limits the power of governments to withhold vital information, to drown out private sector voices, to conduct their business in secret, or to preserve a captive audience from outside or contrary inside influences. Plaintiffs should not necessarily prevail in each case; rather, a first amendment concern about government expression strengthens the arguments for protecting individual rights. For example, perhaps courts should create a constitutional presumption of a right of access to public institutions that could only be defeated by pressing institutional needs.

By treating government expression as part of the matrix in which traditional first amendment claims are examined, one might largely avoid the remedial quandaries of a right to challenge unconstitutional

government speech. Individual plaintiffs will allege a discrete injury, and governments or government officials may be ordered to abandon their course of conduct or to compensate those individuals for the harms they suffered. Although difficulties may persist in demonstrating that the government caused the harm or in proving the value of the loss, at least courts are not forced to determine the injury to the entire polity. The remedy is directed to the individual or organization, but benefits may flow indirectly to all. The approach is essentially epiphenomenal, in the best sense of that word; limitations of government communications powers are convenient byproducts of adjudicating traditional first amendment claims against the state.

In a variety of first amendment cases, individuals and organizations have asserted that governments have unconstitutionally limited their rights of speech and association in contexts that raise concerns about the role of government expression. Frequently, the courts have failed to articulate these concerns. This part will demonstrate that explicit consideration of government expression might have supported the results reached in some cases, and led to contrary results in others, but should have been an important factor in the resolution of each.40

A. The First Amendment and Captive Audiences in Public Schools

The public schools present a kaleidoscope of situations in which courts may be concerned about the vitality of a school's indoctrination efforts, and may wish to use the policies favoring limits on government expression to inform the adjudication of first amendment rights. In

39. What remedies are available is a fundamental question once a court holds a government communications activity unconstitutional. The court might limit itself to a simple declaration of the unconstitutionality of the government expression; it might enjoin the government from speaking; it might order the offending government agency or officials to pay damages for the harm inflicted (subject to sovereign and official immunity doctrine); it might require the government to balance its presentations or allow opposing speakers a right of reply through the same channels of communication; it might order the government to refund to the taxpayer the pro rata share of his taxes devoted to the unconstitutional expression; or it might require governments to delegate authority over communications programs to independent decisionmakers. The very listing of these alternative remedies should give pause to even the most avid proponents of constitutional limits on government expression. The substantial difficulties in fashioning remedies support judicial reluctance to delimit the constitutional boundaries of government expression.

To the extent that these remedial difficulties are based on "principle," Professor Dworkin presumably would consider them a legitimate basis for denying relief. To the extent they are based on institutional and policy concerns, however, he would not allow them to undo principle-based rights against government expression. R. DWORKIN, TAKING RIGHTS SERIOUSLY 115 (1977). Compare id. with H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

40. I confess at the outset to a pronounced eclecticism. I have selected areas of the law already familiar to me or that I find personally intriguing. The following analysis certainly does not exhaust the cases that would support my argument.
When Governments Speak

some ways public schools are a communications theorist's dream: the audience is captive and immature; the messages are labeled as educational (and not as advertising); the teacher can respond individually to the student; the audience may hold the adult communicators in high esteem; and a system of rewards and punishments is available to reinforce the messages.41 On the other hand, "indoctrination" in public schools can hardly be compared to that in the modern totalitarian state. Children are captive only a few hours a day and have ready access to information outside the school environment. Nonetheless, these communications factors, particularly the captive audience notion,42 should render courts more sympathetic to individual assertions of first amendment rights that may reduce the power of governments to persuade.

1. The School Prayer Cases.—While decided on establishment of religion grounds, the school prayer cases43 may be thought of as prohibiting the state from compelling a captive audience to listen to and participate in school prayers and Bible reading. In a sense, the establishment clause is special, for it may be the only substantive constitutional restraint on what governments may say.44 The school prayer emphasizes indoctrination by rote and contains a ritualistic element that appears beyond the educational mission of the school. And yet, the context of the government expression may have been critical. The religious message is communicated to a captive audience, an audience subject to severe peer pressure that may make individual members of


42. See generally Black, He Cannot Choose but Hear: The Plight of the Captive Auditor, 53 COLUM. L. REV. 960 (1953).


44. Actually, the school prayer cases are more ambiguous than the text suggests. In declaring prayer rituals to be inconsistent with the first amendment, the Court inserted this caveat: [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the states in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion. Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963). Hence, it is not the entire subject of religion that is forbidden to government, but only ritualistic indoctrination in a religious point of view. The difficulty in distinguishing between subjective indoctrination and objective education suggests that application of the school prayer cases to particular school activities and communications often will not suggest clear results. See Meltzer v. Board of Pub. Instruction, 548 F.2d 559 (5th Cir. 1977), aff'd in part, 577 F.2d 311 (5th Cir. 1978) (en banc).

875
the audience reluctant to withdraw from the activity. Thus, one may view the school prayer as an interference with the listeners' rights to freedom of association and free exercise of religion; the indoctrination element then supports this resolution of the question.

2. Academic Freedom and Teacher Selection.—The first amendment policy limiting government expression to captive audiences may also apply to other constitutional cases in the public education field. The academic freedom cases are difficult to justify, and in Supreme Court opinions only dicta indicate the existence of an academic freedom doctrine independent of other first amendment traditions. Should the fortuity of speaking and teaching for a living entitle an instructor to some special autonomy that other government employees do not share? Should the right of a teacher to deviate from the established curriculum exceed, for example, the right of a postal employee to say whatever he or she pleases to superiors or customers? If the editor of a private newspaper or manager of a broadcast station can dismiss an employee for failing to follow instructions in communication with the audience, should a government employee serving essentially the same functions be treated any differently?

The place of the teacher in the system of government expression, not the constitutional entitlements of the teacher per se, may offer a more persuasive justification for these cases. The greater the ability of the school system to control what goes on in every classroom, the greater the danger of its promulgating a uniform message to its captive listeners. If teachers were automatons, required to adhere rigidly to lesson plans and assignments of materials promulgated by a central authority, the state would increase its capacity to indoctrinate a single


47. See Goldstein, supra note 45, at 1336-37.

48. Id. at 1340.

ideological point of view. If teachers were free to interpose their own judgments, values, and comments, without close supervision, a sort of pluralism would exist in the school environment, a pluralism that is particularly important when student attendance is compulsory and the audience, in practical terms, is not free to absent itself from the classroom.\textsuperscript{50} Hence, just as the balkanization of responsibility for education among governments reduces the potential danger of a thorough indoctrination, the autonomy of the classroom teacher diminishes the power of government to work its will through communication.

Paradoxically, some commentators argue that the need for academic freedom is stronger for university instructors than for public elementary and secondary school teachers. The former deal with more mature students, are more likely to be engaged in research activities, and are traditionally afforded greater autonomy.\textsuperscript{51} The genesis of the academic freedom doctrine itself is thought to lie in the nineteenth century German concept of the university: academic freedom in the nineteenth and early twentieth centuries essentially "involved freedom of the faculty member as teacher and scholar within the university and as a citizen of the outside community."\textsuperscript{52} From these premises, Professor Goldstein argued that the elementary or secondary school teacher is engaged in a process of instilling values to a captive audience, and that concepts of academic freedom derived from the university setting have little application:

The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools' educational mission. Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education. If the purpose of teaching is to instill values, there would seem to be little reason for the teacher, rather than an elected school board or other governmental body ultimately responsible to the public, to be the one who chooses the values to be instilled.\textsuperscript{53}

While Professor Goldstein's observations about academic freedom in institutions of higher learning are accurate, his suggestion that there is little reason to prefer the teacher to the school board in choosing

\textsuperscript{50} But see Hirschoff, Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?, 50 S. CAL. L. REV. 871 (1977).
\textsuperscript{51} See Goldstein, supra note 45, at 1341-44.
\textsuperscript{52} T. Emerson, supra note 4, at 593. See also Goldstein, supra note 45, at 1299 ("[T]he modern development of the doctrine of academic freedom is derived largely from the nineteenth century German concepts of lehrfreiheit and lernfreiheit—freedom of teaching and learning.").
\textsuperscript{53} Goldstein, supra note 45, at 1342-43.
values should be rejected: it is precisely because public school teachers are charged with instilling values to a captive audience that the protections of academic freedom should be extended to them. Goldstein erred by equating the legitimacy of indoctrination in public elementary and secondary schools with the absence of any need to limit that indoctrination process. Thus, for a distinctly different set of reasons, the case for academic freedom for public school teachers is at least as strong as that for university instructors.

Academic freedom, however, should not be defined so broadly that teachers would be allowed to make basic curricular choices in conflict with those of superiors and elected representatives. The legitimacy of the state's education effort requires that academic freedom be defined in situational terms. Justice Black was undoubtedly correct in arguing that a teacher cannot substitute his or her own notion of an appropriate course for that of the school system or state government. Nonetheless, free-wheeling discussion and critical analysis in the special setting of an educational institution may be accommodated. As Professor Van Alstyne has noted, academic freedoms should refer to a range of permissible presentational techniques and comments within the framework of legitimate state curricular choices. The line-drawing will often be difficult, but at this point I would suggest only that the structure of government speech provides courts with an additional reason to be considerate of interests in academic freedom.

Moreover, the structure of government speech is relevant to the method of selecting teachers. It is important to deny school authorities the power to hire or fire on the basis of personal ideology, political views, or membership in certain organizations. The greater the diversity among those who carry the state's messages, the less capable the state is of finding willing communicators to express a uniform message to a captive audience. In Shelton v. Tucker, for example, the Court invalidated an Arkansas statute requiring public school teachers to file affidavits listing the organizations to which they belonged or contributed. So too, the Supreme Court has been skeptical about loyalty oaths for teachers. Although school systems may have an interest in pro-

55. Van Alstyne, supra note 46, at 857.
When Governments Speak

tecting students from antidemocratic points of view and similar dangers, courts should nonetheless recognize the risk in permitting local and state authorities the power to recruit and retain a homogeneous class of employees who are expected not to deviate from the favored messages of those making centralized curricular judgments.

A recent Supreme Court decision graphically illustrates the socialization questions implicit in teacher selection. *Ambach v. Norwich* addressed the constitutionality of a New York law denying certification to alien teachers in public schools if the aliens are eligible for United States citizenship but decline to seek naturalization. A bare majority of the Court upheld the law. Justice Powell, writing for the majority, recognized many of the law's systemic implications. The issue was not simply the aliens' equal protection interest in not being excluded from teaching in the public schools. Resolution of the case turned in part on government objectives in public schools, which distinguishes the case from those in which the Court has declared unconstitutional laws preventing aliens from serving as lawyers or engineers or fishermen.

As Justice Powell suggested,

>[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government.

>“Such power inheres in the State by virtue of its obligation...‘to preserve the basic conception of a political community.’.”

. . . .

... The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. . . . The assumption of . . . [citizen] status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. The form of this association is important: an oath of allegiance or similar ceremony cannot sub-


59. *See generally Comment, supra note 58, at 111-20.

60. 441 U.S. 68 (1979).

stitute for the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.\textsuperscript{62}

Justice Powell viewed the public school mission almost exclusively in terms of the legitimacy and necessity of instilling democratic values in the nation’s youth to prepare them for citizenship. In a passage devoid of any concern for the possible dangers of government expression in public schools, the majority asserted that “a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught.”\textsuperscript{63} Questions of assimilation, pluralism, homogeneity, and heterogeneity were for the first time recognized as important issues in determining the constitutionality of teacher selection procedures. For Powell, the state’s interest in promulgating particular types of messages in public schools outweighed any other interest. His conclusion was based on a syllogism: (1) Public schools perform an essential public function by inculcating values necessary to preserve democracy; (2) “teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society”\textsuperscript{64} and (3) legislatures may base teacher qualifications on the premise “that generally persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified [to instill democratic citizenship values] than are those who have elected to remain aliens.”\textsuperscript{65}

The dissent, written by Justice Blackmun, primarily attacked the rationality of the assumption that all aliens eligible for citizenship who fail to apply for naturalization are presumptively incapable of instilling democratic values. The dissenters argued persuasively that loyalty oaths, certification requirements, and similar means are available to measure and ensure a teacher’s ability to carry out socialization functions. But nowhere did they discuss the idea that perhaps the New York law went too far in allowing the state to recruit a homogeneous group of teachers intent upon socializing youngsters to a particular set of norms. They made only passing reference to diversity and they agreed with the majority’s observations about the need for public schools to play an assimilative role and to preserve the “values on

\textsuperscript{62} 441 U.S. at 73-75 (quoting Sugarman v. Dougal, 413 U.S. 634, 647 (1972)) (citations and footnote omitted).

\textsuperscript{63} \textit{Id.} at 80.

\textsuperscript{64} \textit{Id.} at 78.

\textsuperscript{65} \textit{Id.} at 81 n.14.
When Governments Speak

which our society rests.” A footnote in the majority opinion went unchallenged:

The curricular requirements of New York’s public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction “to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . . . Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. In addition, required courses include civics, United States and New York history, and principles of American government.

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

Thus, the Court divided over the question of efficient and reasonable means to instill democratic values, not over the more fundamental question of the limits of government expression in public schools. Although the justices recognized the relationship between government expression and teacher selection, they myopically perceived government speech only in terms of promoting affirmative liberty and not in light of the perils of government infringement on individual autonomy and creativity.

The alien teachers explicitly sought to ground the case in the need to limit state discretion in teacher selection, even when the state is pursuing legitimate socialization objectives. They argued that the New York law sought “to suppress respect for diversity and to compel standardization of ideas.” They relied on the student rights cases, the loyalty oath cases, the academic freedom cases, and the communist association cases for the proposition that the first amendment does not tolerate “laws that cast a pall of orthodoxy over the classroom.”

They argued that if communist affiliation is an insufficient reason for excluding teachers from public schools, then alienage is also an insufficient reason. Failure to initiate naturalization is not necessarily a sign of disloyalty to the nation, and aliens may bring to the classroom different perspectives that will benefit the students.

66. Id. at 85-86 (Blackmun, J., dissenting).
67. Id. at 78 n.8 (citations omitted).
69. Id. at 68 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).
The Court either did not understand or chose to ignore appellees' arguments. Justice Powell's hyperbolic response largely missed the thrust of appellees' contentions:

We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government. The New York law does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

The answer that aliens may associate and express themselves outside of the classroom is no answer at all once one considers the total system of communication. Diversity among teachers is a check on government indoctrination distinct from the ability of groups and individuals outside of the educational system to respond to government messages. Outsider speech merely responds to government speech, whereas teacher diversity dilutes the government's power to speak. Further, it is simply untrue that any restrictions on teacher selection or, implicitly, on the state's ability to shape a homogeneous people in public schools will "bar any effort" to inculcate values. There are many reasonable restrictions within which the government can effectively pursue its socialization objectives. The Court should have asked whether this particular selection process, in light of the aliens' interest in teaching in public schools, goes too far in allowing the state to recruit a homogeneous corps of teachers. The Court lost sight of the societal interest in controlling government domination of educational processes and erred in upholding the New York law.

3. School Newspapers.—Closely related to the academic freedom cases are those holding that school authorities may not expel, dismiss, or otherwise punish student editors of official school newspapers for publishing articles contrary to the wishes of the school administration. On first blush, these decisions are difficult to justify. School authorities establish and fund the newspapers, delegating to students the task of editing them, subject to official supervision. Under these circumstances, why should courts prevent a faculty advisor from cen-

70. 441 U.S. at 79 n.10.
soring the newspaper? Why are student editors of a government-owned newspaper entitled to any more protection than the editors and reporters of a private newspaper? The courts often explain artlessly that school authorities may not countermand the delegation once it has occurred, or that a right to speak arises once the school makes the initial delegation. This reasoning simply obfuscates the result. School newspapers are powerful instruments of communication and persuasion. First amendment rights for student editors sensibly reduce the capacity of school officials to utilize a particularly powerful means of communication to captive listeners.

In Joyner v. Whiting the editor of the Campus Echo (the official newspaper of North Carolina Central University) published an article arguing that the university should retain its black character and deny admission to white students. The president of the university terminated the newspaper's financial support when the editor refused to agree to a policy of "represent[ing] fairly the full spectrum of views on [the] campus." The Fourth Circuit held:

It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

... Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censiorial oversight based on the institution's power of the purse.

In the absence of substantial disruption, physical violence, incitement to harass whites and the like, the first amendment protects the newspaper's "message of racial divisiveness and antagonism," however "distasteful" that message is to administrators. Even if the Echo were a state agency, the Constitution would protect its expression of hostility to racial integration: "The Fourteenth Amendment and the Civil Rights Act proscribe state action that denies the equal protection of the laws, not state advocacy. To be sure, the line between action and advocacy may sometimes be difficult to draw, but it is clear that nothing

72. 477 F.2d 456 (4th Cir. 1973).
73. Id. at 459.
74. Id. at 460 (citations omitted).
75. Id. at 461.
76. Id.
written in the *Echo* crossed it."\(^{77}\) Apparently the university would not
be subject to constitutional and statutory claims resulting from the
newspaper articles produced under its aegis.

As written, *Joyner* is difficult to defend. Perhaps advocacy of ra-
cial segregation by a public entity in a position to implement its advoc-
acy is the very rare case in which restraints on government speech are
tolerable. But, in any event, this is a case in which a superior within the
entity has dictated that its newspaper not publish remarks that, to say
the least, may encourage unconstitutional segregation. A priori, this
determination should be entitled to as much weight as a congressional
decision limiting the activities of the public relations offices of the
armed forces. The students do not own the newspaper; they have been
given a limited amount of authority to operate and edit it. They have
not been denied the right to publish, but only the right to express them-
seves at public expense. The most plausible rejoinder is that, as in the
academic freedom cases, adjudication of the editors' first amendment
rights should be informed by a policy of limiting the impact of govern-
ment speech. The case would be stronger if the audience were more
captive and less mature. Nonetheless, perhaps the best rationale for the
court's decision is that the first amendment compels the university, if it
is to operate a newspaper, to delegate some authority and to allow the
editors to make reasonable editorial judgments. The university cannot
make the editors unwilling conduits of uniform government policy,
even on an issue as important as racial discrimination.

4. *The Semipublic Forum*.—Individual students, constrained by
the school environment, are not likely to be powerful communicators of
messages contrary to those of the established school authorities. None-
theless, the affirmation of students’ rights, subject to a substantial dis-
ruption test, to communicate, petition, distribute privately printed
underground newspapers, and form clubs and associations, enhances
their ability to counter government expression in public
schools.\(^{78}\) I do not suggest that there is a right to speak at all times and in all places in
schools, or that a lecture method is unconstitutional. I do suggest, how-
ever, that Justice Fortas was exactly right in saying in *Tinker v. Des
Moines School District*\(^ {79}\) that “in our system, state-operated schools
may not be enclaves of totalitarianism,”\(^ {80}\) for “students may not be re-

77. Id. at 461-62.
79. Id.
80. Id. at 511. *But see* Goldstein, *Reflections on Developing Trends in the Law of Student
When Governments Speak

garded as closed-circuit recipients of only that which the State chooses to communicate.\textsuperscript{81} Professor Goldstein perceived Justice Fortas' remarks to be an expression of the Court's preferred philosophy of instruction.\textsuperscript{82} Instead, it is an expression of a constitutional policy limiting the state's power to communicate to a captive audience, a policy that informs students' first amendment rights in the school environment. \textit{Tinker} and its progeny promote pluralism within an institution with grave potential to dominate and distort thinking, whatever the legitimacy of its overall mission.

Other public forum school cases similarly limit government communications powers.\textsuperscript{83} In the most common situations, school officials allow only some forms of picketing adjacent to the schools, permit the distribution of only certain newspapers and magazines, allow speeches by individuals who express an approved point of view but not the speeches of others, and recognize clubs and other associations on the basis of administrative approval of the organization's objectives. These cases hold that once public school officials open their facilities to individuals and groups who express one point of view, they may not deny others access to the same facilities for the purposes of communicating contrary or different messages. This is the first amendment equal protection doctrine in action, and most courts are quick to observe that a ban on all these forms of expression would be constitutional. But since a total ban would be inconsistent with the school's educational mission, equal protection analysis tends to expand rather than contract the scope of expression and association in public educational institutions. And to the extent that the public forum doctrine opens the schools to outsiders, it prevents a government monopoly over messages to the students and serves strong first amendment policies against government domination of communications channels.

Professor Tribe describes public schools as "semi-public forums," indicating that although they are not parks and streets, their mission and nature allow outsiders to use the schools as forums when no substantial disruption is foreseeable.\textsuperscript{84} But if the schools are semipublic, they are so in a most complex way. The state's own communications efforts generally will not trigger the public forum doctrine; rather, an outsider is granted a right of access only when other outsiders have

\textsuperscript{81} 393 U.S. at 511.
\textsuperscript{82} See Goldstein, \textit{supra} note 80, at 615.
\textsuperscript{84} See L. Tribe, \textit{supra} note 5, § 12-21, at 690.
been afforded the same right. Although someone who works or studies at a public school may have a limited right of expression on the institution's premises, even to the point of responding to the state's own message, true outsiders generally have no such right. A few opinions suggest, in effect, that a sufficiently controversial state message may trigger a right of access or perhaps of reply. But these cases are rare. A right of access subject to the Tinker limits is vital in the implementation of a policy limiting government speech in the public school environment.

The policy of limiting government expression, then, should form the basis for first amendment entitlements of all individuals and groups to communicate in the public schools, depending on features of the context in which the right is asserted—for example, the degree of foreseeable disruption, the content of the message (as it relates to the mission of the school), and time and place problems. I do not advocate that the courts open every geometry class to any outsider who wishes to address a class of young people that the state has captured for him. But the analysis should start with the propositions that government communication in the schools triggers a sort of public forum doctrine, and that allowing access for expression purposes is necessary to counter the state monopoly over communications in public schools. A conscious fostering of diversity in expression furthers the educational mission by promoting tolerance and the exchange of information and ideas. There is no reason why outsiders, subject to the disruption standard, should not be entitled to distribute pamphlets, give speeches in the school yard, and participate in assemblies, even if we all agree that they may not push the English teacher aside in order to teach social anthropology.

87. See, e.g., Bonner-Lyons v. School Comm., 480 F.2d 442 (1st Cir. 1973) (public school information distribution system not to be used to disseminate antibusing literature unless probusing groups are also provided access); Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Alaska 1978) (city publication, intended to disseminate information regarding public and private services and organizations in city area, was a "public forum," and city could not deny homosexual organization access to publication solely on content of its beliefs); Anderson v. City of Boston, Mass. —, 380 N.E.2d 628, 641 (1978), appeal dismissed, 439 U.S. 1060 (1979) ("T]he city's use of telephones and printed materials provided by public funds, and its use of facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access.").
When Governments Speak

At present, however, the case law suggests that institutions such as schools are public forums only for those who "belong" there, and that there is some rebuttable presumption that outsiders will disrupt the institution's activities. Perhaps notions of "private" public property or trespass are at work, analogous to judicial developments in the labor law field, limiting the access of outside union organizers to employer premises. Why the average citizen-taxpayer has any less interest in the schools than those who work and learn there is not entirely clear. A better explanation of the case law may be that the students, and to a lesser extent the teachers, have few opportunities to speak before any audience outside of the school institution; they generally lack resources such as advertising and direct access to the mass media. The government's use of the institution to communicate or indoctrinate does not turn the institution into a public forum; courts simply have recognized the students' right to speak where they may be heard. Questions of access by outsiders, then, are concerned with evenhanded governmental treatment of different groups and individuals and have little to do with countering government expression.

These recent judicial developments, which fail to articulate concerns about government monopoly over captive audiences in access cases, are not encouraging. In *Greer v. Spock*, the Court refused to allow political pamphleteers access to a military base. There is no reason why servicemen, entitled to vote, should not be the beneficiaries of this expression, or why the pamphleteers should be denied access to potential adherents to their point of view. Nonmilitary speakers with diverse political views will counter or at least test the subtle but clear political implications of the military indoctrination program. The content of the message (for example, advocating military insurrection) would be relevant, as would the maturity of the soldiers and their access to competing messages off the base. But the courts should create a presumption of access to military bases as well as to public schools. Nonetheless, *Spock* is a strong indication that the Court is not sympa-

88. See Comment, supra note 58, at 122-23.
89. See Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
thetic to claims of access, a position that may be extended to the educational context. Spock may also overrule Brown v. Louisiana,\textsuperscript{92} decided ten years earlier, in which the Court extended constitutional protection to a silent vigil in a public library as a civil rights protest. Despite Professor Tribe's suggestion, the Court may not be persuaded that libraries and schools are distinguishable from other public institutions because the former's purposes are more "closely linked to expression."\textsuperscript{93}

5. \textit{Freeing the Captive Audience}.—Releasing all or part of a captive audience is one effective way to counter government's persuasive powers. \textit{Pierce v. Society of Sisters}\textsuperscript{94} is a superb example in the education context. In \textit{Pierce} the Supreme Court held unconstitutional an Oregon statute that required all students to satisfy compulsory attendance laws by attending \textit{public} schools. The case appears to have been decided on now repudiated grounds of substantive due process in the economic sphere: the law would have put private education entrepreneurs and teachers virtually out of business. Significantly, however, in the more than fifty years since the decision, \textit{Pierce} has not been repudiated, even by those justices noted for their hostility to economic substantive due process. Commentators and judges attempted to justify \textit{Pierce} in part by reference to the free exercise of religion claims inherent in the litigation (religious schools could not satisfy the Oregon law), and to the emanations from the first and fourteenth amendments that establish the substantive due process rights of parents to raise their children.\textsuperscript{95} Thus, there appears to be widespread hostility to overruling \textit{Pierce}, although some would expand and others would restrict its scope as precedent.\textsuperscript{96}

\textsuperscript{92} 383 U.S. 131 (1966). Perhaps \textit{Brown v. Louisiana} is better understood as a racial discrimination rather than a first amendment case.

\textsuperscript{93} See L. Tribe, \textit{supra} note 5, § 12-21, at 690. The level of government communications activities in prisons, mental hospitals, and military installations is justifiably quite high. See, e.g., P. Barnes, \textit{Pawns: The Flight of the Citizen-Soldier} (1972).


When Governments Speak

*Pierce* is problematic if approached entirely in terms of individual entitlements. Arguably, if the government of a state wills it, private individuals should have no more right to run educational institutions than to organize a private army to defend the nation. The doctrine of academic freedom for teachers would be twisted beyond all recognition if teachers not only had a constitutional right to make reasonable presentational decisions, but had the right to make curricular choices and to force the state to tolerate institutions within which they might make those choices. Parents historically have enjoyed great latitude in making decisions for their children, but apart from the uncertain constitutional derivation of such entitlements, it is not clear why compulsory public schooling is an intolerable interference with parental rights. The state frequently, and often more substantially, interferes with parental choice. Compulsory attendance laws interfere more significantly with parental autonomy than the law in *Pierce*; the decision that children must attend some school for eight or more years of their lives appears more consequential than the secondary decision that they must attend public school. Indeed, even in *Pierce*, the Court did not deny the state extensive authority to regulate the curriculum in private and public schools—presumably by requiring courses in language, history, hygiene, and civics that some parents might find objectionable. Beyond compulsory education, state regulations address intrafamily affairs by terminating parental rights because of child abuse or neglect, or abandonment; by providing compulsory vaccinations and lifesaving medical procedures for children, regardless of parental choice; by forbidding incest and fornication; by banning the sale of pornography, tobacco, and alcoholic beverages to minors, despite parental consent to their use; by regulating child labor; and by otherwise limiting the public and private rights of minors regardless of the parents' attitude toward those restrictions.

Thus, *Pierce* becomes intelligible only against the background of a structure limiting the power of government to indoctrinate the young.


Although the Justices probably did not intend this construction, Pierce may be understood as telling governments that they are free to establish public schools and to make education compulsory for certain age-groups, but they are not free to eliminate competing private sector institutions that promote heterogeneity in education. It is one thing to recognize education as a legitimate enterprise for the state; it is quite another to label private education illegitimate. Similarly, it is one thing for the state to require private schools to offer English, mathematics, or civics courses, and quite another for the state to forbid them from teaching the German language, Bible study, or modern dance.99

A contrary decision in Pierce would have fostered a state monopoly in education, a monopoly that would dangerously strengthen the state's ability to mold the young. To be sure, I do not wish to overstate the case. Private schools convey many values and attitudes identical to those conveyed in public schools. Virtually all schools tend to mirror consensual values and to promote accepted norms of social behavior. Further, a requirement that students spend five or six hours a day in school, for roughly half of each year, hardly precludes socialization in the family. Radio and television, films, peer group norms and pressures, clubs, and other institutions and mechanisms for conveying messages and values greatly reduce the danger of compulsory public schooling. But in the face of indeterminacy about how the various actors and institutions contribute to socialization processes and interact with each other,100 Pierce represents a reasonable, if imperfect, accommodation of conflicting pressures. The state may promulgate its messages in the public school, and parents are free to choose private schools with different orientations. The state must tolerate private education, but need not fund it. The state may make some demands of private schools in satisfaction of compulsory schooling laws, but those demands may not be so excessive that they transform private schools into public schools managed and funded by the private sector. The integrity of the communications and socialization processes in private schools and families remains intact, while the state's interest in producing informed, educated, and productive citizens is preserved. Thus, a

99. See cases cited at note 97 supra.
101. See J. Coons & S. Sugarmann, Education by Choice: The Case for Family Control (1978), in which the authors outline and defend a plan for increasing family autonomy in education. The historic criticism of Pierce, as it operates in fact, has been that only the religiously devout (by virtue of numbers) and the affluent (by virtue of their ability to afford expensive private schools for their children) can take advantage of the rights afforded parents by Pierce.
When Governments Speak

structure that limits government speech gives credence to otherwise tenuous individual rights arguments in *Pierce*.

**B. Limitations on Other Modes of Government Expression**

The Supreme Court has held that governments may not utilize modes of communication compelling individuals to utter words contrary to their beliefs. Here, government is not forbidden from speaking, as it was in the school prayer cases; rather, it is forbidden from using a particular technique for indoctrination. The captive audience phenomenon appears far less important than the means of communication chosen. In *West Virginia State Board of Education v. Barnette*, the Court declared unconstitutional a compulsory flag salute statute because it interfered with first amendment freedom of belief and freedom to choose not to speak. The case turned on the individual's right not to participate (flag salute exercises were not forbidden); thus, the effect was to bar the government from using *compulsory* flag salutes to instill patriotism. Justice Jackson took great pains to point out that governments are not forbidden from teaching patriotism in classrooms; he did not deny government the opportunity to transmit its messages, even to a captive audience. He denied it only the power to communicate in a particularly offensive way. Whether a noncompulsory flag salute is an any less effective means of indoctrination is a more difficult and interesting problem.

*Wooley v. Maynard* recently extended *Barnette* by upholding an injunction that prevented New Hampshire from prosecuting plaintiffs, Jehovah's Witnesses, for obscuring the message "Live Free or Die," embossed on the State's noncommercial license plates. Plaintiffs considered the message "to be repugnant to their moral, religious, and political beliefs." The Chief Justice stated that the issue for decision was "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." The Court reaffirmed its holding in *Barnette*, finding that the right to speak and the right not to speak were "complementary components" of the first amendment. As in *Barnette*, however, the Court emphatically refused to hold that

104. *Id.* at 707.
105. *Id.* at 715.
106. *Id.* at 714.
the state could not promulgate and disseminate its patriotic message; rather the Court denied the state only the ability to utilize unwilling citizens as couriers for its messages:

The State is seeking to communicate to others an official view as to proper “appreciation of history, state pride, [and] individualism.” Of course, the State may legitimately pursue such interests in any number of ways. However, where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.

The Court presumably had no objection per se to the use of state license plates to convey a patriotic message. Thus, Maynard imposes limits on the ways that a state may speak and not on the substance of its expression.

In his dissent Justice Rehnquist appeared to understand the point quite well. He contended that, unlike the students in Barnette, the plaintiffs in Maynard had not been called upon to affirm or reject the state’s message. Reasonable people would not construe the appearance of the message on a license plate as an endorsement of the motto by the owner or driver of the automobile. Significantly, Rehnquist observed that the test of state power to communicate a message could not be predicated simply on whether specific individuals objected to the message:

For example, were New Hampshire to erect a multitude of billboards, each proclaiming “Live Free or Die,” and tax all citizens for the cost of erection and maintenance, clearly the message would be “fostered” by the individual citizen-taxpayers and just as clearly those individuals would be “instruments” in that communication. Certainly, however, that case would not fall within the ambit of Barnette. In that case, as in this case [Maynard], there is no affirmation of belief.

Thus, Rehnquist recognized the significance of the means of state communication and the degree of personal involvement by individual citizens.

The Rehnquist approach denies taxpayers the right to have a portion of their taxes rebated if the state uses the revenues for communication purposes—assuming that taxpayers would even have standing in federal court to assert this generalized claim. Perhaps Rehnquist

107. Id. at 717.
108. Id. at 719. Justice Blackmun joined the Rehnquist dissent. Justice White wrote a separate dissent (joined by Justices Blackmun and Rehnquist), arguing that federal injunctive relief was improper under the circumstances of the case. Id. at 717.
109. Id. at 721.
When Governments Speak

feared that the majority was on the verge of extending a number of its labor union decisions to the public sector; those decisions hold that individual union members, or those paying sums for union services in lieu of membership dues, may not be required to support union political activities (communications?) to which they object. Given the legitimacy of government communication activities, the difficulties in identifying and labeling ideological, noncontroversial, or political speech, and the sheer folly of attempting to calculate how much of an individual’s taxes are spent for specific, objectionable government communications, Justice Rehnquist’s analysis makes sense. Rather than extend the labor law cases to the public sector, the Court should reconsider those decisions in the light of Rehnquist’s discussion of government speech in *Maynard*.

Another method of communication denied governments is the silencing of private speech contrary to the government’s own positions. This argument, of course, draws on the notion that first amendment decisions may strengthen private centers of communication. For example, in *Linmark Association v. Township of Willingboro* the township prohibited the posting of “For Sale” or “Sold” signs in front of residential properties. The purpose of the ordinance was to promote racially stable neighborhoods by stemming white flight. The Court declared the ordinance unconstitutional, largely because it denied residents the opportunity to obtain valuable information about where to live and raise their families, and because the evidence did not demonstrate that the signs produced panic selling by whites. Justice Marshall, writing for a unanimous Court, curiously did not directly address the question


113. *Id.* at 95-96.
whether the ordinance violated the first amendment rights of the owners themselves. And in an intriguing paragraph, Marshall asserted that the township was free to pursue alternative means of communication to promote integrated neighborhoods:

In invalidating this law, we by no means leave Willingboro defenseless in its effort to promote integrated housing. The township obviously remains free to continue "the process of education" it has already begun. It can give widespread publicity—through "Not for Sale" signs or other methods—to the number of whites remaining in Willingboro. And it surely can endeavor to create inducements to retain individuals who are considering selling their homes.\(^{114}\)

*Linmark* is interesting because Marshall casually treats government speech as simply an alternative means of accomplishing social policy objectives. The township can encourage integrated housing by acting or by speaking. At no point does Marshall intimate that speech activities are illegitimate or improper. The problem in *Linmark* was the government's attempt to foster attitudes that it favored by allowing some private speech ("Not for Sale" signs) and disallowing other speech ("For Sale" signs).

*Maynard* suggests, however, that governments cannot constitutionally compel homeowners to put "Not for Sale" signs in front of their homes. The only distinctions between *Maynard* and *Linmark* might be in the nature of the government's message—encouraging integrated housing is somehow more important than encouraging patriotism and national pride—or in the reasons for the government communication—indoctrination for its own sake can be distinguished from indoctrination for some immediate policy objective such as integration. However, these distinctions are sufficiently troublesome, fuzzy, and unprincipled that it seems wiser to construe these cases as addressing the method\(^{115}\) rather than the substance of government communications.

**C. Freedom of Association**

The notion of freedom of association is perhaps the most notable of those developments in first amendment doctrine that succeed in bol-

114. *Id.* at 97.

115. Perhaps decisions allowing individuals to display the flag in ways indicating displeasure with government policies are rooted not only in notions of individual symbolic speech, but also in the idea that the government and its supporters should not be the sole possessors of so powerful a symbolic communicator. See, e.g., Spence v. Washington, 418 U.S. 405, 410 (1974) ("In many of their uses flags are . . . a 'primitive but effective way of communicating ideas . . .', and 'a short cut from mind to mind.'" (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943))); Stromberg v. California, 283 U.S. 359 (1931). But see Halter v. Nebraska, 205 U.S. 34 (1907) (use of representation of a flag on beer bottles).
When Governments Speak

stering competing private centers of communication. Certainly, the concept of a literal right of association embodied in the first amendment is peculiar. Without mention of association, the first amendment expresses "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." But narrow entitlements to assemble to discuss governmental (and perhaps other) matters and to assert grievances are a far cry from a more generalized right of association. Moreover, all sorts of government-imposed limitations on freedom of association have been tolerated historically. The state may establish conditions for the formation of businesses, partnerships, and corporations; it may forbid marriage in some circumstances; it may compel blacks and whites to associate with each other in private and public schools; it may require one to join a labor union or pay the union fees in lieu of membership dues. Finally, association rights apparently do not entitle one to a government job, to membership in the armed forces, or to a seat in a state-supported college classroom.

Many tend to view association in terms of either privacy penumbra of the Bill of Rights or substantive due process, as an affirmation of the individual's basic right to participate in private or intimate relations with other individuals. This view leads to arguments about the existence of a right to marry, a right to homosexual marriage, a right to have contraceptives and marital privacy, a right to raise children, or a right to fornicate with other consenting adults. These notions find no basis in the origin of the first amendment right of association. The notion of a right of association developed in the 1950s and 1960s as the federal government and some states sought to identify members of alleged dangerous organizations—the Communist Party in the case of the federal government and primarily the National Association for the Advancement of Colored People in the case of Southern states. Arguably, a right of association was implicit in earlier Supreme Court speech and assembly decisions. See, e.g., Thomas v. Collins, 323 U.S. 516 (1945); De Jonge v. Oregon, 299 U.S. 353 (1937).

leading case, *NAACP v. Alabama ex rel. Patterson*, the Court unanimously held that the NAACP could not be required to divulge the names of its members. The basis of the decision was not some personal right to associate physically or intimately with other persons; rather, association was tied to freedom of expression: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." In *NAACP v. Button* the Court amplified this holding by noting that the NAACP's litigation activities should be treated as a form of political expression. Mr. Justice Stewart recently traced this derivation of freedom of association:

> Freedom of association has been constitutionally recognized because it is often indispensable to effectuation of explicit First Amendment guarantees. . . . But the scope of the associational right, until now, at least, has been limited to the constitutional need that created it; obviously not every "association" is for First Amendment purposes or serves to promote the ideological freedom that the First Amendment was designed to protect.

> The "association" in this case [which concerned an ordinance limiting occupancy of certain dwelling units to certain combinations of blood relatives] is not for any purpose relating to the promotion of speech, assembly, the press or religion. And wherever the outer boundaries of constitutional protection of freedom of association may eventually turn out to be, they surely do not extend to those who assert no interest other than the gratification, convenience, and economy of sharing the same residence.

> Whatever the merits of the expansive privacy-oriented version of freedom of association, the narrower version of the right is an immensely reasonable gloss to place on freedom of expression once one recognizes the desirability of countering government communications. The lone speaker is frequently no match for the organized and sophisticated communications efforts of government. As government grows, as the activities of the welfare state increase, as the means and expense of communication expand, private individuals may increasingly feel the need to band together if they are to compete effectively with government. Public interest litigation, advertising, mass mailings, and lob-

---

123. Id. at 460.
125. Moore v. City of East Cleveland, 431 U.S. 494, 535-36 (1977) (Stewart, J., dissenting). See generally L. Tribe, supra note 5, § 12-23, at 702 ("a right to join with others to pursue goals independently protected by the first amendment" (emphasis in original)).
bying are all activities that would not be possible but for collective
effort. Further, the group may enjoy an enhanced stature in the public
mind and acquire greater access to the mass media than its members
could individually. It is essential that "whenever men may speak as
individuals, they may speak in and through groups . . . ." Thus, a
right of association is responsive to modern policy concerns about gov-
ernment dominancy of communication channels.

This analysis of traditional first amendment decisions demonstrates the relevance of concerns about excessive government speech in
traditional cases adjudicating individual first amendment rights: pro-
tection of private rights of speech in effect counters excessive govern-
ment expression. Part III examines the legitimacy and feasibility of
direct attacks on government messages and communications programs.

III. Direct Controls on Government Expression

A. The First Amendment as a Constraint on Government Speech

An appealing construction of the first amendment reveals a source of limitation on government expression that may inform the adjudica-
tion of individual rights. While this argument may approach the der-
ivative right that many modern-day textualists reject, there is nonetheless much to commend it. Despite the age-old jurisprudential
debate about what judges may consider in deciding hard cases, notions of limits on government expression clearly fall within the "gravitational force" of decided cases and statutes, filling the interstices of the law. This part will examine the rationale for direct first amendment limits on government speech and the analytical and institutional problems raised by that conception.

One purpose of the first amendment is to prevent government cen-
sorship of private speech, particularly political speech, through the op-
eration of laws. The passage of time since adoption of the Bill of
Rights has revealed that laws and practices that permit massive govern-
ment communications activities may as effectively silence private
speakers as a direct regime of censorship. More important, freedom of
speech protects the ability of a free people to exercise their powers of

128. The following discussion of this interpretation is not concerned per se with Professor Dworkin's distinction between policies and principles. See R. DWORKIN, supra note 39, at 22-23, 82-84.
130. R. DWORKIN, supra note 39, at 111.
independent judgment and to communicate their views about government officials and policies; freedom of expression and association are critical to the processes of consent that justify and legitimate government in a democracy. Government speech may threaten those processes of consent through indoctrination and the withholding of vital information, thereby undermining the power of the citizenry to judge intelligently and to communicate those judgments. The structure of American constitutional government and underlying historical assumptions about the relationship between the governed and the governors justify an interpretation of the first amendment that encompasses limits on government expression. This view is consistent with older notions that the Constitution embodies norms against government secrecy, and that the first amendment restrains, rather than enhances, government powers.

Despite its persuasive appeal, however, a constitutional limitation of government expression would create additional analytical and institutional problems. A constitutional right to curb government speech presumably would place on the government the burden of justifying challenged communications, subject to some very demanding test for the substantiality of the government's interest. This standard does not comport with the dual nature of government expression: if the falsification of consent and the domination of communications are perils, the cabining of governmental powers to educate, to inform, to sponsor and publish research, and to lead is equally perilous. Nor is the federal judiciary particularly well suited to determine the limits on government speech. Of all the branches of government, the judiciary relies most on the power of words, symbols, and custom to persuade and ultimately to enforce its decisions and legitimate its powers. The power of a court emanates more from its role as oracle than from the coercive tools at its command; the sword is not its strong suit. Thus, courts might not be ideally disinterested observers and arbitrators of conflicts over government speech; they are practitioners of the arts of persuasion who may well fail to perceive the dangers of government participation in the system of freedom of expression. Courts may even place constitutional limits on legislation and executive speech merely to enhance the relative impact of their own communicative powers. Even if courts act from the highest ideals and motives, constitutional decisions may ossify

131. See Van Alstyne, supra note 5, at 532-35 (first amendment may be used to forbid domestic government propaganda directed toward American citizens).


133. See generally L. Tribe, supra note 5, ch. 12.
errors in judgment about government speech that would be difficult to correct, despite the resulting limitation on the legitimate use of government communications powers.

Perhaps one way to resolve the problems posed by compelling governments to justify all communication activities is to focus only on certain types of government expression. For example, one might construe the first amendment to require government to justify withholding information from the public.\footnote{134. This approach would constitutionalize the policies underlying the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977 & Supp. 1979).} This construction would increase the flow of information and reduce the ability of government to persuade by failing to present inconvenient information, while recognizing that government will be justified in restricting access to some sensitive information. A similar approach might also provide access to government institutions, such as prisons, military bases, hospitals, and schools, and to government proceedings, such as meetings of administrative agencies.\footnote{135. See generally Emerson, supra note 19, at 14; Parks, supra note 19; Note, supra note 38.}

Another option is to distinguish government propaganda and indoctrination activities from government information, research, education, and leadership activities. This distinction, however, is exceedingly difficult to make.\footnote{136. For example, consider the recent Women's Educational Equity Act Program. Through this program public moneys were provided to various groups and individuals to overcome sex bias in education. Among the programs financed was one to prepare "a nonsexist curriculum for preservice teacher education." U.S. Dept't of Health, Education, & Welfare, Women's Educational Equity Act Program, 14 Am. Educ. 46, 47 (1978). It is difficult to determine the exact nature of this speech and to separate the propaganda from the educational aspects.}\footnote{137. See generally E. Aronson, The Social Animal 55 (1972); B. Russell, Power: A New Social Analysis 368-69 (1938).} If the focus is on the content of the message, the distinction boils down to an acceptance of one set of values over another. For example, one might tend to treat government speech encouraging racial hatred or communism as propaganda, while considering activities on behalf of racial equality or free enterprise as informational. The distinction will vary largely with the accepted truths at a given time within a particular culture.
unreasonable searches. What government does not have the power to do within the constitutional system, it should not have the power to advocate. These tests, however, share a common flaw: their application in practice would strain the judicial craft. Is it unconstitutional government speech for a city government to recommend the abolition of the exclusionary rule in criminal prosecutions when evidence has been unlawfully obtained by the police? Does a state legislature have the authority to pass a resolution critical of the Supreme Court’s school prayer decisions? What of government messages that fail to anticipate Supreme Court decisions? Should the courts link the authority of governments to speak to the shifting tides of constitutional jurisprudence? And what of the obligation of governmental branches other than the judiciary to interpret the Constitution and to defend publicly those interpretations? May the Constitution be amended? Perhaps skilled judges could and should apply such standards on the ground that private individuals and groups may challenge constitutional and democratic dogma, but the government should not. In a situation in which the government incites private action that would be unconstitutional if directly performed by the government (for example, racial discrimination), the case for limiting the government’s expression is strong. Nonetheless, the danger remains that constitutional decisions proceeding from this understanding would etch existing values into stone.

An alternative standard of constitutionality might focus on the tendency of government expression to distort the thinking processes of listeners. “Propaganda” consists of the “big lie,” of outrageous efforts to create an artificial reality. An inept political leadership characterizes itself as courageous and wise. The opposition is disgraced by untruths about its wrongdoings. The economy is touted as booming to shroud the reality of economic decay. Lost battles and wars are described as great victories. Government expression of this kind comports with widely held notions about the essence of propaganda in totalitarian


When Governments Speak

countries: it is self-serving; its purpose is not to illuminate or inform; it appeals to emotion and not reason; and its accuracy is always questionable. This standard reflects the recognition that the greatest danger of government expression is its potential for undermining the ability of citizens to think clearly about policy issues and government leaders.

Modern first amendment law governing private expression provides modest analogies. Commercial advertising enjoys some first amendment protection, but governments may forbid false and misleading advertising and fraud. Even innocent misrepresentations may lead to liability. Labor laws may forbid employers from telling certain harsh truths to employees about the effects of unionization for fear it will distort the outcome of a union representation election. Prosecutors may not wave the bloody knife before the jury in a murder trial because the emotional impact of that symbolic act may outweigh its evidentiary value. One may view even the classic incitement to violence cases as efforts to curb forms of expression likely to cause people to act without the temperance of calmer reflection.

Although the judgment distortion test strikes at the heart of the most objectionable side of government speech, it is plagued with analytical difficulties. Conventional first amendment doctrine embraces the notion of self-correcting forces in the political marketplace and would not allow the state to forbid expression that attempts to persuade over time. For example, the incitement cases appear to be concerned with immediate unlawful consequences—incitement within a narrow time frame. At least in democratic countries, government persuasion efforts tend to be more subtle, untruths are harder to identify, self-agrandizing characterizations of facts are common, and indoctrination is

140. See generally C. LINDBLOM, supra note 12, at 56-59.
144. "[Relevant] evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury . . . ." FED. R. EVID. 403.
146. "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command [of the first amendment]." Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).
a cumulative process. To condemn any single message or communications program on the basis of the judgment distortion test would be quite difficult. Even governmental communications in modern communist systems are directed at a presumably rational citizenry.\textsuperscript{147} At some point, perhaps we will instinctively recognize totalitarian propaganda, and perhaps judges should respond viscerally\textsuperscript{148} to such propaganda by declaring it unconstitutional under the first amendment. Our inability to formulate reasonably precise standards does not necessarily mean that judges should not act, but as in the case of pornography, our collective inarticulateness should give us pause.

Perhaps courts should consider the degree to which the government has captured its audience in determining the likelihood of government distortion of the citizenry's thought processes.\textsuperscript{149} Government expression may be more persuasive when the audience has no choice but to listen to the message (or at least to appear to be doing so). Thus, the potential for government indoctrination may be greatest in the case of "total institutions"\textsuperscript{150} such as prisons and semitotal institutions such as schools and military bases. The maturity of the audience, the techniques of persuasion employed, and the receptiveness of the institution and its captive audience to countermessages may be critical factors in determining the constitutionality of government speech. The greater the state's monopoly, the more apparent the dangers of government communications. Perhaps the captive audience phenomenon alone should not justify a finding of unconstitutional government expression, but it may be decisive in combination with other factors.\textsuperscript{151}

Another standard of constitutionality for government expression might distinguish partisan from nonpartisan communication. As Professor Emerson has said, "It is not the function of the government to

\textsuperscript{147} See C. Lindblom, supra note 12, at 59.

\textsuperscript{148} Grappling with the difficulties in defining obscenity, Justice Stewart remarked, "[P]erhaps I could never succeed in intelligibly [defining obscenity]. But I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).


\textsuperscript{150} The term "total institutions" is taken from E. Goffman, supra note 1, at 9 passim.

\textsuperscript{151} See generally Haiman, Speech v. Privacy: Is There a Right Not to Be Spoken to?, 67 Nw. L. Rev. 153 (1972); See also Van Alstyne, supra note 5, at 534 (the first amendment argument for silencing government speech is compelling when there is a captive audience).
get itself reelected." Thus, government officials could not use their offices, staffs, or public monies to promote their reelection or other personal political interests. This argument follows not only from the fear of government domination of mass communications but from the undesirability of requiring taxpayers to fund government speech that they find objectionable. To some extent, state and federal statutes prohibiting abuse of public office or the use of public monies and personnel for reelection address the same problem. These statutes, for example, track the flow of dollars and the activities of public employees and officers on government time.

However, except in the most blatant cases of misuse of public funds or employees by government officials, my impression is that the abuse-of-office statutes have been easily evaded and rarely enforced. Similar problems would probably arise if the partisan-nonpartisan distinction were constitutionalized, particularly if the standard covered all forms of government expression and not misuse of tax dollars per se. Members of Congress do not prepare and mail political pamphlets at public expense; rather, they send out newsletters designed to inform the electorate of their own and Congress’ activities. They are sternly warned in the United States Code:

> It is the intent of the Congress that a Member of or Member-elect to Congress may not mail as franked mail . . . mail matter which constitutes or includes any article, account, sketch, narration, or other text laudatory and complimentary of any Member of, or Member-elect to, Congress on a purely personal basis rather than on the basis of performance of official duties . . . [or] mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office . . . .

The admonition effectively tells officials, if you avoid being too blatant, you may use the franking privilege to endear yourself to the electorate; describe your performance of official duties, but refrain from directly asking for votes or political contributions. Thus, except in rare cases, it is virtually impossible to disentangle partisan from nonpartisan speech. The advancement of policy objectives through communications activities almost invariably advances the interests of those in power. For example, when the President speaks as a national leader,

---

152. T. Emerson, supra note 4, at 699.
he may also be speaking on behalf of his party or for his own reelection.

One might further refine the standard by declaring that an official's speech violates the first amendment if motivated by partisan or political concerns, but given at public expense and on public time. But the same difficulties inherent in identifying propaganda are present in determining motivation. We should not necessarily assume in anthropomorphic fashion that institutions have motives in the same sense as do persons. Even if they do have such motivations, or if one could identify within the institution a single actor with human motives, those motives are likely to be mixed. The President may speak because he believes it is in the nation's best interest, because he is looking forward to the next election, and because he wishes to unite his party behind him. Whether the public official would have acted and spoken as he did but for partisan motivation is an insoluble question. Nor is it at all clear that there is or should be a structural first amendment interest in restraining partisan, political speech, at least at the highest levels of executive and legislative policymaking.

Perhaps the partisan-nonpartisan distinction is most appropriate in judging the speech of government personnel who may be viewed as employees and not as elected officials or policymakers. For example, the mission of a public schoolteacher or a commanding officer on a military base probably does not include indoctrination of a particular political viewpoint. The state may charge public schoolteachers to teach about democratic processes and American history, but their duties are not thought to include advocating the election of particular candidates for public office. Perhaps courts would be justified in intervening when they are able to identify such blatant abuse of public trust. Again, however, the difficulties in isolating unconstitutional partisan expression would be extraordinary. The commander of a military base can communicate ideas about appropriate military policy that by implication endorse the program of a particular political party. In describing the free enterprise system, democratic institutions, the lives of great American patriots, and the history of the Great Depression, a teacher can subtly convey values that are readily identifiable with the values of one political interest or another.155

The ambiguities of the partisan-nonpartisan distinction suggest yet another problem for a first amendment theory limiting excessive gov-

155. In addition some states require teachers to instruct in “principles of government . . . established by the constitution” and permit instruction in “communism and its method and its destructive effects.” N.Y. EDUC. LAW §§ 3204(3)(a)(2) & (3) (McKinney 1970).
When Governments Speak

government communications activities. Public officials and employees retain their personal first amendment rights to freedom of speech and association, which may be violated by another's right to restrain certain forms of government expression. Thus, an acceptable constitutional theory of limitation on government expression must be able to separate government speech from the private expression of public officials. Intuitively, it is one thing for a teacher to make a passing remark about the virtues of free enterprise or socialism, but it is quite another thing for the school board to require each teacher to belabor such points on a daily basis. A mayor or members of a city council may advocate the passage or defeat of a statewide referendum, but a different issue is raised when they mobilize city employees and organize an advertising campaign, financed by tax monies, for the same purposes.

In a small number of federal court and probably a somewhat larger number of state court cases, litigants have directly challenged government communications activities. One cannot speak with much assurance about these matters, for the information management devices of the legal profession—digests, law reviews, indexes—simply do not classify cases according to their import for government expression. The cases arise in incredibly diverse circumstances, and their legal characterizations run the gamut from substantive and procedural due process to the speech or debate and commerce clauses. The most common government speech cases concern taxpayer challenges in state court to local government advertising during the pendency of an election or referendum. Business entities occasionally seek to quiet adverse publicity emanating from administrative agencies. The absence of any direct legal challenges to massive federal communications programs highlights the elusive nature of a search for constitutional constraints in this area and the tendency to rely on nonjudicial approaches.

The constitutionalization of direct rights and remedies with respect to government expression is troubling. I am reminded of Professor Fuller's wise counsel:

A sledge-hammer is a fine thing for driving stakes. It is a cumbersome device for cracking nuts, though it can be used for that

159. E.g., Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978).
purpose in a pinch. It is hopeless as a substitute for a can-opener. So it is with adjudication. Some social tasks confront it with an opportunity to display its fullest powers. For others it can be at best a *pis aller*. For still others it is completely useless.

. . . .

. . . It is notable that the greatest failure in American administrative law has been with respect to those agencies that were assigned, or assumed for themselves, polycentric tasks which they attempted to discharge through adjudicative forms. . . . [They] have failed . . . because they were compelled, or thought they were compelled, to create and shape that [extralegal] community through adjudicative procedures.

. . . [L]ike many other precious human goals, the rule of law may best be achieved not by aiming at it directly.160 Direct judicial action is probably not the best way to limit the impact of government speech. The indirect approach, the chipping away at the problem through the adjudication of more traditional first amendment claims, is preferable. A purposeful reconstruction of government communication networks might fall wide of the mark and perhaps disable governments from implementing policy objectives in legitimate ways. Yet, the door to direct judicial intervention against government expression should not be closed. It must be left open a crack; resort to the courts may yet prove necessary in the pinch. Thus, the remainder of this Article examines some practical and analytical problems inherent in the application of direct controls on government expression, and proposes that courts look to the legislature for guidance in identifying objectionable government speech.

B. Misleading Speech by an Executive Officer

The courts are usually quite hesitant to restrain government speech, and that hesitancy is reflected in *Wickard v. Filburn*,161 a 1942 case generally cited for the proposition that Congress has extraordinarily broad powers under the commerce clause to regulate private activities in the states. The Court upheld the Agricultural Adjustment Act of 1938,162 as subsequently amended,163 even as it applied to a farmer who grew only 462 bushels of wheat. The Supreme Court paid scant attention to what appeared to the lower court to be plaintiff's primary concerns. In the district court, plaintiff argued that the wheat farmers'

162. Ch. 30, 52 Stat. 31 (1938).
vote on national marketing quotas took place after they had planted their crops, and that the Secretary of Agriculture, Claude Wickard, had failed to inform farmers that the penalties for overproduction would be increased from their preplanting and prereferendum level of fifteen cents per bushel to forty-nine cents per bushel. Plaintiff alleged that the retroactive application of the higher penalties was an unconstitutional taking. The lower court held for plaintiff on this ground, and the Supreme Court reversed, addressing primarily the commerce clause and not the taking issue.

The key event from the perspective of government speech was a radio address by the Secretary, entitled “Wheat Farmers and the Battle for Democracy,” in which he urged the farmers to vote for the wheat quotas. The Secretary stressed that without the quotas wheat prices would decline drastically and that farmers would not be eligible for wheat loans. He neglected to tell them that legislation pending in Congress would increase the penalties for overproduction. More than eighty percent of the eligible wheat farmers voted for the quotas, and in essence, plaintiff alleged that they had been misled by the Secretary’s remarks. The lower court responded by saying simply “that the equities of the case . . . favor the plaintiff,” and held that the Agricultural Adjustment Act amendments were unconstitutional because of the retroactive increase in penalties for overproduction, thus basing the judgment on the taking argument. Justice Jackson misconstrued the holding, declaring that the lower court held “that the speech of the Secretary invalidated the referendum . . .”

Whether Justice Jackson decided a real case or a hypothetical one, his remarks about the Secretary’s speech are quite interesting. He disposed of the issue in two paragraphs. First, he disputed whether the speech was misleading. Second, he disputed whether anyone listened to or was influenced by the speech. Third, he noted that the text of the pending act was readily available and that the Secretary’s speech did not purport to be an explication of its provisions. Finally, he expressed concern about the practical implications of overturning the referendum on the basis of the speech:

165. Id. at 1018.
166. Id. at 1019.
167. Id. at 1019. The lower court enjoined the collection of the penalties.
169. Id. at 117-18.
171. 317 U.S. at 118.
To hold that a speech by a Cabinet officer, which failed to meet judicial ideals of clarity, precision, and exhaustiveness, may defeat a policy embodied in an Act of Congress, would invest communication between administrators and the people with perils heretofore unsuspected. Moreover, we should have to conclude that such an officer is able to do by accident what he has no power to do by design.\textsuperscript{172}

Jackson's approach to the government speech problem in the context of the case is quite sensible. Although invalidation of the referendum\textsuperscript{173} was a workable remedy, Jackson essentially said that if high level executive officers were held accountable for every misstatement or omission, government leadership on vital matters of national concern might well come to a halt. The text of the bill in Congress was publicly available, and it was up to the Filburns of the nation to organize and voice their opposition to the ratification of the quotas. In short, the preferred response to government propaganda is counter-propaganda, not the silencing of government officials.\textsuperscript{174} Identifying appropriate executive branch advocacy by distinguishing judgment distortion from public leadership, and government speech from private speech by a public official, is so difficult that it is preferable to rely upon the pluralistic character of the system of freedom of expression. If reply to the Secretary is difficult, by virtue of his status and access to the media, that is an inevitable consequence of pluralism; there is no guarantee in the political system at large that all interest groups and individuals will be equally capable of pressing for political solutions favorable to their interests.

\textbf{C. Captive Audiences and Enjoining Government Expression: Bonner-Lyons}

As a general matter, neither federal nor state courts have created any right of reply to government speech or any overall framework in which government speakers must be balanced in their presentations.\textsuperscript{175} \textit{Bonner-Lyons v. School Committee}\textsuperscript{176} appears to be the major excep-
tion. In that case the Boston School Committee adopted an official resolution authorizing the distribution of notices to parents urging them to support a rally and march designed to oppose the state's Racial Imbalance Law and the involuntary busing of school children to achieve racially integrated schools. The notice encouraged parents to support a state bill that would require written consent of the parents before a student could be bused, and criticized a desegregation proposal pending before the State Board of Education. The School Committee distributed the notices to approximately 97,000 students by requiring each teacher to deliver a copy to each student in his or her charge. The students were merely couriers; the notices were specifically addressed to the parents. The School Committee refused to abandon the planned distribution when challenged by the Ad Hoc Parents' Committee for Quality Education, and refused to permit the dissemination, in a similar manner, of probusing notices. The Parents' Committee challenged the refusal, and the district court denied relief. The court of appeals reversed:

As we read the March 30 notice, it seems apparent that this message tended to lend support and to mobilize opinion in favor of the position of those private parties who sponsored the April 3 "Parents' March on the State House." Under these circumstances, we conclude that defendants, by authorizing this distribution, sanctioned the use of the school distribution system as a forum for discussion of at least those issues which were treated in this notice. When defendants' refusal to allow plaintiffs access to this system is considered in light of this conclusion, the trial court's error becomes manifest since it is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed.

The court enjoined defendants from distributing similar notices through their employees to students on school premises, "unless fair and reasonable [sic] timely opportunity is afforded to others having differing views to use the same channels to invite attendance at or call attention to rallies and activity in furtherance of such differing views."

The court's holding is unprecedented if read literally. The holding

177. Id. at 442-43.
178. Id. at 443.
179. Id.
180. Id. at 443-44.
181. Id. at 444.
gives private individuals and groups (though unidentified except in terms of their opposition to the School Committee's position) an affirmative right to reply to the School Committee's messages on racial balance issues. The court relied on cases that do not support this position. Those cases refer to the public forum doctrine and the notion that the equal protection clause and the first amendment do not permit a public institution to allow some groups and individuals access to the forum while denying it to others on the basis of message content. In some cases the forum was opened to both public and private groups, but in no case was the forum opened because the public entity itself chose to communicate its own messages. Moreover, even though the forum was opened, the courts created no right of reply to specific messages that had been transmitted.

Although the result in Bonner-Lyons may be correct—what business does the School Committee have in trying to persuade parents on volatile busing issues through its ability to communicate with a captive audience—the court never set forth principles to guide more difficult cases. Can one fashion principled distinctions between different types of government communications? If the established school curriculum for civics promotes representative democracy, do opponents have a right to reply through the same channels (in the classroom)? Presumably, nearly everything that is taught in public schools may occasion opposition, but to allow a right of reply in every instance would disable the government's legitimate educational mission. And if there is a right of reply in schools, is there not also a similar right in the military, prisons, hospitals, and other public institutions? A right of access to public institutions consistent with the institutional mission and the substantial disruption standard would alleviate the dangers of government communications to a captive audience without granting an unprecedented right of reply to every official communication.

Bonner-Lyons could have been decided on far more defensible grounds. The court noted in a footnote that school authorities had per-
mitted a "private group," the Home and School Association, to utilize the school distribution system for antibusing materials that the group itself had obtained. If the Association was actually a private group, the court justifiably could have declared that a public forum had been created. But, again, this would simply mean that the authorities, in allowing access to the public forum, could not pick and choose among private groups on the basis of message content. It would not mean, as the court's order clearly states, that opposition groups were entitled to reply to each antibusing message communicated by public school officials.

The type and context of the government expression in Bonner-Lyons raise profound concerns. First, the case did not bear on the rights of individual school board members to express their own positions in a public meeting or in their capacity as elected public officials. The message sent to the parents through the students was the product of official school board policies and directives and was perceived to emanate from the governmental entity itself. Second, the School Committee took advantage of its position of public trust to convey this official message to a captive audience, a situation that should make courts particularly sensitive to government communications excesses. Third, and most important, the message was not only blatantly partisan, but also clearly outside the institutional mission of public schools. The message was not even addressed to the students; rather, the board wished to reach the parents. The School Committee did not even create a pretense that the message was a part of the educational process.

I suspect most of us are offended by the school board's speech in Bonner-Lyons. Surely civics courses, history courses, the school's manner of operation, and the rules of the school environment convey political values. And presumably individual teachers and administrators, either explicitly or implicitly, communicate their views on controversial issues like school busing. But somehow this speech is different in kind; it is more like the distribution of pamphlets listing the names of political candidates that the school system favors. Thus, Bonner-Lyons may be the rare case in which injunctive relief is appropriate. The nature of the message, the nature of the audience, and commonly held perceptions about the legitimate role of public education lead to this conclusion. However, the intellectual boundaries between propaganda and education, partisan and nonpartisan speech, subtle and explicit indo-
trination, remain indistinct. For that reason, courts should be reluctant to expand the *Bonner-Lyons* holding on injunctive relief. But the dangers of that speech, when weighed against the order's lack of interference with the mission of the public schools, reinforce the view that the case was decided properly.

**D. Enjoining Government Expression: First Amendment Policy and the Ultra Vires Doctrine**

The effective application of direct judicial controls on government expression suffers from impressive difficulties in identifying offensive government speech and objectionable modes of government communication. Instead, courts may look to the legislature for guidance in meeting these definitional problems. If a legislative body determines that a particular type of government expression poses a threat of falsifying consent or is otherwise inappropriate, the courts should not be in the business of second-guessing that decision.

A reexamination of *Bonner-Lyons* will illustrate the analysis. The court should have determined whether the legislature of Massachusetts had authorized the local board of education to act as it did, and declared these highly offensive communications ultra vires absent explicit legislative authorization. This state-law approach, unlike a constitutional decision, leaves the last word with the legislature. On an ad hoc basis the legislature can define objectionable and unobjectionable speech by a school system, without compromising the state's educational program. The legislature can also assist the courts in distinguishing private speech of public officials from organized governmental communications activities. This essentially statutory approach, in effect, recommends that when government communications raise grave issues of democratic precepts and the first amendment, courts should be particularly certain that legislative bodies have authorized the communications activity. This suspensive veto should not be grounded in the Constitution itself; the ultra vires doctrine is a method of statutory construction that permits the avoidance of constitutional difficulties.

I suggest this variation of the "legislative remand" with great

---


189. The phrase "legislative remand" refers to a statutory version of what has been described as structural due process or structural justice.

We may begin by observing that all . . . of the constitutional models thus far examined have been concerned with ways of achieving substantive ends through variations in governmental structures and processes of choice.

When Governments Speak

trepidation. While it avoids the error of placing ultimate authority with the courts in a rigid constitutional framework, it is not at all clear when courts should intervene, even on this more limited basis. Presumably, not all government speech should be subjected to a presumption that it is ultra vires in the absence of explicit legislative endorsement; not all speech threatens the dangers I have discussed here, and legislatures cannot be expected to sanction or even consider fully the endless variety of government communications. The propaganda-education distinction, for example, appears no less tenuous in the legislative remand context than it is in its substantive constitutional garb. Enjoining government speech, even temporarily while awaiting legislative action (which is hardly inevitable), may cripple legitimate government operations. Moreover, the legislature may seek to restrain speech by executive government officials to gain an advantage in the conflicts between branches of government. The ultra vires approach is suggested, in large measure, because state courts in a relatively large number of cases have used the technique to grant injunctions limiting government communication activities, apparently without precipitating any dire effects.

Further, state legislatures have almost invariably

I mean [then] the approach to constitutional values that either mandates or at least favors the use of particular decisional structures for specific substantive purposes in concrete contexts, without drawing on any single generalization about which decisional pattern is best suited, on the whole, to which substantive aims. Tribe, The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking, 10 CREIGHTON L. REV. 433, 440-41 (1977). See also Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976). Citing Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), and Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), Professor Tribe notes that structural concerns are inherent in cases in which the Court held "that the challenged delegation had gone beyond the bounds of Congress' power to abdicate responsibility for substantive policy choice . . . ". Tribe, supra, at 441. Thus, the manner in which a rule or law is made or an activity is authorized, as well as the substance of the rule, law, or activity, is significant in determining its validity. Id. at 442.

Both the Panama Refining approach and that of Hampton put pressure on legislatures and/or agencies to reconsider the invalidated provision from a fresh perspective, and both approaches leave open the possibility that the Court may uphold a somewhat revised provision if such reconsideration leads to its enactment in an altered form or by a different body. Thus both approaches bear some similarity to the notion of "remand to the legislature" often advocated by constitutional and common-law commentators. Id. at 442-43. Courts should require legislatures to consider the wisdom of certain types of government communications activities by enjoining the activity until the legislature expressly authorizes it.


913
declined the opportunity to overturn the suspensive veto of the state courts.

*Stanson v. Mott*\(^1\) is an excellent example of the application of the ultra vires technique by a state court. California voters were asked to consider a $250 million bond referendum, the bond monies to be used for acquisition of park land and recreational and historical facilities by state and local governments. Plaintiff, a taxpayer, alleged that defendant Mott, director of the California Department of Parks and Recreation, had authorized the expenditure of $5000 in public funds to promote the passage of the bond issue. The $5000 was used to pay for promotional materials written and published by the department staff and private groups, to finance speaking engagements to promote the bond issue, and to hire a three-person staff to engage in similar activities. The California Supreme Court found that the California legislature had not authorized the expenditure of government funds for these purposes. The court further noted that "every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not explicitly authorized . . . or on the broader ground that such expenditures are never appropriate."\(^2\) Although the court did not rely on the broader constitutional ground,\(^3\) it noted that judicial reluctance to sanction government speech activities such as those in question had its roots in constitutional and democratic precepts:

Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate

---


\(^3\) 17 Cal. 3d at 217, 551 P.2d at 8-9, 130 Cal. Rptr. at 704-05. The court's statement is technically in error since there is at least one case in which such authority was upheld. See City Affairs Comm. v. Board of Comm’rs, 132 N.J.L. 532, 41 A.2d 798 (Sup. Ct. 1945). But see Citizens to Protect Pub. Funds v. Board of Educ., 13 N.J. 172, 98 A.2d 673 (1953).

---

914
themselves, or their allies, in office . . .; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.\textsuperscript{194}

The court recognized the difficulty in distinguishing “improper ‘campaign’ expenditures from proper ‘informational’ activities,”\textsuperscript{195} but relegated this factual question to the lower court for determination in the light of a “careful consideration of such factors as the style, tenor and timing of the publication . . . .”\textsuperscript{196} It could formulate “no hard and fast rule govern[ing] every case.”\textsuperscript{197} The court held that if plaintiff succeeded in meeting his burden of proof, lie would be entitled to a declaratory judgment that the expenditures were unauthorized and an injunction against such activities if they were threatened in the future. The court did not indicate whether appropriate relief would include the overturning of the referendum result (the voters had approved the bond issue). The defendant public official, however, could not be held strictly liable for the unauthorized expenditures; rather, he could be held liable only if he had failed to exercise “reasonable diligence . . . in authorizing the expenditure of public funds . . . .”\textsuperscript{198}

\textit{Stanson} and other cases\textsuperscript{199} suggest a number of factors that influence whether particular government communications should be subjected to a strict test of legislative authorization. First, all of the cases concerned government communications during the pendency of public elections or referendums. Government attempts to influence election results, a critical point in the democratic process,\textsuperscript{200} are particularly suspect. Second, the objectionable speech must be something more than isolated instances of government involvement in partisan campaigns; the courts have not restrained individual officials from speaking out on public issues. Third, almost invariably the cases concerned the dedication of a specific sum of tax monies for the communications activity. Fourth, it was usually clear that the messages were partisan attempts to influence political results; they were not simply minor lapses in an objective and balanced presentation of the issues. Finally, the courts were hostile to expenditures that financed mailing and advertising campaigns directed explicitly to the voters. They have gener-

\textsuperscript{194} 17 Cal. 3d at 217, 551 P.2d at 9, 130 Cal. Rptr. at 705.
\textsuperscript{195} 1d. at 221, 551 P.2d at 11, 130 Cal. Rptr. at 707.
\textsuperscript{196} Id. at 222, 551 P.2d at 12, 130 Cal. Rptr. at 708.
\textsuperscript{197} 1d.
\textsuperscript{198} Id. at 226, 551 P.2d at 15, 130 Cal. Rptr. at 711.
\textsuperscript{199} See cases cited at note 190 supra.
\textsuperscript{200} See Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (The first amendment “has its fullest and most urgent application to the conduct of campaigns for political office.”).
ally permitted local governments to finance lobbying activities directed to individual state legislators and legislative committees.\textsuperscript{201}

The adequacy of these criteria is uncertain. The information-partisan-advocacy distinction remains elusive. A per se rule that the legislative remand should operate only during the pendency of elections would limit greatly the scope of judicial interference with government communications activities. On the other hand, the distinction between electoral politics and, for example, interest group politics seems artificial. Why is lobbying different in kind from an attempt to influence public opinion, which in turn will influence legislators?\textsuperscript{202} Is the bond election in \textit{Stanson} much different from the campaign to influence the state legislature in \textit{Bonner-Lyons} in terms of the dangers of government speech? Certainly, one would be hard pressed to say that one issue was more or less partisan or controversial than the other, and the possibility of distortion of the democratic process is apparent in both cases.

The distinction between organized, publicly funded government speech and more sporadic speech at virtually no public expense is also troublesome. The Secretary of Agriculture's speech in \textit{Filburn}, using radio time for which neither Wickard nor the government paid, may be more likely to distort election or referendum results than the publishing and mailing of pamphlets at public expense in \textit{Stanson}. A comparison of the \textit{Filburn} and \textit{Stanson} holdings may suggest that state courts are more concerned with the misapplication of tax monies than with any other issue. Alteratively, the distinction between types of government officials may be important: high-level, policymaking officials are free to influence political outcomes, but lower-echelon civil servants must remain isolated from or neutral toward the political processes. Hence, Secretary Wickard could engage in conduct and speech activities that would be forbidden to ordinary bureaucrats.\textsuperscript{203} Indeed, this may be the real distinction between isolated speeches (generally made by high-level officials) and organized government communications activities (in


\textsuperscript{203} \textit{See} 5 U.S.C. § 1502(a), (c) (1976) (exempting governors, lieutenant governors, mayors, and heads of executive departments from ban on state or local officers and employees working in federally financed programs, or "be[ing] a candidate for elective office.") \textit{See also} \textit{Hatch Act}, 5 U.S.C. § 7324 (1976).
When Governments Speak

which many civil servants, including those in nonpolicymaking roles, participate).

If the legislature is the branch of government most likely to address government speech excesses, a judicial approach that focuses legislative attention on those issues and encourages legislative debate and resolution of the role of government speech in a democracy is desirable. The primary benefit of the legislative remand approach is that it invites legislatures to grapple with government speech issues. And it avoids, at least in part, the charge of an imperial judiciary, ruling in the stead of elected representatives.

IV. Conclusion

A constitutional right to be free of excessive government speech is frequently a standardless right that may impose substantial costs on the operation of government. There are many approaches to curbing government speech excesses, but each entails significant analytical difficulties. Although courts should be particularly reluctant to enjoin government speech, those policies regarding the need to limit government expression should inform the adjudication of traditional first amendment claims. Though the traditional cases are rooted in principles of individual and group rights of expression and association, they have systemic implications favorable to the limitation of government speech. Courts should be more explicit about this facet of the first amendment in establishing the framework for decision. In this fashion, government falsification of majorities becomes less likely as speech in the private sector remains viable.

The preferred approach leaves matters relating to government participation in communications networks to legislatures and not to judicial constitutional creativity. The technique of judicial remand to legislative bodies for a sober second look at offending government communications is attractive. Courts should declare as ultra vires government speech activities that are particularly offensive and that are likely to interfere with individual judgment, unless they are specifically authorized by legislative bodies. The courts can be the eyes and ears of the legislature, a body not structured to systematically identify communications excesses. The ultra vires technique, while based upon state and federal statutes, is quite similar to the Supreme Court’s approach to the dormant commerce clause: the Court polices state measures for interference with interstate commerce, while recognizing that Congress
has the last word on what constitutes an impermissible interference.\textsuperscript{204} Upon remand, there is ample reason to believe that elected legislative bodies will be inhospitable to much propagandizing, particularly when executive officers are the offenders. Although legislative bodies may have little incentive to verify the nexus between legislative majorities and popular majorities, they have a great incentive to thwart a falsification of consent by executive agencies. Since legislatures, because of their fragmented nature, cannot hope to win a battle of words with the executive branch, they frequently will perceive executive communications activities as threats to their powers and will act accordingly. If the legislature believes that executive agencies have acted properly, there is usually good reason to be confident about its judgment.

This outline of ways to limit government speech is quite tentative. I have not identified, much less analyzed satisfactorily, the myriad ways in which governments promulgate their messages. Nor have I investigated the too-frequent blind faith in pluralism.\textsuperscript{205} An examination of the relevant communications and political science literature on the effectiveness of mass communications, including those emanating from government, is in order. Government structure has received only passing attention, and I have discussed only a limited number of cases arising under the first amendment.

My hope is that this essay will spark scholarly debate of long-neglected issues, even if it is the wrongheadedness of my analysis that provokes others to write. In any event, I have suggested the direction of my own future research, and perhaps others, more insightful than I, may perceive the wisdom of investigating government speech in the context of a general consideration of the system of freedom of expression.
