

WHY IS GOVERNMENT SPEECH PROBLEMATIC? THE UNNECESSARY PROBLEM, THE UNNOTICED PROBLEM, AND THE BIG PROBLEM

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INTRODUCTION

What Justice Stevens describes as “the recently minted government speech doctrine”¹ is the site of some difficult and well-known doctrinal problems. When is government speaking, as opposed to regulating? Should subsidies with restrictions attached be treated as government speech or as content-based regulations of private speech? What constitutional difference should it make if government is viewed as the speaker, subsidizer, or regulator? What constitutional restrictions, if any, should limit government as the speaker?

Some of these doctrinal difficulties were on display in the recent case of *Pleasant Grove v. Summum*.² Did monuments placed or rejected from placement in a Pleasant Grove city park represent government speech, or private speech? If they were private speech, wasn't the city engaging in forbidden content discrimination by accepting a Ten Commandments monument while rejecting a monument inscribed with the Seven Aphorisms of the less familiar Summum religion? Conversely, if the monuments were government speech, wasn't there at least a serious question about whether Pleasant Grove violated the establishment clause by putting up the Ten Commandments monument?³

Some people may have come to the government speech conference⁴ with the expectation of hearing solutions to these sorts of doctrinal problems. And it's possible that they will find some solutions—but not from me, I'm afraid. I'm frankly doubtful that satisfactory solutions exist, and in any case I have none to offer. So instead of proposing solutions, I want to step back and ask (in what I fear will be a somewhat speculative and

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1. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

2. *See id.* at 1131 (majority opinion).

3. Justice Stevens and Justice Scalia both noted the issue. *Id.* at 1139 (Stevens, J., concurring); *id.* at 1139–40 (Scalia, J., concurring).

4. 17th Annual Ira C. Rothgerber Conference co-hosted by the Byron R. White Center for the Study of American Constitutional Law and the *Denver University Law Review*. The conference, which focused on government speech, was held in Denver, Colorado on January 22.

meandering inquiry): *Why does* government speech seem to be the source of such difficult constitutional problems?

Why ask *why*? Well, it might be that at least some of these problems are unnecessary—false conflicts, as they say in *Conflicts of Law*. For me, the inquiry grows out of an assumption that understanding is intrinsically a good thing; so understanding our situation is a good thing. Part of understanding our situation is understanding how or why we have come to have the problems we have, even if that understanding doesn't immediately eliminate the problems.

In any case, that is the question I want to ask: Why is government speech problematic?

I suggest that some of the difficulties arise from a commitment to government neutrality that is fundamentally misconceived. Our commitment to neutrality is in fact a source of serious difficulties, but it doesn't need to be: we could simply relinquish the commitment (at least in theory).

Even if we did that, however, the difficulties associated with government speech would not disappear. That is because in part those difficulties grow out of a different problem—one from which the fixation on neutrality may serve to distract attention—that is less often noticed but is very real. I will call this the problem of institutional capture. This problem is hardly unique to government, but it affects government, and once noticed, suggests a possible explanation for some constitutional difficulties that government speech can generate.

Indeed, reflection on the problem of institutional capture points us to the larger difficulty—what I call the “big problem”—that I believe underlies controversies about government speech. The big problem is, basically, the collapse of any working consensus about the proper domain and functions of government. Controversies about government speech, I'll suggest, are actually symptoms of this larger problem.

I. THE UNNECESSARY PROBLEM: NEUTRALITY

Many of the problems associated with government speech are caused in part by ostensible constitutional obligations of governmental neutrality. These obligations are misconceived; we can and should banish them by disavowing the misplaced commitment to neutrality. So neutrality is, or at least could and should be, a non-problem. In this section I'll try to explain this view.

A. Neutrality vs. Government Speech

A familiar modern conception associates liberal government with “neutrality.” Liberal thinkers vary in what they think government must be neutral *towards* or *about*. The narrowest claim, perhaps, affirmed by all but a few outliers (like myself), is that government must be neutral

toward “religion” (whatever that is).⁵ Others give the neutrality principle a much broader scope. For example, prominent thinkers like John Rawls and Ronald Dworkin sometimes say that government must be neutral with respect to “the good,” or the “good life,” or with respect to “comprehensive doctrines.”⁶ A revered judicial pronouncement, if read closely and analytically (as, fortunately, it hardly ever is), implies that the zone of neutrality should cover “politics, nationalism, religion, or other matters of opinion.”⁷

Commitments to neutrality inevitably influence and infiltrate understandings of freedom of speech, and of government speech. Thus, if government is obligated to be neutral within some domain, then a logical (albeit untenable) implication would be that government should refrain from making pronouncements or taking sides within that domain. In this vein, one prominent scholar purports to find in the free speech cases an “anti-orthodoxy” principle.⁸ Although he applies this principle mostly to governmental efforts to restrict expression by private speakers, he also seems to contemplate that the principle might limit government expression as well⁹ (as indeed “an anti-orthodoxy” principle worthy of the title seemingly should). Another scholar argues that the Constitution, by implication, contains a “political establishment clause” that prohibits gov-

5. See, e.g., Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 7–8 (1986) (“In my view, the establishment clause absolutely disables the government from taking a position for or against religion. . . . The government must have no opinion because it is not the government’s role to have an opinion.”). Michael Perry elaborates on the theme:

No matter how much some persons might prefer one or more religions, government may not take any action based on the view that the preferred religion or religions are, as religion, better along one or another dimension of value than one or more other religions or than no religion at all. So, for example, government may not take any action based on the view that Christianity, or Roman Catholicism, or the Fifth Street Baptist Church, is, as a religion or church, closer to the truth than one or more other religions or churches or than no religion at all—or, if not necessarily closer to the truth, at least a more authentic reflection of the religious history and culture of the American people. . . . Similarly, no matter how much some persons might prefer one or more religious practices, government may not take any action based on the view that the preferred practice or practices are, as religious practice . . . , better—truer or more efficacious spiritually, for example, or more authentically American—than one or more other religious or nonreligious practices or than no religious practice at all.

MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 15 (1997).

6. RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985); JOHN RAWLS, POLITICAL LIBERALISM 190–95 (expanded ed. 2005).

7. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

8. Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 818–22 (2001).

9. Thus, Rubenfeld suggests that his anti-orthodoxy principle would forbid government to “declare the truth about . . . how many gods there are.” *Id.* at 819. And he indicates, perhaps somewhat ambiguously, that “the law has no power to tell anyone what to think.” *Id.* at 821. In a similar vein, another theorist argues that “evaluative neutrality” by government toward the ideas communicated through speech “is central to our understanding of freedom of expression.” LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 177–78 (2005). However, Alexander goes on to argue that evaluative neutrality is impossible: he thus finds the commitment to freedom of expression—and liberalism generally—deeply paradoxical. See *id.* at 147–81.

ernment from advocating political viewpoints, much in the way that the establishment clause is thought to prohibit religious speech.¹⁰

Similar ideas pop up in the Court's opinions themselves. Justice Brennan explained in a curious case that public school officials cannot remove books from the school library "simply because they dislike the ideas contained in those books"¹¹—as if the selection of books under conditions of limited funds and limited space did not routinely and inevitably entail non-neutral evaluations of the ideas such books contain. Perhaps the most celebrated expression of this sort of "neutrality" or "anti-orthodoxy" aspiration occurred in the case I already alluded to—in Justice Jackson's magnificent, celebrated, utterly implausible declaration that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or* force citizens to confess by word or act their faith therein."¹²

Notice that Jackson used the conjunction "or" rather than "and." He asserted that government officials, high or petty, are prohibited not simply from coercively imposing orthodoxies on a broad range of matters, but also from "prescrib[ing]" them.¹³ But "orthodoxy" is a term that derives from Greek and simply means "right opinion."¹⁴ To assert *X* is necessarily to assert that *X* is *true*, and thus that it is the right opinion. Therefore, to declare that "democracy is good and communism and fascism are bad" (or that "smoking is bad," or that "global warming is a serious problem") is to say that these propositions are *true*, and hence the right opinion. And to assert that an idea is true and the right opinion is surely to "prescribe" it. Consequently, a scrupulous adherence to Jackson's celebrated dictum would have the consequence of prohibiting a large chunk of governmental speech—maybe even most of it.

No one favors such an impossible prohibition (pleasant though the vision may be).¹⁵ Therefore, at the cost of rendering Jackson's statement internally redundant and stripping its more inspirational phrases of their

10. See Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979).

11. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982).

12. *Barnette*, 319 U.S. at 642 (emphasis added). For my criticisms of the pronouncement, see Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 628 (2003). See also ALEXANDER, *supra* note 8, at 176–81.

13. *Barnette*, 319 U.S. at 642.

14. PAUL TILLICH, *A HISTORY OF CHRISTIAN THOUGHT: FROM ITS JUDAIC AND HELLENISTIC ORIGINS TO EXISTENTIALISM* 305 (Carl E. Braaten ed., 1967).

15. In his comment on Professor Randall Bezanson's paper in this symposium, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809 (2010), Professor Robert Nagel suggests that one unintended but happy consequence of the rigorous implementation of Bezanson's proposal would be that "a blessed silence would descend upon the land." Robert F. Nagel, *A Comment on "The Manner of Government Speech"*, 87 DENV. U. L. REV. ONLINE 85 (2010), http://denverlawreview.org/storage/Nagel_BezansonComment.pdf. Neither Nagel nor Bezanson actually expects this surmise to be realized, however.

significance, we may avoid its untenable implications by reading “pre-*scribe*” to mean something like issuing prescriptions *backed by coercion*. Still, that isn’t what Jackson said, and his pronouncement looms in the background, evincing the appeal of “anti-orthodoxy” neutrality, and ready to cast a pall of suspicion on governmental speech of any moment.

But these are isolated pronouncements. The aspiration to neutrality is more systematically manifest in the reigning doctrinal approach to free-speech protection, under which the most serious evil that a censorious government can commit is thought to be “viewpoint discrimination.”¹⁶ Officially, to be sure, the “no viewpoint discrimination” doctrine does not apply when governments are *speaking*; the doctrine holds only that governments must be viewpoint neutral when they *regulate* or *restrict* speech by nongovernmental actors.¹⁷ Indeed, it is plausible to view the development of the “government speech doctrine” in large part as an effort to relieve government of the suffocating demands of the prohibition on viewpoint discrimination.¹⁸ The convergence of these doctrines can accordingly make the constitutionality of a practice turn on whether government is speaking or regulating, as in the *Summum*¹⁹ case. Particularly when the challenged practice involves the conditional funding of expression by non-governmental speakers, though, this line can be hard to draw.²⁰ This difficulty is one of the most conspicuous constitutional problems currently presented by government speech.²¹

One major reason the line is hard to administer, I submit, is that the line itself makes little sense in terms of the obligation of neutrality that inspires the “no viewpoint discrimination” doctrine in the first place. If government is supposed to be neutral—in other words, neutral toward “the good,” or toward “comprehensive doctrines,” or toward “politics,

16. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (“Viewpoint discrimination is censorship in its purest form . . .”).

17. See, e.g., *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1132 (2009).

18. Once again, the *Summum* case illustrates this “escape valve” function of the government speech doctrine. However, the doctrine also serves to provide an escape valve from other sometimes inconvenient doctrines, such as the *Abood* doctrine, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 260 (1977); see also *infra* notes 57–58 and accompanying text, forbidding some compulsory contribution provisions which have been understood to require compelled affirmations by unwilling speakers. See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 558–59 (2005). This issue is discussed in more detail in Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 834–839 (2010).

19. *Summum*, 129 S. Ct. at 1132–34.

20. The problem manifests itself in the difficulty of reconciling cases like *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991), in which the Court upheld a restriction forbidding recipients of federal health care funding from engaging in abortion counseling, with cases like *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 845–46 (1995), in which the Court struck down a University of Virginia policy prohibiting funding for speakers and newspapers from being allocated to religious speakers or media. For a discussion of the difficulties, see ALEXANDER, *supra* note 8, at 87–88.

21. Scholars have struggled to make the distinction operable. See, e.g., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

nationalism, religion, or other matters of opinion”—then government violates that obligation as surely by speaking in favor of one view in a controversy as by regulating the expression of views by others.²²

The underlying difficulty can be seen by reference to what is probably the most common rationale given for the “no viewpoint discrimination” doctrine. That rationale holds that non-neutral regulation is objectionable because it distorts public discussion and skews the marketplace of ideas.²³ Speakers are supposed to engage in fair, level-playing-field combat,²⁴ with the Miltonian hope that true ideas will prevail.²⁵ If government restricts some viewpoints, then the game seems rigged and the marketplace is prevented from producing the right outcome.²⁶

On this rationale, though, government speech presents a major embarrassment. After all, government is likely to be the biggest, loudest, best-funded speaker on the block—by far. In public schools, for example, government gets to speak to captive audiences; it speaks to them for hours and days on end at the formative period in life—childhood—when people are most susceptible to indoctrination. No other speaker comes close to enjoying those discursive advantages. So if government uses its booming voice to favor one view over others, it is hard to say that the playing field is level.²⁷ Indeed, the “skewing” or “distorting” effect might

22. This assertion might provoke the objection, suggested by Professor Chen in his comments on this paper, that viewpoint discrimination in governmental *expression* is in one crucial respect unlike viewpoint discrimination in governmental *regulation* because the latter kind of censorship eliminates some ideas from the marketplace, and thereby makes them unavailable for consideration and possible acceptance. See Alan Chen, *Right Labels, Wrong Categories: Some Comments on Steven D. Smith's "Why is Government Speech Problematic?"*, 87 DENV. U. L. REV. ONLINE 78 (2010), http://www.denverlawreview.org/storage/Chen_RightLabels.pdf. But in fact much viewpoint discriminatory regulation affects only the time, place, and manner of expression. Such regulation disadvantages some ideas relative to others, to be sure, but it does not remove any ideas from the intellectual or conversational marketplace. Geoffrey Stone describes these as “modest viewpoint-based restrictions.” Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 200 (1983).

23. Geoffrey Stone, a leading proponent of the content neutrality approach, explains that a non-neutral speech regulation “distorts public debate.” *Id.* at 198. “This is so, not because such a law restricts ‘a lot’ of speech, but because by effectively excising a specific message from public debate, it mutilates ‘the thinking process of the community’” *Id.*

24. *Cf. R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992) (condemning viewpoint discriminatory ordinance because “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules”).

25. One of the most often quoted statements in the free speech tradition is from Milton:
And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter.

JOHN MILTON, *AREOPAGITICA* (1644), reprinted in JOHN MILTON, *AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON* 3, 45 (1999).

26. For an argument that government speech can distort the marketplace of ideas, see Kamen-shine, *supra* note 9, at 1105–06.

27. *Cf.* Lee C. Bollinger & Geoffrey R. Stone, *Epilogue* to *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 311, 313 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (observing that “the massive presence of government in the society presents extraordinary opportunities for

be vastly more powerful than if government simply imposed a few moderate viewpoint-based regulations (many of which would burden but not eliminate the expression of disfavored views).²⁸

In short, government speech stands in stark tension with the aspiration to neutrality. Sanford Levinson explains:

This image of the state as . . . benignly neutral . . . is quite naive, not least because it almost wholly fails to pay adequate attention to the fact that the state is often an active participant in the intellectual marketplace. The easiest examples, of course, involve presidents giving major policy addresses or teachers using state-mandated textbooks within the public school system. Both regularly articulate, clothed in the full symbolic and actual authority of the state, highly contestable—and completely unneutral—views on important political and cultural matters. The danger facing those who disagree with the state’s views comes, most often, not from any plausible fear of classic censorship . . . but, rather, from being drowned out of the marketplace by the often superior resources of the state.²⁹

B. *Banishing the Problem?*

In sum, one reason why the “government-speech versus private-speech” question can seem so troublesome, especially in cases of government-funded expression, is that the question is an effort to apply a distinction that makes little sense in terms of the principal rationale that has generated this part of free speech doctrine. More generally, the fact of government speech—and in the political world we inhabit, governments inevitably and incessantly speak and on all sorts of matters—stands in tension with the notion that liberal governments must be neutral toward “the good,” or toward “politics, nationalism, religion, or other matters of opinion.” So long as that tension persists, government speech is likely to present intractable problems. Put simply, the liberal commitment to neutrality, carried to its logical conclusion, implies that governments basically shouldn’t speak on important and controversial matters. Governments do and must speak on such matters, but such speech is inherently problematic.

There is, however, a straightforward remedy for this particular problem: we could simply acknowledge that the neutrality conception of lib-

it to distort the marketplace of ideas”). For a painstaking analysis demonstrating the difficulty, see ALEXANDER, *supra* note 8, at 82–102.

28. A robust enough Miltonian confidence might be undaunted by these disadvantages. Strictly speaking, Milton did not say that the competition needed to be fair but only “free and open,” and that truth needed to be “in the field.” See MILTON *supra* note 24, at 45. Like David, if it is allowed to compete, truth can perhaps vanquish Goliath-like falsehoods. Maybe. But the view is remarkable for its optimism.

29. SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 79–80 (1998).

eralism is and always was misconceived.³⁰ Instead of the aggressively timid, insistent noncommittal liberalism of thinkers like Dworkin and Rawls,³¹ we might embrace the more robust, classical liberalism associated in different versions with people like Mill³² and Madison.³³ This more robust liberalism does not purport to be agnostic on matters of truth or the good life. On the contrary, it actively asserts—asserts as *true* (and thus, if you like, as “right opinion,” or “orthodox”)—a vision of the good life and the good society, but one committed to values such as the pursuit of truth, freedom of thought and expression, and tolerance of competing viewpoints.³⁴ A constitutional regime should promote freedom and tolerance not because the regime is noncommittal about truth or the good but, on the contrary, because the regime takes it as true that such values are important human goods.³⁵ And the government in such a regime should be permitted, even encouraged, to say as much. In short, under this more robust liberal conception, there is nothing inherently problematic about government speech, even on matters about which citizens energetically disagree.

So, by renouncing the misconceived commitment to neutrality, would we thereby have dissolved the constitutional problems that afflict government speech? Hardly. Renouncing neutrality might dissolve some problems. For example, the problem in the *Sumnum* case I highlighted at the outset of this article would be eliminated, or at least reduced. Suppose we were to conclude (as we might or might not) that once the obligation of neutrality is lifted, the free speech doctrine prohibiting viewpoint discrimination should likewise be abandoned. In that case, and depending on what free speech doctrine were to develop in place of the current doctrine, it might be that Pleasant Grove could freely accept one monument and not another—even if the monuments were considered private speech. Or it might be that we would retain the prohibition on viewpoint discrimination—not because government is obligated to be neutral but simply as a useful device for detecting and preventing some kinds of undesirable censorship.³⁶ In that case, if we think the monu-

30. For an argument to this effect, see Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 18–22 (2000).

31. See George Rutherglen, *Private Law and Public Reason*, 92 VA. L. REV. 1503, 1504 (2006).

32. See David Luban, *The Posner Variations (Twenty-seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001, 1025 (1996).

33. See William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1169–72 (2002).

34. See Steven D. Smith, *Educating for Liberalism*, 42 U.C. DAVIS L. REV. 1039, 1043–46 (2009).

35. I have discussed these alternatives in more detail elsewhere. See *id.*; Steven D. Smith, *Tolerance and Liberal Commitments*, in NOMOS XLVIII: TOLERATION AND ITS LIMITS 243, 243–71 (Melissa S. Williams & Jeremy Waldron eds., 2008); Steven D. Smith, *Recovering (from) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1283–87 (2004).

36. It is possible, for example, to understand the central free speech commitment not in terms of a commitment to neutrality, or to a level-playing-field marketplace of ideas, but rather in terms of a prohibition on governmental suppression of ideas (subject, no doubt, to various qualifications, as in

ments are best classified as government speech, then there should be no problem in letting the city accept one religious monument but not another. In doing this, the city would not be acting in a religiously neutral manner, to be sure; but if the obligation of neutrality were removed, that departure from neutrality would not be a problem.

I expect this conclusion to provoke objections, because even people who are skeptical about a general obligation of governmental neutrality still believe that government must be neutral in matters of religion and that religious expression by government is therefore problematic.³⁷ So I need to say something about this view. In addition, even if abandoning the neutrality conception could eliminate the problems presented in cases like *Summum*, government speech would still present other difficulties. For example, the large problem of how to treat message-restrictive or content-restrictive government subsidies of private speakers would continue to plague us.

So in carrying the inquiry further, a natural next point of investigation is the one I just noted—the issue of governmental religious speech. My hope is that by thinking about why religious speech seems problematic, we can gain some insights into the source of the difficulties about government speech generally.

C. *Is Religious Speech Special?*

Even theorists who do not embrace the general prescription that government must be neutral with respect to “the good” or “the good life” often insist on some such neutrality in matters of “religion.”³⁸ And the Justices—all of them, it seems—agree.³⁹ Indeed, the ostensible obligation of *religious* neutrality has given rise to the only concrete, enforceable (albeit sporadic), constitutional limit on governmental speech. Thus, under the so-called “no endorsement” doctrine (the status of which seems somewhat precarious at present⁴⁰), government is constitutionally forbidden to do or say things that endorse or disapprove of religion.⁴¹

the standard categories of unprotected speech). By this understanding, viewpoint discriminatory restrictions might nevertheless be disfavored—not so much because government has deviated from neutrality or skewed the marketplace, but rather because the discrimination evidences a purpose to suppress.

37. In this vein, Abner Greene argues vigorously against a general requirement of neutrality. See Greene, *supra* note 29, at 18–22. “Government may, and should, use its speech powers to advance specific conceptions of the good, even if those conceptions are contested, controversial, or seen as favoring a particular viewpoint.” *Id.* at 5. Nonetheless, Greene “carves out an exception for government religious speech,” which he would forbid. *Id.*

38. See RAWLS, *supra* note 5, at 194–95.

39. Thus, in the recent Ten Commandments cases, the Justices disagreed strenuously about what religious neutrality entails, but they did not seem to disagree about *whether* government is supposed to be neutral towards religion. See, e.g., *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 860–62 (2005).

40. In the most obvious recent opportunity for application of the “no endorsement” doctrine—namely, the Ten Commandments decisions—the Supreme Court referred to rationales from the “no

But once we have abandoned any general obligation of governmental neutrality toward “the good,” or toward “comprehensive doctrines,” why should the obligation be retained for religion? Why should religious speech by government be especially problematic? The common and easy answer, of course, is “because the Constitution says so.” But in fact, the Constitution does *not* say so— not in its literal terms, at least. Nor, until fairly recently, was the Constitution thought by almost anyone to prohibit religious expression by government: there is in fact a long and revered tradition of such expression, extending to pronouncements like the Declaration of Independence, Jefferson’s Virginia Statute for Religious Freedom, and Lincoln’s Second Inaugural Address (as well as inaugural addresses by every other President, including President Obama).⁴² No doubt we can now read the Constitution to prohibit such expression if we want to, but why should we want to?

Some of the most familiar responses seem less than compelling. Religious speech by government may be divisive, yes, but a great deal of what governments say is divisive.⁴³ Religion is core to some people’s identity, but so are race, ethnicity, language, and politics.⁴⁴ Religious assertions are not provable by ordinary empirical methods, but then a great deal that government speakers say is not provable.⁴⁵

A common opinion suggests that although government speakers say plenty of profoundly controversial and unprovable things on matters of economics, politics, foreign policy, and other subjects, those statements are permissible because government *has to* address those sorts of matters. Neutrality in those domains is impossible. Conversely, government doesn’t need to say anything about religion, so there is no justification for deviating from neutrality in this area.⁴⁶ There are various objections to this argument, but for now, I will mention only one: genuine neutrality is as impossible in this area as in others.⁴⁷ In a nation of many and diverse religions, much that government does and says inevitably will contradict the religious beliefs held by some, perhaps many, Americans.

endorsement” cases but did not explicitly apply the “no endorsement” doctrine. *See id.* at 857; *Van Orden v. Perry*, 545 U.S. 677, 684–87 (2005).

41. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

42. *See* Steven D. Smith, *Justice Douglas, Justice O’Connor, and George Orwell: Does the Constitution Compel Us to Disown Our Past?* 2–3 (San Diego Legal Studies Research Paper No. 06-17, 2005), available at <http://ssrn.com/abstract=728663> (elaborating on religious references in presidential speeches).

43. For criticism of the divisiveness rationale, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1723 (2006).

44. For more detailed discussion, see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 202–04 (1991).

45. For a helpful discussion of this issue, see Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 773 (1993).

46. In this vein, Douglas Laycock asserts that “[t]he government must have no opinion [about religion] because it is not the government’s role to have an opinion.” Laycock, *supra* note 4, at 8.

47. 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 60 (2008).

In this vein, though he strongly supports governmental neutrality regarding religion, Kent Greenawalt concedes that:

[M]any laws and policies, as well as ethical principles taught in public schools, inevitably imply that religious doctrines that are diametrically opposed to the laws, policies, and ethical principles are mistaken. A government that maintains strong military forces and engages in armed conflict implies that pacifist religions are in error; one that forbids racial discrimination implies that religions based on racial inequality are misguided.⁴⁸

Perhaps the most conspicuous instances involve the teaching of evolution in the public schools. To be sure, the theory of evolution is not incompatible with “religion” (if there is such a thing), but it is starkly at odds with *some* religious beliefs held by some Americans—namely, those who believe in biblical literalism and six-day creationism. It may be that in teaching evolution, schools are not motivated by a desire to undermine those religions.⁴⁹ Nonetheless, the contradiction between what the schools teach and what these religions believe is obvious (which of course is one reason why the teaching of evolution continues to provoke heated controversy in some locales).⁵⁰

To be sure, government speech that contradicts some widely-held religious beliefs may not affirmatively endorse any particular religion or religion generally. From this observation, some might go on to conclude that government must and therefore may *contradict* some religious beliefs, but government need not and should not *favor* any religious beliefs—at least not directly and specifically.⁵¹ Still, it would be a very peculiar version of neutrality that forbids government to favor particular views or positions, but permits government to contradict and oppose other potentially competing views and positions. Would anyone accept a church’s profession of “neutrality” in a Presidential election, for example, if the church refrained from instructing its members to vote *for* the Republican candidate but urged them to vote *against* the Democratic candidate? Such a slanted, one-way constraint is simply not “neutrality” in any meaningful sense.

Nonetheless, the commitment to governmental neutrality in matters of religion seems deeply entrenched. One reason may be that it is easy to imagine religious declarations that governments conceivably might make

48. *Id.*

49. Or perhaps they are so motivated, at least implicitly. Doesn’t the goal of inculcating (what one believes to be) truth entail or include the goal of dispelling (what one believes to be) corresponding falsehoods?

50. For a recent, much publicized instance, see *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708–09 (M.D. Pa. 2005).

51. *Cf. GREENAWALT, supra* note 46, at 61 (“Although the state unavoidably carries out actions that imply that certain religious doctrines about social justice and order are unsound, never, or rarely, need its policies imply *the correctness* of any particular religious understanding.”).

(even if it is unlikely that governments in this country today would actually make them) that seem deeply problematic, even to people (like myself) who do not believe the Constitution does or should contain any general prohibition on governmental endorsement of religion.⁵² Suppose, for example, that following ancient precedent, Congress were to pass a resolution declaring that the Athanasian version of the doctrine of the Trinity is true and the Arian version is false. Even if the resolution were purely advisory, leaving all citizens free to agree or disagree or pay no attention at all, such speech would plainly be inappropriate. Wouldn't it? But why, exactly?

In our current discursive climate, it is natural to explain the inappropriateness by supposing that there must be some government obligation to be neutral in matters of religion and that sectarian expressions of the kind I have imagined would violate that obligation. This neutrality-centered explanation makes it difficult to say that such highly sectarian expressions are inappropriate without also condemning more generic religious expressions such as those in the national motto and the Pledge of Allegiance. (Even though many people—Justice O'Connor is a leading example—evidently wish there were some good basis for a distinction, and therefore resort to transparently flimsy rationalizations to save the more generic expressions.⁵³) By contrast, I want to suggest that there is a different explanation for our intuitions regarding such sectarian statements. This explanation is worth considering, I hope, in part because it points us to a different and real—though less often noticed—problem that affects not only governmental religious speech but the regime of free speech more generally.

II. THE UNNOTICED PROBLEM: INSTITUTIONAL CAPTURE

In order to develop this alternative explanation, it will be helpful to momentarily step back from considering speech by *government* specifically. Instead, we might think about a problem that attends speech by multi-person organizations or associations generally.

A. An Example: People Watching Birds

Imagine a hypothetical association, the Birdwatchers' Society of America (BSA), which has been formed to promote and facilitate bird-watching. The BSA has a national, five-person executive board. It sponsors a website and disseminates written materials, including a magazine with stories, tips, and beautiful photos of birds. The organization also sponsors local chapters throughout the country in which members organize field trips and activities, exchange information and experiences, and

52. For my objections to the endorsement doctrine, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

53. See *infra* note 66 and accompanying text.

learn about birds and techniques for observing them. In order to support these activities, the BSA charges yearly dues. United by a fascination with birds, thousands of people from all walks of life—lawyers, teachers, plumbers, tinkers, tailors, cabinet makers, and many others—join the organization, pay the dues, and participate in the activities.

In a presidential election year, without advance notice to the membership, the BSA's executive board votes 3–2 to make a public declaration that the organization endorses and supports the Democratic Party's candidate for President. This declaration comes as a surprise to many of the association's members, and they are even more startled when, a few months later, the executive board publicizes a resolution (again adopted by a 3–2 vote) expressing enthusiasm for Gaia philosophy and spirituality. The resolution declares that unlike more archaic and oppressive biblical religions such as Christianity and Judaism, which teach the duty of “subduing” and “exercising dominion” over the earth, Gaia joyously and devoutly celebrates the spirit within nature and thereby promotes environmental harmony.

Many BSA members object to these declarations, and they communicate their dissatisfaction both publicly and within the organization. The dissenters say the BSA includes and represents members of diverse political and religious persuasions, or of none; consequently, the organization should not be in the business of endorsing political parties and religious positions that many of its members do not support. But the executive board defends its decisions, arguing that in each instance its statements are in harmony with and supportive of the values and purposes of the association. In addition, the board points out that membership in the organization is entirely voluntary; members who are sufficiently offended by the controversial affirmations are perfectly free to withdraw from the association.

Is the board right? It is true that the controversial statements can be understood to be related—albeit in an indirect and contestable way—to the values that inform the association. It is true as well that members who are dissatisfied are free to drop out of the association. But that observation points to a problem with the board's statements. Is it fair, or is it desirable, measured by the association's own values and purposes, for members who share a common passion for birdwatching to be put to the choice of tacitly standing behind political and religious opinions which they find objectionable, or else to withdraw from the organization?

What has happened, the critics argue, is that a group of board members has in effect captured a legitimate and valuable association and used it to further their own partisan political, religious, and philosophical agendas. They have thereby disserved the association by making continued participation at least uncomfortable for some members, and perhaps forcing these members to withdraw their participation and support. Moreover, these injuries—to the members and to the association itself—

are unjustified, because even if the board's statements can be related to the association's central values, the relationship is distant and highly debatable, and most importantly, the statements are clearly not necessary to further those association purposes which the members agree upon and which have brought them together in a mutual enterprise devoted to *birdwatching*, not *religion* or *politics*.

I have tried to give a relatively stark example. But there is room for disagreement even here, and in many other cases the judgments would be more difficult. Suppose, for example, that Congress is contemplating the repeal of environmental legislation, and the repeal is likely to reduce the numbers of birds and bird species. Now BSA opposition to such legislation will be more obviously and directly related to the organization's central purposes. Or suppose the birdwatching group was originally founded by a group of Gaia devotees. Now the connection between birdwatching and the tenets and values of Gaia might be an essential and understood basis for the organization. That basis might persist in the association's self-understanding, even if people who are not Gaia devotees are later permitted to join the organization.

I will return to consider these complexities later. For now, the important point is that associations can be captured by factions within them to express messages and promote positions extraneous to the associations' central purposes. Such commandeering, however, is not only injurious to an association and unfair to dissenting members. As I will show, it can be subversive of free speech values as well.

B. Institutional Capture and Free Speech

So, what is so bad about the sort of commandeering that our hypothetical case has illustrated? Some of the evils have already been noticed: the practice is unfair and oppressive to dissenting members. Those members have, after all, contributed time, effort, and money to the association on the assumption that it exists to serve purposes that they support. If the association then turns to promoting specific beliefs or causes that these members do *not* support, and did not understand to be within the association's reason for being, they have cause to feel deceived and exploited.

It is easy enough as well to appreciate how institutional capture has the potential to weaken an association. Some members may withdraw altogether, and others may remain while feeling less allegiance and more distrust than they previously experienced. As a result, these disaffected members may be less willing to contribute their time, money, and energies to the institution. In this way, a faction that commandeers an organi-

zation to promote its agenda can be like a virus that takes over a host for its own purposes but in the long run weakens or destroys the host.⁵⁴

Although institutional capture can cause these general injuries, it can also damage more specifically speech-related values in several ways. In the first place, the sorts of expressions that result from institutional capture are likely to be misleading. They suggest that the association as a whole stands behind the captive association's message when in fact this may not be true. To be sure, observers no doubt understand that with any large and diverse organization, it is unlikely that any particular view enjoys unanimous support. Still, a statement by an organization is typically taken as representing at least a sort of consensus or dominant view; but when capture occurs, that representation may be false.

Indeed, most likely it is precisely to gain the advantage of such a representation—an advantage based on deception—that the faction makes the effort to capture the organization for its expressive purposes. In our hypothetical case, for example, the three board members and any others who shared their views could have issued the contested statements *for themselves*; but such statements would likely lack the impact that a statement emanating from a respected national association has. Although it carries more weight, however, the statement by the association is fundamentally misleading if, in fact, it does not represent a consensus within the organization.

Closely related to this harm is a sort of allocative distortion of resources that is brought to bear upon the marketplace of ideas. A statement resulting from institutional capture not only misleads by misrepresenting the views of dissenting members (who may be numerous, or even a majority); it in effect appropriates their resources and uses those resources to promote messages that they may not want to support. This harm is distinct, and might be present even if all of the members happen to agree with the statements that result from commandeering.

Suppose, for example, that all of the members of BSA support the Democratic Party. Even so, they may not want to contribute financially or otherwise to its presidential candidate, and they may think it is no business of the organization to make political endorsements. By placing

54. The undermining of associations is no trivial matter. Tocqueville observed that Americans had a penchant for voluntary associations, and that in comparison with people in less democratic nations, Americans seemed to be especially adept at what he called the "skill of association." 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1840), *reprinted in* ALEXIS DE TOCQUEVILLE *DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA* 493, 600 (Gerald E. Bevan trans., 2003). And he regarded this capacity for association to be vital to democracy; indeed, "if [men living in democratic countries] failed to acquire the practice of association in their day-to-day lives, civilization itself would be in danger." *Id.* at 597. If Tocqueville was right, then practices that would undermine willingness to participate in and contribute to associations are not a negligible concern. And although the matter and the causal connections are no doubt complex, some observers today perceive a decline in Americans' propensity to associate. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 27 (2000).

the prestige and authority of the organization behind this message—prestige and authority which are the product of the time, effort, and money that members have invested in the organization—the commandeering faction effectively seizes those resources and puts them to a communicative use that the investors themselves do not favor.

The allocative harm is similar in kind to the harm that would result if the organization were legally authorized to levy a tax on, say, the sale of birdseed, and then to use the money to buy advertising for its messages. In my hypothetical case, of course, the tax is being paid by members of the BSA itself. But since by hypothesis many of those members do not believe the organization should be promoting the messages in question, and since the board accordingly is in effect seizing these members' past contributions of time and money and diverting such resources to expression without the contributors' consent, the effect is similar: resources are being seized and used to support expression that the owners of the resources do not want to support. That sort of misallocation will naturally have an effect on the marketplace of ideas—the same sort of distorting or “skewing” effect that proponents of viewpoint neutrality in speech regulation often worry about.⁵⁵

These harms to free speech values—the misleading nature of the communications that result from institutional capture, and the misallocation of resources and consequent distortion of the marketplace that such commandeering involves—point to a third harm. The Supreme Court has indicated that compelling a person to affirm something that he or she does not believe or does not choose to affirm is a serious violation of First Amendment values.⁵⁶ And in cases like *Keller v. State Bar of California*⁵⁷ and *Abood v. Detroit Board of Education*,⁵⁸ the Court has ruled as well that if an organization such as a state bar association or a labor union uses a member's dues to promote political views that are not closely related to the organization's purpose, this practice can amount to a constitutionally-forbidden compelled affirmation. Speech that results from organizational commandeering can thus bring about this particularly objectionable sort of harm.⁵⁹ To be sure, insofar as the BSA is a purely private organization in which membership is entirely voluntary, its members would likely not have a legally cognizable claim under the *Keller* and *Abood* line of decisions. Even so, the underlying harm to free

55. See Kamenshine, *supra* note 9, at 1105–06.

56. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713–14 (1977). For an analysis questioning this view, see Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

57. 496 U.S. 1, 13–15 (1990).

58. 431 U.S. 209, 235–37 (1977).

59. This harm is related, obviously, to the first harm I have discussed—namely, the misleading nature of the communications. But that harm is inflicted on *recipients* of the misleading speech and, arguably, on the marketplace of ideas generally. By contrast, the harm of compelled affirmation is suffered by the unwilling *speaker*—namely, the member whose contributions are used to support a message he does not support.

speech values is similar. It is easy enough to say, and it is in some sense true, that a member who does not agree with what the BSA is saying can drop out of the association. But dropping out might entail significant costs—loss of regular association with long-time friends, loss of connection to an activity that a person deeply values, possibly even loss of connections and experiences vital to certain types of professions. Such costs may be even more obvious and severe for other types of associations—academic, legal, or medical professional associations, for example. In theory, no one is required to belong to such associations, and so any contributions people make may be deemed “voluntary.” But in fact many people have no realistic choice but to remain in such associations, and to make the required contributions: their ability to continue in their occupations may depend on such affiliation. In such instances, the “compelled affirmation” logic of *Keller* and *Abood* has great force, even if the courts will not, and probably should not, give any legal remedy in most such cases.

My discussion has suggested that communications that result from institutional capture can create an array of harms. Some of these harms—the unfairness to and exploitation of dissenting members, the weakening of associational ties and commitments—do not sound in First Amendment values specifically. Other harms—the misleading nature of the resulting communications, the misallocation of resources and consequent distortion of the marketplace of ideas, the “compelled affirmations” by dissenting members—relate directly to familiar free speech values. I have illustrated these harms, however, by a hypothetical case. If we move from the hypothetical world to the real one, how serious is the problem of institutional capture?

There is no manifest answer to that question. My own impression, however, is that the problem is pervasive. It seems to me that all manner of associations—universities,⁶⁰ business corporations, churches, professional associations, and, of course, governmental institutions—are frequently the targets of factions who seek, often successfully, to capture them in order to endorse or spread the factions’ favored messages. The associations in which lawyers are most deeply involved—the ABA and the AALS—regularly (in my view) take partisan and unnecessary positions on issues with respect to which the diverse views of their members should be respected. Thus, the ABA submits amicus briefs—gratuitously and improperly, in my humble opinion—in cases on a wide range of controversial issues (from affirmative action to freedom of association to capital punishment) about which lawyers hold different views and as to

60. On universities, see STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 18–19 (2008).

which there is no good reason for the ABA to take a partisan stance.⁶¹ The AALS, by imposing a sort of quasi-boycott on a hotel whose owner contributed money to one side in a California ballot initiative, effectively and unnecessarily endorsed a position that many citizens and even a few intransigent and unenlightened academics (again, I happen to be one of them) do not share.⁶²

Still, it is understandable that the problem of institutional capture goes largely unnoticed, and that many might resist classifying it as a problem at all. For one thing, the factions who commandeer associations typically do not thereby violate any positive law. And they naturally believe in the justice of their causes. So it is easy for them in their righteous zeal, and for others who agree with them, to overlook the damage they inflict on institutional integrity and to freedom of speech and association, and to understand themselves simply to be exercising their legal rights to spread a message they believe to be true and just.

In addition, whether a particular expression or message is the result of dubious commandeering will usually involve complex and contestable judgments. I have tried to describe a practice by which factions capture associations for the purpose of sending or supporting extraneous and partisan messages—i.e., messages not closely related to the associations' shared and understood purposes. But what messages are "extraneous"? How can we distinguish between extraneous messages and proper ones? After all, associations often express messages and take positions—they sometimes exist precisely for that purpose—and it is always people within the associations who determine what messages such associations will send and what positions they will take. So, what is the difference between this normal and inevitable functioning of associations and what I am calling institutional capture?

61. See STEWART GREENLEAF, FEDERALIST SOC'Y, REPORT ON ABA AMICUS BRIEFS 5, http://www.fed-soc.org/doclib/20070321_AmicusArticle.pdf (last visited Apr. 22, 2010). The Report concludes:

The ABA has filed numerous amicus briefs over the past two decades, often in cases involving contentious issues that split the legal community, including ABA members. The constitutionality of the line-item veto and independent counsel law, the limitations on capital punishment, and the scope of the Fourth Amendment and the good-faith exception to the exclusionary rule are among the areas addressed by ABA amicus briefs. But the breadth and controversial nature of at least some of this activity is not proscribed by the Association's policies. The standards governing the approval of amicus briefs are broad enough to allow the Standing Committee on Amicus Briefs and the Board of Governors to sign off on briefs supporting controversial positions on which the ABA has not yet adopted any policy. At present, Board of Governors discretion, and the potential political effects of especially vocal ABA entities objecting to some other committee's proposed brief, are the principal blocks on the process.

Id.

62. For a discussion, see Eugene Volokh, *More on the AALS "Boycott" of Hotel Because of Owner's Contribution to Anti-Same-Sex Marriage Ballot Initiative*, VOLOKH CONSPIRACY, Sept. 5, 2008, <http://volokh.com/posts/1220638833.shtml>.

The question in any given instance requires attention to both the substantive and procedural dimensions of an association. Substantively, an association and its purposes are defined by such things as its history, its established practices, the tacit understandings of its leaders and members, and perhaps its accepted or official statements of purpose (organizing documents, mission statements, and so forth). Procedurally, associations have methods by which different sorts of decisions are supposed to be made. And they may have a sort of institutional character. Not all associations are the same: some organizations are understood to be democratic and “bottom-up,”⁶³ while others are more “top-down,” self-consciously investing more responsibility and authority in a leader or leaders.⁶⁴ Insofar as communications made in the name of the association are made in accordance with accepted procedures and with processes that respect the essential character of the organization, there is less basis for saying that the association has been “captured” (even if not all members agree with the content of particular communications). Conversely, if a faction bypasses the normal or accepted procedures or makes decisions that do not respect the association’s essential character, the charge of “capture” has more force.

These substantive and procedural dimensions of an association are often complex and subject to competing interpretations. So there will often be differing views about whether any particular message or endorsement is the result of “capture,” or “commandeering.” Although I have mentioned what I believe to be some illustrative examples, I understand that these examples are debatable. My purpose here is not to determine whether “capture” has occurred in any particular case. My immediate purpose, rather, is to suggest an alternative explanation for our intuitions about governmental religious speech—an explanation which

63. Suppose, for example, that the BSA in my hypothetical case has traditionally been a generally democratic organization. It has an executive board, but the board has typically performed internal and largely routine administrative functions; any major decisions have been the product of wide-ranging consultation within the organization. Perhaps most association members have paid scant attention to the selection and doings of the national leaders and would have difficulty even remembering their names or picking them out of a line-up. In this situation, if the (previously almost anonymous) leaders then make major decisions and issue controversial public statements for the organization on sensitive issues, there will be an understandable sense that these leaders have “commandeered” the organization for their purposes.

64. To give just one example, in some churches, such as the Roman Catholic church, the upper leadership may historically have been viewed as having considerable authority to determine and declare the official views of the association, without a great deal of input from ordinary members. In such an association, a statement made by leaders but not supported by many members will not cause the harms mentioned above to the same extent. Thus, if an association is understood to be “top-down” and hierarchical with a strong central authority, statements emanating from that authority are not as likely to be understood as an expression of the views of the lower-level membership. And members who contribute time, effort, and money to an organization which they understand to be governed by a strong centralized authority will do so knowing that the authority may take positions or issue statements without consulting with the membership: that is the sort of association to which they choose to contribute.

may also help to illumine the difficulties associated with government speech generally.

C. Government Speech and the Problem of Capture

Political communities presided over by governments are one class of association—a vitally important class, given their wide-ranging functions and coercive powers—subject to capture or commandeering.

Return to an example mentioned earlier. Suppose the White House issues an official declaration saying that the Athanasian doctrine of the Trinity is true and that the Arian doctrine is heretical. Leaving aside the question of constitutionality, I suspect that nearly everyone in this country will believe that this declaration is at least inappropriate. But why? The easy explanation, in our current constitutional climate at least, is that the declaration violates government's obligation to be neutral in matters of religion. That explanation implies that the words "under God" in the Pledge of Allegiance are similarly inappropriate. And of course some citizens—Michael Newdow, for instance—heartily agree.⁶⁵ But many other citizens, like Justice O'Connor, perceive these expressions as fundamentally different, and so having articulated a neutrality principle they are forced to offer strained and even unseemly distinctions to try to rationalize these diverse intuitions.⁶⁶ The discussion of institutional capture suggests an alternative explanation (other than neutrality) that helps distinguish between those religious expressions nearly everyone finds inappropriate, and those that many find acceptable.

That discussion indicates that government would act inappropriately by expressing messages or endorsing positions on matters extraneous to government's proper purposes or concerns. Of course, there is vast disagreement about what government's proper purposes or concerns are—a difficulty I will consider again shortly. But for now let me venture this observation: although the issue is enormously controversial, there is in the American political tradition a great deal of precedent and support for a view in which government recognizes and participates in the minimal expressions and observances that are sometimes described as "civil religion."⁶⁷ Many people believe—and from the nation's beginning many

65. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring).

66. *Id.* at 33–45; cf. Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 235 (2004) (observing that "[O'Connor's] rationale is unconvincing both to serious nonbelievers and to serious believers"). Steven H. Shiffrin observes, "I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine." Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 70 (2004). And he adds that "pretending [that this and similar expressions] are not religious is simply insulting." *Id.* at 71.

67. See, e.g., ROBERT N. BELLAH, *Civil Religion in America*, in BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD 168, 168 (1970) ("[T]here actually exists alongside of

have believed—that government may properly promote this sort of generic religion.⁶⁸ Civil religion has its vociferous critics, of course, both religious and secular: I am not here offering any defense on the merits, but merely observing that support for civil religion is deeply entrenched in our political tradition.⁶⁹ On the other hand, there is little or no support or precedent for the view that a proper function of government—in this country, at least—is to make more definite theological pronouncements or to resolve intricate theological controversies.

If this observation is correct as a descriptive matter, then it is understandable that highly sectarian pronouncements by government (like the hypothetical approval of Athanasian doctrine) would be viewed as improper. They are improper not because government is somehow obligated to be neutral in all matters of religion, but rather because there is no viable conception of the proper function of governments, in this country anyway, by which such highly sectarian statements would not be wholly extraneous to governments' proper role. It would thus be hard to see them as anything other than products of improper commandeering or capture. Conversely, more generic religious statements like the national motto, while still controversial, are well within the functions of government as these have traditionally been understood by many in this country.

As a sort of thought experiment to test this alternative explanation, we might consider whether analogous partisan but not religious statements by government would generate similar intuitions. Imagine some parallel generic and more specific statements that governments conceivably might make in the areas of science, music, and sports:

and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America.”).

68. I discuss this tradition at much greater length in Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions* (forthcoming 2010).

69. For an exchange of views on the subject, compare Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275 (2007), with Steven D. Smith, “Sectarianizing” Civil Religion? *A Comment on Gedicks and Hendrix*, 110 W. VA. L. REV. 307 (2007).

1. *Science*

- a) A government education agency declares that science is a valuable human enterprise and that scientific education and research should be encouraged.
- b) A government agency declares that the Big Bang theory is true but that “string theory” is bogus science.

2. *Music*

- a) A government agency responsible for promoting cultural affairs says that music is a valuable human achievement and activity, and that musical performances and music education should be promoted.
- b) A government agency declares that jazz music is the highest and best form of music originating in this country and that Country Western music is aesthetically inferior.

3. *Sports*

- a) Congress passes a resolution declaring that baseball is an important part of the national heritage and that a particular week will be designated as “National Baseball Week.”
- b) Congress passes a resolution declaring that the New York Yankees have been the most worthy and admirable franchise in the history of baseball, to be revered above any other team (especially including the Boston Red Sox and the Los Angeles Dodgers).

In each of these instances, I suspect, many citizens would likely regard the generic statements as unobjectionable but would find the more specific statements to be inappropriate. But why? The specific statements are controversial, to be sure, and some people would disagree with them. But that does not seem to be the precise problem here. After all, some people disagree with anything government says (including the more generic statements I have given above); it surely does not follow that government cannot speak. In these instances, moreover, I suspect that even people who happen to agree with the specific affirmations—the statements condemning string theory, disparaging Country Western music, and extolling the Yankees—would acknowledge that government acts improperly in saying such things.

If I am right in these surmises about common judgments in such instances, then I think the examples support my alternative explanation of governmental religious speech. It is not governmental *religious* messages *per se* that are especially objectionable, but rather inappropriately narrow affirmations. *Sectarian* affirmations, perhaps (“sectarian” in the sense in

which the word is occasionally used to denote views or statements, whether or not they are theological in character, that seem specific and unduly partisan). And sectarian affirmations by government are objectionable not because there is some constitutional prohibition of sectarian statements *per se*; rather, they are objectionable if, because, and to the extent that they go beyond the proper functions of government. In that case, they suggest and reflect an objectionable capture of governmental institutions by partisan factions, and they produce the evils associated with such capture.⁷⁰

But this conclusion points to what may be the larger reason why government speech in general is problematic, and especially problematic today in a way that was not as apparent in the past. I call this larger reason “the big problem.”

III. THE BIG PROBLEM: WHAT IS GOVERNMENT FOR ANYWAY?

The preceding discussion has suggested that some common objections to religious messages by government may be best accounted for as manifestations not of some special problem of religion, or even of government speech in particular, but rather of a more general problem of institutional capture. The underlying, animating idea here is simple enough in the abstract: it is simply a notion of institutional integrity. Associations have a character and a purpose. Members and leaders of an association ought to respect that character and those purposes, rather than trying to exploit the association to promote causes and send messages that are extraneous to the association’s character and purposes—even messages that may seem to be righteous, good, and true. Members and leaders who use associations in this way ought to be criticized as hijackers, not praised as heroes of truth and justice; and they ought to be criticized even by those who happen to agree with the particular expressions that the commandeered associations issue.⁷¹

Whether this sort of exploitation—or capture, or commandeering—has occurred in a given instance is often a complex and contested issue turning on judgments about the character and purpose of the association. But not always. So the controversial status of generic religious expres-

70. To be sure, even if it turns out that the core underlying objection is to sectarian government speech, not to religious speech *per se*, the objection still might find a more secure foothold in the constitutional text and doctrine when directed against *religious* sectarian speech than when focused on nonreligious sectarian statements. Even so, it might be that the most compelling objection is to sectarian speech, not to religious speech as such, and that such speech is problematic not because government is violating an obligation of neutrality, but because government is speaking and acting in ways extraneous to its proper purposes.

71. Abner Greene points out to me that concerns about institutional integrity and about institutional capture are not entirely coextensive: even a majority of members, acting openly and in complete accord with an organization’s procedures, might cause the organization to act or speak in ways that are extraneous or contrary to its character and purpose. This point seems right, although in such cases it would also be arguable that the association has in effect altered its self-understanding of its character and purposes.

sions by government today reflects disagreements about whether observance and promotion of civil religion is a proper function of American governments. And the uncontroversial inappropriateness of more narrowly sectarian statements reflects the fact that it is very hard to find support or precedent in the American political tradition for any conception of government that would warrant these kinds of statements.

So far I have discussed the problem of institutional capture—and the related notion of institutional integrity which such capture offends—in relation to government religious speech. But a broader possibility now reveals itself: perhaps it is the problem of institutional capture (along with the principle of institutional integrity) that lies behind most or all of the controversies associated with government speech. What a government can properly say depends on the defined proper and essential role or function of the government. And issues of government speech are difficult—intractable, maybe—because there is no agreement about what government's purpose and function is or is not. In this respect, controversies about government speech are merely symptoms of a deeper disagreement about the proper domain and role of government. Those symptoms are unlikely to be satisfactorily treated so long as the underlying disagreement persists.

One way to consider this hypothesis is to remember—or, rather, imagine—a world in which the proper functions and powers of government are more clearly defined and limited. So imagine a world in which the national government is limited to exercising a contained and finite set of powers enumerated in, say, the Constitution. And state governments are understood to be confined to acting for “public” purposes, as opposed to “private” purposes: the line separating these spheres is, let us imagine, relatively clearly drawn. In this world, I submit, government speech *as speech* would not seem especially problematic. So long as national or state governments acted only in accordance with their contained and finite powers, they would presumably be free to speak, or pay others to speak for them, as they deemed fit. Conversely, if a government began issuing messages not closely related to the functions and powers entrusted to it, people (including people who happened to agree with what government said) might be critical not only of the substance but of the expression itself. But even then, the objection would not be against the government for *speaking*, exactly (as if the *speaking* presented some special problem). It would be a criticism of the government for exceeding its proper powers or functions: the fact that this excess consisted of speech would be, in a sense, incidental.

I am not trying to be excessively Utopian here, so I am assuming that there would still be plenty of disagreement in this simpler, cleaner world. As a result, citizens would often disagree with *the substance* of what governments might say. But those disagreements would not challenge the right or authority of governments to speak.

I have described this world as imaginary, and I think it probably is. But it is most likely true that if we were to go back a century or so, there was at least a widespread belief that the functions and powers of governments were meaningfully confined by something like the enumerated powers doctrine and the “public purpose” constraint. Maybe the belief was naïve, but it was earnestly and widely held. And so it is not surprising that “government speech” *per se* did not then seem to present a conspicuous constitutional problem. Conversely, as the twentieth century progressed, the constitutional limitations on government power were progressively dissolved. Or, if you prefer, the fragile or illusory nature of the supposed limitations became increasingly apparent. And of course, citizens vary radically in their conceptions of what the proper role of government should be. Those disagreements manifest themselves in differing views about the propriety of different kinds of government speech.

But if, as I have suggested, controversies about speech are merely reflections of deeper disagreements about the nature and functions of government, then it seems unlikely that we will be able to find satisfactory solutions by focusing on controversies on the level of speech. That is because, ultimately, it is not *speech* that is the problem, but rather *government*.

CONCLUSION

Still, we have little choice but to address and manage the controversies that arise as best we can. I suspect that the popularity of “neutrality” as a strategy reflects this necessity. If there were some shared understanding of what the functions and nature of government are, we would not need to tell governments to be “neutral” toward anything: we could simply try to ensure that governments do their job, no more and no less, as well as they can (we would of course argue about whether and how well governments were doing this). Given the disappearance of meaningful, agreed-upon limits on governments’ proper domain and functions,⁷² we try to make up for the loss by instructing governments to be “neutral.” Governments could comply with this instruction, if at all, only by not speaking, and that is not about to happen. Arguments based on neutrality may be rhetorically useful, but (or because) they typically serve more to obfuscate than to illumine.

I said at the outset that I would not be offering solutions to the doctrinal problems presented by government speech, and I believe I have kept my word. My central purpose has been to diagnose, not to prescribe. Actually, though, there may be some potential practical implications in this diagnosis. For example, some of the most difficult problems in this area in recent years have grown out of the assumption that governmental

72. Alan Chen surmises that consensus about the proper role or function of government is unlikely to develop. See Chen, *supra* note 22. It would be hard to disagree.

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religious speech is especially problematic: if we were to recognize the error of that assumption, as I have suggested, those particular problems would disappear (as a matter of constitutional law, at least).

More generally, though, my diagnosis suggests that we should recognize that what seem to be constitutional problems raised by government speech are not fundamentally problems about speech at all. If there are solutions to these problems, we will need to look for them elsewhere.