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GOVERNMENT SPEECH ON UNSETTLED ISSUES

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Government speaks either directly (e.g., public relations campaigns) or indirectly (e.g., funding otherwise private speakers). Does the Constitution restrict government speech? In a prior article,[1] I argued that with some (important) limitations, government is free to say what it wants and fund what speech it wants. Speech is not regulation; at least it is not the kind of regulation that involves typical governmental sanctions such as prison and fines. If government speech neither coerces (as regulation does) nor creates a monopoly in a given speech market, the Constitution is not implicated.

Here I would like to address one aspect of the government speech problem, namely, the treatment of consensus versus controversy, of the settled versus the unsettled. Here is how Cass Sunstein has discussed the matter:

> I say that viewpoint discrimination is "at least usually" impermissible, because there will be some possible counterexamples. Suppose, for example, that the government decides to fund programs for the celebration and possible export of democracy. Or suppose that it says that governmentally-funded portrayals of the Civil War cannot advocate slavery. Or suppose that it funds projects to discourage cigarette smoking or drug addiction. For reasons to be explored shortly, viewpoint discrimination of this kind may be acceptable in some circumstances.
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> . . . .
>
> Government may be permitted to discriminate on the basis of point of view if (1) it is doing so in the context of sharply limited, discrete initiatives and (2) the viewpoint discrimination does not involve taking sides in a currently contested political debate. For example, it seems clear that a fund for democracy may permissibly promote democratic causes. Perhaps this is so because democracy has come to be understood [FN 16] as a sufficiently shared, sufficiently nonpartisan goal as to escape the prohibition on viewpoint discrimination. Similarly, [an] anticigarette campaign may

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1. Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1 (2000).

> legitimately fund people who will campaign against cigarette smoking; the government need not also fund people who approve of smoking. But these are unusual cases. Most across-the-board laws containing viewpoint discrimination would be impossible to justify.
>
> FN16. The word "understood" shows the problem: the approval of democracy is a form of viewpoint discrimination even if there is everything to be said on behalf of the viewpoint being approved.[2]

One can readily agree with Sunstein's major premise, that viewpoint discrimination is almost always unconstitutional. But Sunstein uses the term "viewpoint discrimination" in a way I find troubling and draws a distinction between government funding in contested versus uncontested areas of social policy that cannot withstand further analysis. On the use of "viewpoint discrimination": the word "discrimination" stacks the deck. It is often used to mean invalid regulatory treatment of x, y, or z (e.g., on the basis of race, or gender, or viewpoint). But the validity of the criterion in question is the issue, and should not be assumed away through use of the label "discrimination." And whether government funding, as opposed to regulation, on the basis of viewpoint should ever be deemed "viewpoint discrimination" is also the issue, and also should not be assumed away definitionally.

The key issue here, though, is not co-opting the argument through use of the term "viewpoint discrimination." Rather, it is the operative distinction Sunstein draws between (a) taking sides in a currently contested political debate and (b) advancing a sufficiently shared, sufficiently nonpartisan goal. Sunstein concludes that government funding that does the former is constitutionally invalid, while government funding that does the latter is permissible. This distinction, however, represents an improper move from an accurate descriptive observation to an indefensible normative conclusion. The accurate descriptive observation is that when government speaks on matters that appear settled, government does not appear to be favoring a particular viewpoint, and its speech is not likely to stir up trouble. Similarly, it is accurate to observe that when government speaks on matters that appear contested, government does seem to be favoring a particular viewpoint, and its speech is likely to cause a firestorm. But even combining these two factors—government speech in a contested area appears viewpoint-based and is likely to add to discord—does not lead to the separate and much more complex normative conclusion of unconstitutionality.

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2. Cass R. Sunstein, Democracy and the Problem of Free Speech 229, 231-32, 305 n.16 (2d ed. 1995) [hereinafter Sunstein, Democracy]. An earlier version of these arguments, less well developed, appears in Cass R. Sunstein, The Partial Constitution 311, 313 (1993).

I first show that the distinction between the settled and the unsettled has important analogues in areas of law other than government speech. I try to synthesize, as a descriptive matter, the various appearances of the settled/unsettled distinction and give ground on the claim that government action in unsettled areas can often be irksome. But there is a major is-ought problem here, and I attempt to show that the normative claims that often follow from the observation that an area is unsettled are claims that cannot stand.

* * *

The distinction between the settled and the unsettled appears often throughout American law. The common thread is this: Government, as a conduit for the people, appropriately represents the people in areas of great social consensus. But in unsettled areas, where the people are transparently divided, government has little or no role, for it does not have interests of its own, and can only represent the people's interests, which are indiscernible if the people are divided. Here are three areas in which this distinction is manifest: certain theories of judicial review, based in aspects of Marshall's opinion in *Marbury*[3] and most prominent in Thayerian notions of judicial restraint;[4] differential responses to invocations of science versus invocations of policy in administrative law; and government speech. In each instance, government is seen as acting appropriately when funneling what's just out there, what's accepted, what's given, what's taken for granted, but as acting inappropriately and often beyond constitutional authority or in otherwise *ultra vires* fashion when entering a controversy and resolving it, or when upsetting what appears settled. The deep sense here is that government is a necessary evil. If only the people could achieve their desires in an unmediated fashion, with full consent and no compromise and no representation; in such a prelapsarian world, there would be no room for dissensus. Although we don't live in Eden, government is nonetheless seen, perhaps dimly, as most legitimate when the least mediated. Government action that carries out the clear will of the people is easy to defend; government action that upsets such will, or seeks to create it out of babel, is something else indeed.

But as I will try to show, this view of government is naive (although charmingly so). It fails to see government as part of discord, as a participant in both unsettling and the unsettled. It elevates the dream of the *unum–e pluribus unum*, out of many, one—over the reality of

3. Marbury v. Madison, 5 U.S. 137 (1803).

4. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

the *e pluribus*—the many we are and will be.[5] And when applied to government speech, this view becomes oddly associated with a certain form of liberalism; political liberals, New Deal liberals, who otherwise support government action in many arenas, get very antsy when government uses its speech power to advance contested views of the good. These liberals, I argue, should calm down.

* * *

Judicial review, both in theory and practice, has been dominated by the distinction between the settled and the unsettled, the taken for granted and the up for grabs. Larry Lessig has described the phenomenon well:

> By "contested" I mean a discourse where fundamentals in that discourse appear up for grabs; that participants in that discourse acknowledge the legitimacy of disagreement about these fundamentals; that disagreement is a sign of normalcy for a participant, not oddness.
>
> An uncontested discourse is much the opposite. Here people don't, in the main, disagree about fundamentals. In the main, they don't think much about fundamentals at all. People act, or argue, instead, taking these fundamentals for granted. Life here is normal science.[6]

That describes the phenomenon. Here is what comes of it: "About the contestable, judges can say nothing; about the uncontested, judges can say only one thing."[7] What Lessig is tracking—the inappropriateness of judges doing politics, the appropriateness of judges carrying out understandings that appear to come already-made—has deep roots. As far back as *Marbury*, I want to argue.

Two aspects of *Marbury* are important here. The first is Marshall's invention of the political question doctrine. The second is Marshall's mention of appropriate cases for judicial invalidation of statutes. Together, we see an early and influential example of the distinction between the settled and the unsettled and the unease with which the latter is viewed. First, on political questions: Recall that Marbury's commission as justice of the peace had been signed but never delivered. He sued Madison, then Secretary of State, to receive the commission, pursuant to a law authorizing such suits directly in the Supreme Court. The Court, of course, held that Congress lacked the power to authorize such suits. But before reaching that question (and

5. *See* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 Colum. L. Rev. 1 (1996).

6. Lawrence Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365, 1393 (1997).

7. Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 Geo. L.J. 1837, 1846-47 (1997).

the most well-known portion of the opinion), Marshall first determined that Marbury had a right to the commission and then turned to the question whether the laws of the country afforded him a remedy. Here he began developing the political question doctrine. He wrote: "Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?"[8] And a bit later:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.
>
> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.
>
> The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[9]

8. *Marbury*, 5 U.S. at 164.
9. *Id.* at 165-66.

Courts play a proper role in enforcing settled understandings of legal duties; other powers are granted to government without specific restriction by rule, and those powers are not judicially examinable; they are, in other words, merely political. Those powers deal with matters unsettled. In the very next section of the opinion, Marshall discussed the nature of the writ (mandamus), and asked whether the officer against whom the writ is directed (Madison, the Secretary of State) may be hauled into court in this type of matter. Such would be improper if Marbury were asking Madison to perform a discretionary function in one way or another, but proper if asking for the carrying out of a specified legal duty. Marshall wrote, echoing the earlier passage: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[10] Marbury's commission, it turns out, did not involve such political discretion. So although in the early portions of the opinion Marshall ruled again and again for Marbury, deeming the commission his vested right and mandamus against Madison a (generally) appropriate remedy, he slipped in (all dicta) the important distinction between the role of the courts in enforcing settled legal rights and the required abstinence of the courts in matters discretionary, political, or one might say, unsettled.

When Marshall turned to his discussion of judicial review (and established the power of the Court to invalidate unconstitutional legislation), he first made the easier point that the Constitution trumps inconsistent statutes and then turned to the harder question of whether the courts have the power to make such a determination of inconsistency. He offered various arguments: that it is a court's role to say what the law is; that therefore courts must interpret all law and rule in cases of conflict between one source of law and another; that without judicial review legislatures would have a kind of omnipotence, and thus that judicial review serves as an important check on legislative overreaching; and that in some cases (cycling back to his point about inconsistency of two sources of law) "the constitution must be looked into by the judges."[11] At this point (just before making an argument from the judicial oath), Marshall stated: "There are many other parts of the constitution which serve to illustrate this subject."[12] What follows is what I shall call his easy cases list:

> It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought

10. *Id.* at 170.
11. *Id.* at 179.
12. *Id.*

> judgment to be rendered in such a case? [O]ught the judges to close their eyes on the constitution, and only see the law[?]
>
> The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."
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> If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?
>
> "No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."
>
> Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?
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> From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature.[13]

Contrast this discussion with the earlier passages about political questions. Here are Marshall's easy case examples for judicial invalidation, for rights clearly established by the Constitution for which no argument for deference to politics shall be heard. These are, in other words, the examples of courts enforcing settled understandings; none of the examples is a hard case in which the court is asked to enforce a right of murky contour; all are cases in which the reader is expected to assent without question, murmuring, "well of course the court must step in here, there's no politics involved, no mucking around in unsettled, discretionary waters, just the enforcement of the clear will of the people as expressed through the Constitution." Of course the hard work is in determining when one is looking at an easy case, and when a hard one. But for present purposes, the distinction drawn in *Marbury* between political questions and easy cases is the distinction between the controversial and the settled.

One way of mapping the connection between the settled/unsettled distinction in judicial review and in government speech is to suggest that it directly favors my argument for a robust role for government speech. In judicial review, courts enforce readings that are settled, but leave to politics matters that are unsettled. Similarly, one could say,

13. *Id.* at 179-80.

politics is the place to resolve unsettled issues in the government speech area as well.

The mapping seems wrong to me, however. One has to work here by analogy, rather than directly. The distinction between settled and unsettled in judicial review is about keeping the forum for principle—the courts—away from the griminess of politics. In the government speech arena, the distinction also separates a forum for principle—where the settled may be advanced—from a forum for politics—where dissensus rules. But in the government speech arena, government generally is often seen as the forum for principle, and private speech is seen as the forum for politics. There is something pristine about government simply carrying out the consensus mandate (the "Just Say No to Drugs" campaign, for example), but something seen as unruly when government steps into the muck of politics. The muck of politics, in judicial review theory generally, is precisely the government's terrain; but that same arena of discord is viewed as inappropriate when what's at stake are competing speech positions about a controversial topic. There, government should step back, it is argued, and let the private sector arguments hash things out.

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When courts review agency action, they often draw the following line (though not always explicitly): If the agency has relied on policy considerations in fleshing out an otherwise vague statute, the court will defer to policy;[14] if the agency has relied on science or other technical expertise in fleshing out an otherwise vague statute, the court will ensure that the science is valid and then will defer to the scientific claim. Although in the latter instance the role of the court is more intrusive than in the former (and for good reason: in the former case, the agency is willing to take the policy heat; in the latter, it is passing the buck to technical claims), the court is still, even in the science setting, ultimately deferring to an outside authority. Whether the authority is that of the unruly world of politics or the more tidy world of scientists and technocrats, the court never assumes power itself, i.e., it never announces what it thinks the vague statute should mean. This posture of avoiding responsibility is similar to the judicial review posture I have described above, where courts prefer either to: (a) rely on settled understandings, or what appear to be easy cases, for invalidating the action of another branch, or to (b) defer to the maelstrom of politics. The analogue to the government speech setting is this: many scholars (the Sunstein position et al.) are vastly more comfortable with government simply implementing decisions that

14. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45, 865-66 (1984).

seem easy, settled, and backgrounded (e.g., Just Say No), and become very uncomfortable when government appears to be stepping into a hot-button social issue, even if using its powers of persuasion only. Such action (even though legislative, and not judicial, as my judicial review and administrative law examples are) presents the relevant governmental actor as distorting an arena in which government is better left as implementer only. I shall argue later that this is the wrong way to look at government speech on controversial issues.

In the administrative law setting, I want to focus on two opinions by Justice Scalia, helping to draw the line between agency reliance on policy and agency reliance on science. In *NLRB v. Curtin Matheson Scientific, Inc.*,[15] the Court upheld the NLRB's refusal to presume that replacement workers oppose an incumbent union. The Court allowed the NLRB to continue its relatively new practice of case-by-case assessment of the sentiments of replacement workers. Justice Scalia characterized the question differently: whether in the case at hand the NLRB had substantial evidence for its conclusion that the employer had not established a reasonable good-faith doubt as to the union's majority status. Of interest here is the way Scalia challenged the majority's reasoning. It is one thing, he wrote, for an agency to rely on a presumption of law, that is, for the agency to declare that, as a policy matter, it would conclusively presume certain things to be true. Thus, the NLRB perhaps could have declared, as a matter of policy, that it would presume nothing about whether replacement workers support the incumbent union. But, said Scalia, the NLRB did not so declare. Rather, it relied on an inference, i.e., a presumption of fact, by stating that as a matter of logic and reasoning, there is no inference to be drawn about whether replacement workers support the union. And that, said Scalia, is challengeable as any statement of logic and reasoning is challengeable, and (he concluded) it is wrong.

The key point for our purposes is that, according to Scalia, courts should defer to agencies if the agencies come clean and make explicit policy moves (so long as Congress has not otherwise forbidden the policy choice in question). But courts may not defer to agencies if the agencies are relying on science or other technical expertise. In such settings, agencies are either: (a) actually relying on science, which should be subject to any relevant scientific test (or other test of reason), or (b) relying on science as a mask, under which is really a policy choice. Thus, Scalia wrote: "[The Board] ... has chosen—unlike any other major agency of the Federal Government—to make almost all its policy through adjudication. It is entitled to do [so], but it is not entitled to disguise policymaking as factfinding, and thereby

15. 494 U.S. 775 (1990).

to escape the legal and political limitations to which policymaking is subject."[16]

In a subsequent labor case, Scalia won a majority for holding an agency to the logic of its reasoning process if it was not explicitly claiming authority based on policy. *Allentown Mack Sales and Service, Inc. v. NLRB*[17] held first, that the NLRB did not act arbitrarily or capriciously by requiring employers to show good-faith reasonable doubt about a union's majority support before either conducting an internal poll of employee support for the union, requesting Board-supervised elections, or unilaterally withdrawing recognition. Next, the Court held that on the facts of the case, management had reasonable, good-faith grounds to doubt the union's retention of majority support, and that the NLRB lacked substantial evidence for its conclusion to the contrary. The Board argued, however, that it had developed a practice of discounting certain sorts of employee testimony on the subject of union support and was rejecting such evidence (here favoring management) accordingly. In response, Scalia for the Court wrote:

> Of course, the Board is entitled to be skeptical about the employer's claimed reliance on secondhand reports when the reporter has little basis for knowledge, or has some incentive to mislead. But that is a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions.[18]

The NLRB had claimed that its precedent established such skepticism, but Scalia responded that its stated standards remained more favorable to management. (That is, management can have good-faith doubt about a union's majority status even by relying heavily on the testimony of interested employees.) Had the Board changed its standards in clear fashion, with the public on notice that a policy change was happening, that could have been upheld. But by announcing more pro-management standards and then seeking to apply more pro-labor principles case by case, the Board had, in effect, sought to avoid policy scrutiny. Thus, its conclusions must be examined case by case to see if they meet the substantial evidence test, and in this case they did not. Again, for Scalia, courts should defer to politics if it is clear that politics has happened;[19] otherwise the authority of science (including logic, reasoning, inferences from facts) takes over, and the deference is to what is settled (i.e., understood as authoritative) in that arena.

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16. *Id.* at 819.
17. 522 U.S. 359 (1998).
18. *Id.* at 379.
19. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (finding that the Court should defer to agency's regulatory decision as a matter of politics).

* * *

In both areas discussed—judicial review and administrative law—the settled/unsettled line represents a kind of discomfort with government as proactive. Government, seen thus as a necessary evil (wouldn't things be better if unmediated? if desires didn't have to be filtered and compromised and re-presented?), is best off implementing decisions already made (the easy cases from *Marbury* that the Court should enforce; the administrative law deference to policy, while challenging science on science's terms only). Whether the branch of government is the judiciary or the executive, government does best when it is seen as doing least. The analogy in the area of free speech scholarship on government speech is the easy acceptance of government promotion of settled ideas, with the accompanying discomfort when such speech enters an arena of current social contest. Here the branch in question is the legislature, and even though the legislature is otherwise seen as the appropriate branch for policy squabbles (seen as such in *Marbury's* discussion of political questions and in the various administrative law deference doctrines), when it comes to government promotion of contested notions of the good, even the legislature is too much government and not enough immediacy. Immediacy, that is, involves funneling accepted and settled notions (Just Say No); but using government funds to advance a controversial argument (no abortion counseling[20] or no indecent art[21]) cannot be seen as funneling the people's desires in a smooth way and thus is seen as problematic.

I have already set forth Cass Sunstein's arguments on this. He is not alone, though, and it is helpful to see how much support he has. Elena Kagan suggests that perhaps government funding that warns of the dangers of tobacco would be permissible (without funding the tobacco companies' message). She writes that "the debate in this case, by its nature, offers the hope of right and wrong answers—answers subject to verification and proof," that "society has reached a shared consensus on the issue; the answers, in addition to being verifiable, are widely believed," and that, most importantly, "one side of the debate appears to do great harm."[22] Other scholars have delineated a similar line between the settled and the unsettled, by focusing on whether

20. *See* Rust v. Sullivan, 500 U.S. 173 (1991). I discuss in the text the majority view in the scholarly community against viewpoint-based government funding and therefore opposed to the outcome in *Rust.*

21. *See* NEA v. Finley, 524 U.S. 569 (1998). See *supra* note 20 for an explanation of scholarly community versus caselaw.

22. Elena Kagan, *The Changing Faces of First Amendment Neutrality*: R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29, 75.

government speech would alter the nature of a speech forum or would be consonant with extant understandings of the forum.[23] David Cole writes:

> Where neutrality is consistent with such an institution's function, strict neutrality should be required; where some non-neutral content decisions must be made, the first amendment should guarantee a degree of independence for the decision-maker. Where, on the other hand, the institution does not play an important role in furthering public dialogue or individual autonomy, or where non-neutral government speech is necessary to further an important government function or first amendment values, government should be free to support speech non-neutrally. By requiring neutrality and independence in certain spheres of government funding and allowing departures from neutrality in others, the first amendment can structurally accommodate the inherently contradictory values and dangers of government-funded speech on an institution-by-institution rather than case-by-case basis.[24]

Robert Post argues, in analogous fashion: "[T]he allocation of speech to managerial domains is a question of normative characterization.... [S]uch restrictions on speech can be justified only where those occupying the relevant social space actually inhabit roles that are defined by reference to an instrumental logic."[25] The normal understanding of the doctor-patient relationship, explains Post, includes an openness of discourse and an independence of medical judgment; the Court was wrong to treat the abortion counseling gag rule at issue in *Rust* as within a managerial domain.[26] Post acknowledges that this relationship may be in fact altered within a particular setting (such as Title X); such alteration is unusual, though, and the "Court offers no evidence to support its claim that it has occurred within Title X clinics."[27] He further acknowledges that the government may create special clinics in which special roles are clearly manifested, i.e., physicians are in fact state employees; this is permitted under the first amendment. "What the First Amendment forbids is the attempt to hire what all concerned understand to be physicians and then to attempt to regulate their speech as though they were merely employees."[28]

The Cole and Post discussions are similar to the Sunstein and Kagan ones in the following way: Sunstein and Kagan explicitly point to whether an issue is settled, noncontroversial (government speech okay), or whether the issue is a matter of current social contest

23. For further discussion on this point, see Greene, *supra* note 1, at 52-67.

24. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 716 (1992).

25. Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 171 (1996).

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

27. Post, *supra* note 25, at 173-74 n. 127.

28. *Id.* at 174 n.128.

(government speech supporting one side only not okay). Cole and Post point to whether current social understandings of the speech forum in question support government speech in a restricted fashion; if so, the speech may continue. Such forums are the analogy of the settled/noncontroversial in the Sunstein/Kagan argument. Cole and Post point, on the contrary, to government speech that seeks to disrupt extant forum understandings (Cole: is the forum understood now as neutral or not? Post: are the actors in the relevant social space now actually inhabiting certain roles or not?). Such speech is impermissible, they say.

In other words, government, here represented by the legislature, is most defensible when carrying out the already understood and accepted, and the least defensible when shaking up understandings. We have seen the same structure of concern with the courts in *Marbury* (the easy case list versus questions by their nature political) and with agencies in administrative law doctrine (judicial hands-off regarding matters understood as policy).

How are we to understand this overarching comfort with the settled and discomfort with the unsettled, regarding government speech? One answer is purely prudential: Government will do better and society will be more stable if government stays out of social messes. Joseph Raz puts it this way:

> The pursuit of full-blooded perfectionist policies, even of those which are entirely sound and justified, is likely, in many countries if not in all, to backfire by arousing popular resistance leading to civil strife. In such circumstances compromise is the order of the day. There is no abstract doctrine which can delineate what the terms of the compromise should be. All one can say is that it will confine perfectionist measures to matters which command a large measure of social consensus, and it will further restrict the use of coercive and of greatly confining measures and will favour gentler measures favouring one trend or another.[29]

But what of arguments from principle? What arguments are there that government may not, as a matter of either first amendment understanding or political theory, put its speech powers behind one side or another in a matter of current social contest?

The constitutional argument is that such government speech is viewpoint discrimination, as bad here as it is in regulatory actions. This extrapolation of concerns over viewpoint discrimination from the regulatory setting to the speech setting is a poor one, however.[30] Why is viewpoint discrimination problematic? Geoffrey Stone writes that "the first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and

29. Joseph Raz, The Morality of Freedom 429 (1986).
30. For a related discussion, see Greene, *supra* note 1, at 31-40.

perhaps even more fundamentally—with the extent to which the law distorts public debate."[31] Suppressing a viewpoint amounts to "an effective prohibition on the expression of [one's] view."[32] It "mutilates 'the thinking process of the community.'"[33] In addition, such restrictions display governmental disapproval of certain messages, reflecting government partiality.[34] Elena Kagan agrees that viewpoint regulation is the worst form of content-based regulation, because it "skews public debate in a way a general ban (or refusal to subsidize) would not and because it more likely arises from an impermissible motive."[35]

Viewpoint discrimination—take as a paradigm an ordinance permitting speech favoring the incumbent administration while banning speech opposing the incumbent administration—is indeed deeply problematic. But it is important here to distinguish between regulation and government speech. When government criminalizes the expression of a particular point of view, is the concern that the government has come out for the opposing point of view? Or is the concern that the threat of criminal sanctions will effectively silence certain speakers (of the criminalized viewpoint), undercutting individual autonomy and thereby distorting debate? If the government says "we favor viewpoint x, but you may continue to express viewpoint y all you want, without fear of criminal sanctions," has it not done something quite different? The first difference is that government speech advances a viewpoint in debate, while regulatory restrictions do not. Secondly, to the extent that freedom of speech is concerned with protecting self-expression as a core element of personhood, with protecting autonomy, criminal sanctions on a particular viewpoint are vastly more inhibiting than government speech supporting the opposing viewpoint. To the extent that freedom of speech is concerned with ensuring an open marketplace for speech and with ensuring democracy through open channels of debate and protest, criminal sanctions on a particular viewpoint are much more likely than government speech favoring the opposing viewpoint to create a highly distorted marketplace or an ill-functioning democracy. Government speech supporting viewpoint x, while allowing viewpoint y to exist (but without government support), leaves the marketplace open (unless the government speech creates a monopoly[36] or coerces citizen choice[37]) and leaves room for dissent in

31. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 198 (1983).

32. *Id.*

33. *Id.*

34. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 54-57 (1987); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 103 (1978).

35. Kagan, *supra* note 22, at 67.

36. *See* Greene, *supra* note 1, at 27-40.

the political process. Moreover, government speech may, by playing a role (but not the only role) in a given speech market, expand that market, making it more robust.

In short, viewpoint discrimination is a term that we should leave for government regulation of a particular viewpoint. We should not use it to describe government speech favoring a given viewpoint. Such speech, absent monopoly, coercion, or ventriloquism concerns,[38] should be considered a healthy part of the market and of democratic debate and as no intrusion on the liberty or autonomy of citizens to express contrary viewpoints.

So we have rejected two possible arguments for allowing government speech on settled issues only. The *modus vivendi* argument—that greater stability is achieved when government stays out of social controversy—has its place, but not as an anchor for a principle of either constitutional law or political theory. The viewpoint discrimination argument—that government support for one side over another in a currently contested social matter violates the first amendment—advances a point of principle, but as we have seen, the point should be rejected. What remains, I think, is a deeper argument about the proper role of government in a liberal democracy. Let's look again at some of Lessig's work to see how such an argument is set up descriptively and cashed out normatively.

Lessig writes that the force of social meanings "hangs upon their resting upon a certain uncontested, or taken-for-granted, background of thought or expectation—alternatively, that though constructed, their force depends upon them not seeming constructed."[39] In other words:

> When these understandings or expectations become uncontested and invisible, social meanings derived from them appear natural, or necessary. The more they appear natural, or necessary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be. The converse is also true: the more contested or contingent, the less powerful meanings appear to be.[40]

If one accepts this description—that the more meanings appear contested, the less powerful they are—then what follows also makes sense. That is:

> [E]fforts by the government to regulate social meaning that are seen

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37. *See id.* at 41-49.

38. Ventriloquism involves government speech, either directly or through funding conditions, that masks the fact that government is the source of the speech. This is problematic, but should not be a sufficient ground for constitutional invalidation. For discussion, see *id.* at 49-52.

39. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 951 (1995).

40. *Id.* at 960-61.

> as efforts by the government to *change* social meaning will be less effective than efforts that are not so viewed.... [T]here is a strong incentive for the government to deliver its message of change while hiding the messenger.... [G]overnment will have an incentive to [minimize] the extent to which its messages seeking change seem to be messages from it, by tying its messages to independent authorities (for example, doctors) or authority (science).[41]

The descriptive point migrates into a normative one. Settled understandings are more powerful than contested ones, and if government is seeking to engage in speech activity, and wants to be effective, it will try to make the arguments seem not contested, and one way to do this is to make the argument seem that of science (and settled) rather than that of policy (and unruly). I have dubbed this sort of masking "ventriloquism" and have argued that when government engages in speech it should come clean and reveal its role in the debate.[42] Government may have an incentive to avoid this, but it is not an incentive conducive to accountable democratic governance. If the cost of coming clean is that more social meanings will be seen as contested and thus harder to instantiate as science, then so be it. Again, this is not an argument against governmental intrusion into contested social debates; it's just an acknowledgment that the efforts at persuasion may be hampered by revealing that (a) the government is involved and (b) the issue is contested.

Lessig proceeds from the descriptive claim about the relative power of seemingly settled social meaning, and the quasi-normative discussion about masking, to a clearly normative concern with government speech. He writes:

> [C]ensorship is just one part of any power over orthodoxy.... [W]e might worry when institutions, whether government or private, exercise significant market power.... This might... suggest a greater anxiety about governmental speech.... [T]he proscription of speech is just one of many means to the establishment of orthodoxy–indeed, perhaps the least effective way. What the techniques of social meaning regulation reveal is that there are many ways for government to establish what is orthodox and what is heretical, speech proscription being just one. Yet for these other techniques, the First Amendment has nothing to say.[43]

On the last point, others disagree. There is clearly a body of scholarship that places first amendment limits on government speech.[44] To the extent that such speech monopolizes a speech market

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41. *Id.* at 1017-18.

42. *See* Greene, *supra* note 1, at 49-52.

43. Lessig, *supra* note 39, at 1036, 1037, 1039, 1041.

44. *See* Owen M. Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of State Power 107 (1996); Owen M. Fiss, The Irony of Free Speech 45-48 (1996); Sunstein, Democracy, *supra* note 2, at 115, 231; Cole, *supra* note 24, at 743; Kagan, *supra* note 22, at 67; Post, *supra* note 25, at 173-74; Martin H. Redish & Daryl

or coerces citizen choice, I agree that the first amendment comes into play.[45] But Lessig's normative concern exists even without such showings, and even without invoking the first amendment. As a matter of political principle, government power backing some viewpoints over others seems problematic because government "establish[ment]" of accepted views, or meanings, seems contrary to core American understandings of the limited power of government.

I could not agree more with the major premise: that government establishment or prescription of ideas is invalid. But it is far too easy, it seems to me, to assume that government participation in contested social debates has the effect of establishing or prescribing ideas. That government in a liberal democracy must leave ample space for diverse expression, for dissent, for wide-ranging debate, is a no-brainer. That government in a liberal democracy must remove itself from such debates is, it seems to me, a much harder position to defend. The argument seems to be—from Lessig as well as from the others I have discussed and cited—that even if government is not monopolizing a speech market, or coercing citizen choice, or ventriloquizing, it still exerts an overly powerful force on debate, and too great a risk of the pall of government-prescribed orthodoxy is present. Government support for already accepted orthodoxy—Just Say No, etc.—is often perceived as perfectly legitimate, however. Taking sides in a contested debate—such as the abortion debate or the debate about indecent art—is seen as highly problematic. The concern Lessig expresses with governmental "establish[ment]" of social meaning is shared by the other scholars precisely at those moments when government is seen most clearly as trying to tip the balance in a hot area, not when it is seen as merely playing out what has already been decided. Leaving aside the first amendment doctrinal analogue of this concern (viewpoint discrimination, which I have discussed earlier), the point of liberal democratic theory seems to be that government should not appear to be adding its weight to one side or the other of a debate.

But it is exactly this point that I want to contest. It seems to me a mistaken understanding of liberal democratic theory to extend the concept of "neutrality" this far. Liberal democratic government is not and has not been relegated to that of night watchman, or even that of funnel of the people's desires. Especially in the post-New Deal era, government does much more. There are several ways of understanding government's contribution as speaker.[46] First: Some government speech serves as a public good; the production of some art and information might lag were it not for government suppport. Second: Government speech can serve as an avenue for the

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I. Kessler, *Government Subsidies and Free Expression*, 80 Minn. L. Rev. 543, 576, 580 (1996).

45. *See* Greene, *supra* note 1, at 26-49.

46. For further discussion, see *id.* at 8-12.

representation of citizens' higher-minded desires even when as consumers they act with perhaps lower-minded motives (the smoker who supports Surgeon General's warnings against smoking, the careless litterer who supports environmental recycling campaigns, etc.). Third: Government can use its speech powers to alter social norms that might be difficult for people to alter through private action. Fourth: We might develop a theory of moral responsibility to suggest that government has an obligation to try to persuade toward its view of the good. If person *X* has a duty of care toward person *Y*, and person *X* believes that a certain view on an issue relevant to person *Y*'s well-being is the best view, then perhaps person *X* has a duty of straightforwardness on that issue to person *Y*. Might we not say that government has a similar duty to the citizens? Government's conceptions of the good might not simply mirror a clear consensus of the populace, but so long as government is one speaker among many and is not coercing citizen choice, why should we deem government speech "establishment" or "regulation" or "imposition"?[47] We trust the people to distinguish good arguments from bad ones all the time; indeed, this is one of the principal defenses of a strong free speech clause. Why can't we trust the very same population to weed out bad governmental arguments from good ones?

In short, if there is an argument from principle against government speech on contested issues apart from concerns about monopoly, coercion, and ventriloquism, it must be an argument resting in a neutrality theory of liberal democracy. But government speech on contested issues need not be seen as violating the core of neutrality. The settled/controversial distinction has deep roots in our law. I have discussed two areas in which government replication of what appears settled ruffles no feathers, but government "intervention" into the unsettled appears problematic. Whether or not these distinctions make sense in the areas of judicial review and administrative law (questions I will pass on here), the distinction leads us astray when thinking about government speech. Government speech on unsettled issues might appear nonneutral and accordingly less defensible. But this only converts to an argument from principle if we rely on a conception of government as carrying forth common ground, as the repository of our desire to overcome difference. Government, no less than any other social institution, is more unruly than that. It is a place

47. The establishment clause of the first amendment should be understood as placing restrictions on governmental religious speech, restrictions that do not extend to governmental secular speech. *See* Abner S. Greene, *The Incommensurability of Religion*, *in* Law and Religion: A Critical Anthology 226 (Stephen M. Feldman ed., 2000); Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. Ill. L. Rev. 535; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611 (1993).

not only for struggle toward a common end, but also for uncommon struggles that never end.[48]

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As this article was going to press, the Supreme Court decided an important case about conditional speech limitations in government funding programs. The Legal Services Corporation ("LSC") distributes federal money for the legal representation of indigent persons in civil matters. Congress enacted a provision forbidding LSC representation in cases that "involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."[49] The specific concern was with use of federal funds to litigate welfare reform issues.

The Supreme Court, by a 5-4 vote, invalidated this funding condition, in *Legal Services Corporation v. Velazquez*.[50] The opinion, by Justice Kennedy, offered various grounds for the holding. First, the Court distinguished *Rust v. Sullivan*,[51] in which it had upheld speech restrictions in a family planning funding program, specifically forbidding abortion counseling or referral by health care providers receiving federal funds. The *Velazquez* Court said that the "counseling activities of the doctors... amounted to governmental speech,"[52] and thus the government could restrict the speech to its favored viewpoint. The LSC program was designed "to facilitate private speech, not to promote a governmental message."[53] That is, an LSC-funded lawyer "speaks on the behalf of the client," and "is not the government's speaker."[54] The leeway that government has in advancing its own message disappears when it is funding speech not attributable to government.

Second, although the Court acknowledged that government often establishes limited purpose speech forums, either physical in nature or via funding, it may not "distort [the] usual functioning"[55] of a particular type of expression. Here, that means Congress may not "distort[] the legal system by altering the traditional role of... attorneys,"[56] which the LSC funding restrictions would do by removing a type of argument from a funded attorney's legal options.

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48. *See* Abner S. Greene, *The Irreducible Constitution*, 7 J. Contemp. Legal Issues 293 (1996); Abner S. Greene, *Uncommon Ground—A Review of* Political Liberalism *by John Rawls and* Life's Dominion *by Ronald Dworkin*, 62 Geo. Wash. L. Rev. 646 (1994).

49. Legal Servs. Corp. v. Velazquez, slip op. at 3 (Feb. 28, 2001).

50. Slip op. (Feb. 28, 2001).

51. 500 U.S. 173 (1991).

52. *Velazquez*, slip op. at 6.

53. *Id.* at 7.

54. *Id.*

55. *Id.* at 8; *see also id.* at 9.

56. *Id.* at 10.

Third, the Court was concerned that although the indigent women in *Rust* could get abortion-related advice from other sources, the indigent clients in *Velazquez* would often have "no alternative source . . . to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits."[57]

Fourth, the Court noted that the funding restriction "operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns."[58] In other words, the restriction "is designed to insulate the Government's interpretation of the Constitution from judicial challenge."[59]

Although *Velazquez* was correctly decided, the opinion is overwritten, and the second ground for the holding, in particular, is problematic. As I suggested in my prior piece on government speech, the LSC funding condition at issue in *Velazquez* is unconstitutional because it blocks the path of legal change.[60] Following the classic *Carolene Products* footnote 4,[61] and John Hart Ely's elaboration on the theme,[62] government may not block avenues of challenge to itself, and that is precisely what the *Velazquez* funding condition does. That is the Court's fourth ground for its holding, and it would have been sufficient.

The third ground also touches on a proper concern in the setting of government funding of speech. If government pushes a particular point of view, and other viewpoints are available in the same speech forum, then there is no problem. But if the governmental point of view is essentially a monopoly in the given speech market, then the speech restrictions are problematic.[63] The Court was probably right to say that indigent clients rely solely on the government-funded lawyers in making legal arguments, although if the indigent women in *Rust* could get abortion-related advice from sources other than the government-funded doctors, perhaps the clients in *Velazquez* could get outside legal advice, as well. Or perhaps the indigent women in *Rust* could not get such outside medical advice. These are difficult, fact-specific determinations. The underlying focus—on the possible monopoly power of government in some speech settings—is a good one.

The first ground is an important consideration, but the Court makes too much of it. In the setting of funding conditions, when the message

57. *Id.* at 12.
58. *Id.* at 13.
59. *Id.* at 14.
60. *See* Greene, *supra* note 1, at 39-40.
61. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).
62. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75-104 (1980).
63. *See* Greene, *supra* note 1, at 27-40.

(or message prohibition) is clearly that of the government, citizens know whom to blame and any virtues of government speech are apparent. When the message (or message prohibition) is not clearly that of the government, these attributes disappear. But the fact that speech (or its restriction) may not be clearly attributable to government should not, by itself, doom a conditional funding program.[64] Here, it would certainly have been smoother had Congress insisted that LSC-funded lawyers say to their clients, "while I'm allowed to challenge the denial of welfare benefits or the amount of the benefits, the U.S. Government won't allow me to challenge the underlying law itself." Even without such disclosure, however, the condition on funding nonetheless represents the government's speech interest in the particular speech setting. Here, the government speech interest is "no challenge to extant welfare law" and the speech setting is "conditional funding of LSC lawyers."

The second ground for the Court's holding is the most far-reaching, and almost certainly wrong. The Court states that Congress may not, through funding conditions, "distort" the normal functioning of a type of expression, here, lawyer-client speech. Clients expect their lawyers to represent them vigorously and comprehensively; funding restrictions that remove a weapon from a lawyer's arsenal alter that traditional lawyer-client relationship. Descriptively, this is true. But the Court is a long way from justifying its normative conclusion that the alteration of the traditional lawyer-client relationship, via funding conditions, is a ground for constitutional invalidation. Here, for the first time in the caselaw, the Court has backed the Cole/Post argument discussed above,[65] namely, that government funding conditions may not disrupt conventional speech relationships. As I suggested earlier, however, this argument inappropriately privileges the settled over the unsettled, and adopts a conventionalist understanding of government's role in speech markets that does not properly acknowledge the ways in which government may, through funding, alter the nature of speech markets.[66] In other words, bracketing the *Carolene Products* footnote 4 issue for the moment, we should not construe the first amendment to prevent the government from changing the nature of LSC representation if it so chooses, even if we think such alteration awful as a matter of social policy. If LSC lawyers are to be limited purpose lawyers, then that is what they are to be. They would then be a certain type of government-funded agent, and would be understood as such.

We must wait to see how far this aspect of *Velazquez* extends; the case may well be limited, over time, to the legitimate *Carolene*

64. *See id.* at 49-52.
65. *See supra,* pages 1678-79.
66. *See* Greene, *supra* note 1, at 52-67.

Products foonote 4 concern with government using funding conditions to block the channels of political/legal change.