RETHINKING THE GOVERNMENT SPEECH DOCTRINE, POST-TRUMP

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The Supreme Court has held that when the government speaks, it faces few constitutional constraints, including adherence to viewpoint neutrality. The Court has indicated that if voters dislike the content of governmental speech, they should express this displeasure through democratic process. Yet the inadequacy of this logic has been exposed by the Trump presidency, which reflected extraordinary willingness to defy norms and conventions of the presidency, including the expectation that the office would not be abused to advance partisan goals or attack political enemies. Since many of Trump's statements had the precise aim of influencing popular self-determination, his presidency shows a weakness of the government speech doctrine's reliance on electoral accountability: it offers no constitutional mechanism for addressing government speech that distorts democratic process itself.

This Article addresses this lacuna in the government speech doctrine by demonstrating how norms of democratic accountability should discipline the government speech doctrine. It first reconstructs the liberal origins of the government speech doctrine and demonstrates these origins elicit the tension between constitutional and democratic authority. The principles of popular autonomy that inform the government speech doctrine are premised upon cultivating responsible and independent reasoning by voters. These norms are the same that justify traditional application of viewpoint neutrality as a mechanism for protecting political reasoning in First Amendment doctrine. The government speech doctrine is novel because it extends this logic of free speech not to constrain the government through constitutional oversight but to suggest it should be subject to democratic rather than constitutional control. A sensitive approach to this balance in general and the government speech doctrine in particular vindicates constitutional scrutiny of government speech when it threatens reasoned and balanced political discourse. The Article then explores one class of government speech characteristic of Trumpist governance that shows the urgency of revising the theory and practice of the government speech doctrine: partisan speech that deviates from neutral governance.

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The responsible individual reasoning and collective electoral accountability that underlie the government speech doctrine suggest its appropriate future development: government speech invites constitutional scrutiny when it threatens to distort or prejudice, rather than cultivate and clarify, citizens' reasoning. The Supreme Court, rather than rigidly exempting state speech from constitutional scrutiny, should adopt such a nuanced analysis in future application of the government speech doctrine.

TABLE OF CONTENTS

I. INTRODUCTION: TRUMP AND NEW URGENCY TO THE CONSTITUTIONAL SCRUTINY OF STATE SPEECH 1945
II. REIMAGINING THE ORTHODOXY: THE OBLIQUE DEVELOPMENT AND DEMOCRATIC FOUNDATIONS OF THE GOVERNMENT SPEECH DOCTRINE 1947
  A. *The Doctrinal Development of the Not-So-Recently Minted Government Speech Doctrine* 1947
    1. *The Oblique Foundations of the Doctrine: From Compelled Private Speech to State Freedom* 1948
    2. *The Government Speech Doctrine, Fully-Formed: State Emancipation from Viewpoint Neutrality* 1950
  B. *The Theoretical Justifications of the Speech Doctrine: Democratic Self-Rule and Its Constitutional Limits* 1951
  C. *The Judicial Posture and the Scholarly Response: Favoring Greater Constitutional Scrutiny of State Speech* 1954
III. THE TRUMPIST STRESS TEST AND ITS LESSONS FOR FREE SPEECH LIBERALISM 1956
  A. *Trump's Provocations and Norm-Defiance* 1956
    1. *False Statements* 1956
    2. *Ideological Provocations* 1957
    3. *From Ideological Provocation to Incitement* 1958
  B. *Speech and Truthseeking: The Traditional View and Its Limits for Constraining Trumpism* 1959
    1. *The Broad Constitutional Defense of Speech: Lies and Political Accountability* 1959
    2. *The Broad Constitutional Defense of Speech: Incitement and Free Speech Libertarianism* 1961
  C. *The Liberal Justification: Speech as a Path to Truth, the Electorate as the Ultimate Authority, and the Ultimate Logic of the Government Speech Doctrine* 1962
IV. POLARIZATION, PARTISANSHIP, AND THE FRACTURED SOCIETY: FIRST STEPS IN DEVELOPING FIRST AMENDMENT LIMITS TO THE GOVERNMENT SPEECH DOCTRINE 1965
V. CONCLUSION: THE PAST, PRESENT, AND FUTURE OF THE GOVERNMENT SPEECH DOCTRINE 1969

I. INTRODUCTION: TRUMP AND NEW URGENCY TO THE CONSTITUTIONAL SCRUTINY OF STATE SPEECH

Donald Trump's presidency was marked by an extraordinary set of violations of the expectations of presidential conduct. Some of these transgressions violated law and are subject to judicial scrutiny (whether in a constitutional capacity, or otherwise, such as private anti-corruption investigations). Others 'merely' contravened conventions or expectations of decorum and dignity.[1] This latter category raises a puzzle of rising importance given the polity-wide intense polarization and Trump's continued leadership of the Republican party. How can other governmental actors constrain or disincentivize conduct destructive to the broader American political and constitutional order?

The status of one category of governmental conduct as beyond constitutional oversight raises distinct difficulties, given Trump's inclination for toxic rhetoric. In developing the government speech doctrine, the Supreme Court has indicated that speech by government actors is subject to minimal constitutional scrutiny. In particular, unlike government regulation of speech, speech by the government need not conform to viewpoint neutrality. Invoking the conventional justification for unrestricted speech in citizens' capacity to parse information, the Court has indicated that the appropriate mechanism for disciplining government speech is popular will be channeled through the electoral process.

Yet a major focus of Trump's speech—as exemplified by his provocation of rioters during the January 6, 2021 incident—has precisely distorted popular will and interfered with democratic procedure. His conduct urgently illustrates that the government speech doctrine is poorly positioned to address speech that subverts the very mechanism of popular control. While other scholars have suggested that government speech should be held to constitutional standards as a matter of normative right or substantive morality, speech such as Trump's raises a challenge that is integral to the Court's own procedural justification for governmental speech.

To handle this challenge, this Article proposes a general reform of the government speech doctrine based on the Court's own procedural logic: government speech should be subject to constitutional scrutiny when it harms, rather than benefits, prospective voters' reasoned and reflective evaluation of politics and policy. To develop this proposal, this Article explores one particular type of self-serving government speech—partisan speech—that poses a particular threat to sound voter reasoning in light of contemporary polarization.

This Article proceeds as follows. Part II offers a careful reconstruction of the development of the government speech doctrine, and in particular its circuitous development through the problem of compelled speech. The government speech doctrine had a peculiar incubation as a dicta companion to the question of when individuals can assert a constitutional right to silence against compelled

1. Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 191 (2018); Michael J. Klarman, *The Degradation of American Democracy-and the Court*, 134 HARV. L. REV. 1, 1 (2020).

participation in group speech (including membership in state organizations). To offer assurances that the conditional First Amendment right against compelled speech would not hamstring the governments' ability to pursue policy objectives, the Court declared that state speech itself would face no requirement of viewpoint neutrality. Yet when, in *Johanns v. Livestock Marketing*,[2] the dictum was adopted as precedential, the Supreme Court insulated state speech from constitutional review and reiterated its commitment to the principle that popular disapprobation expressed through electoral outcomes is the mechanism that should control government speech. Underlying this is the tension, largely unexplored in doctrine and scholarship, between constitutional and democratic aspects of self-rule as competing expressions of citizen freedom. The government speech doctrine is most notable as the judiciary's explicit *limitation* of a constitutional principle—viewpoint neutrality—because of the asserted capacity of democratic self-rule alone to adequately control the state.

Part III considers the challenge posed to the government speech doctrine by Trump's provocative and disruptive political comments. Blunt application of the government speech doctrine could limit judicial opportunity to scrutinize such destructive governmental speech. Traditional First Amendment principles, however, seem to offer few avenues for policing such destructive state speech and seemingly support the limited role of constitutional oversight expressed by the government speech doctrine. In response, the Article revisits the liberal foundations of the doctrine (particularly as articulated by John Stuart Mill)[3] to argue that doctrine's basis in democratic accountability justifies examining what conditions are necessary for the flourishing of such accountability, rather than removing government speech from constitutional scrutiny. Popular control of government speech, as a logical development of the free speech libertarianism which has characterized the modern First Amendment jurisprudence, is based in the capacity of individuals to engage in free and fully developed reasoning. Recognizing the capacity of the state to interfere with such reasoning suggests the circumstances where First Amendment scrutiny of government speech may be appropriate. It also provides a mechanism for bringing unity to the constitutional-democratic divide that the government speech doctrine threatens to introduce.

Part IV applies this principle of when government speech should endure constitutional scrutiny by considering partisan speech, particularly where it seeks to exploit and exacerbate polarization. It demonstrates that there is a norm—established in both the doctrine and statute, particularly the Hatch Act—that advances partisan neutrality. This norm of neutrality is an exemplary consideration that the Court should take into account to further develop the government speech doctrine.

In sum, this Article connects the origins and future of the government speech doctrine by parsing its foundations in citizen freedom and showing how those values should shape its further evolution. The constitutional value of free expression derives from its facilitation of persons' political reasoning and

2. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 550 (2005).
3. *See infra* Section III.C.

decision-making without external domination. Oversight of government speech can be left to the democratic process, insofar as it can be effectively policed by electoral accountability—but such accountability is only as effective as the discursive and analytic opportunities of the citizens who decide elections. Where government speech threatens to impair or dominate rather than express such citizen will, it should, in line with First Amendment norms, be subject to constitutional scrutiny. Excessively and viciously partisan speech—as exemplified by the Trump presidency—demonstrates the precise need to take these underlying values into account in applying the government speech doctrine.

II. REIMAGINING THE ORTHODOXY: THE OBLIQUE DEVELOPMENT AND DEMOCRATIC FOUNDATIONS OF THE GOVERNMENT SPEECH DOCTRINE

A series of cases has established that when the government speaks, it is largely free from First Amendment constitutional scrutiny; indeed, scholars suggest the only certain limit on government speech is the Establishment Clause.[4] While a relatively new core constitutional rule, the government speech doctrine has emerged from a deeper constitutional tradition than has been generally acknowledged. This Part reconstructs the twisting evolution of the government speech doctrine, examines the judicial mantra that control of government speech should be left to democratic oversight, and considers scholarly responses to the doctrine.

A. The Doctrinal Development of the Not-So-Recently Minted Government Speech Doctrine

The Supreme Court first decisively relied upon the government speech doctrine in 2005 with *Johanns v. Livestock Marketing*[5] and it has been more clearly articulated in later cases.[6] This has led Justice Stevens to deem it "recently minted,"[7] a view of its novelty shared by scholars.[8] Yet a closer look shows that it was not newly innovated, but rather developed "obliquely"[9] from the Court's assessment of First Amendment challenges to collectively funded speech.

4. Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 649 (2013); Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 145 (2010) ("The only clear limit on government speech is the Establishment Clause of the U.S. Constitution.").

5. *Johanns*, 544 U.S. at 550.

6. *See, e.g.*, *Summum*, 555 U.S. at 460; Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 207 (2015).

7. *Summum*, 555 U.S. at 481.

8. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, B.C. L. REV. 695, 696 (2011); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 162 (2012); Tebbe, *supra* note 4, at 648.

9. *See* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 31 (2019).

1. The Oblique Foundations of the Doctrine: From Compelled Private Speech to State Freedom

The Court has long and firmly held that the First Amendment guarantees private citizens a right to silence as well as expression and thus prohibits the government from compelling speech.[10] The application is obvious enough when denying the state the power to demand that individuals recite the Pledge of Allegiance[11] or emblazon the state motto on their private property.[12] It becomes more complicated when persons who desire silence are not required to speak individually but rather to affiliate with organizations that generate speech. In its early engagement with this problem, the Court queried if the right to silence is violated when organizations, such as public unions[13] and bar associations,[14] undertake speech. These institutions derive power from state sponsorship or affiliation and use members' dues to undertake speech and advocacy.[15] Relatedly, the Court evaluated the constitutionality of government programs that require speech by fund recipients but impose, as conditions for receiving the funding, ideologically controversial limitations on the content of the speech.[16] Both contexts queried how much First Amendment rights constrain the government (or government-affiliated entities) from undertaking speech that draws off the resources and capacities of individuals.

The Court struggled to enunciate a clear rule. Two early engagements, *Abood*[17] and *Keller*,[18] indicate that mandatory, fee-based affiliation with a state-sponsored speaker does not illegally compel speech,[19] so long as the fees collected are not used for "activities having political or ideological coloration which are not reasonably related to the advancement of [the] goals" of the organization at issue.[20] The Court, however, conceded that identifying this distinction is a "difficult question" and "not always easy to discern."[21] Perhaps more importantly, *Keller* also included dicta that most directly prefigured the government speech doctrine: "[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed. . . the process of government as we know it [would be] radically transformed."[22] Relatedly, *Rust v. Sullivan* concluded that requiring a functional form of viewpoint neutrality in the implementation of federal policy by fund recipients would be unworkable and

10. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2463 (2018) (collecting cases); *cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

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

12. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

13. *Abood*, 431 U.S. at 209.

14. Keller v. State Bar of Cal., 496 U.S. 1, 1 (1990).

15. *Id.* at 15.

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

17. *Abood*, 431 U.S. at 209.

18. *Keller*, 496 U.S. at 1.

19. In *Janus*, the Court overturned *Abood* and rejected the constitutionality of mandated affiliation with regards to public employee unions. Janus v. AFSCME, 138 S. Ct. 2448, 2460 (2018).

20. *Keller*, 496 U.S. at 13–15.

21. *Id.* at 14–15.

22. *Id.* at 12–13.

"render numerous Government programs constitutionally suspect"[23]—a position that anticipates the government speech doctrine. In none of these cases was the government itself speaking. Rather, the government was, directly or indirectly, mandating or conditioning private individuals' participation in speech.

The government speech doctrine—which addresses where the government speaks directly—emerged as an incidental corollary to the *limited* constitutional discretion of the government to compel speech (directly or indirectly) by non-governmental actors. Its origins are most clearly demonstrated in *Boards of Regents of the University of Wisconsin v. Southworth*,[24] which concluded that when a state entity aggregates and redistributes mandatory fees collected from private persons to sponsor third-party speech that some contributors find objectionable, but allocates the money through an equitable and open process, viewpoint neutrality is satisfied and there is no constitutional infirmity.[25] The *Southworth* opinion noted, however, that if the Court were assessing direct speech by a state actor, the speech would face even less constitutional scrutiny (*i.e.*, would not be expected to comply with viewpoint neutrality in any form):

> Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.[26]

This statement (which the Court took pains to classify as dicta)[27] contains the core principle of the government speech doctrine: government speech is not generally subject to First Amendment scrutiny.[28] Extrapolating from *Rust*'s conclusion that the government must have discretion to advance policies,[29] this analysis characterizes government speech as, like any other government action, a privilege[30] to implement a policy even if some citizens object to it. The Court (in a move that it relies upon in the maturation of the doctrine) draws a comparison to taxation.[31] Citizens do not have a right to object to being taxed even if they

23. 500 U.S. 173, 194 (1991).

24. Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).

25. The centrality of viewpoint neutrality to university funding of speech when undertaken by private parties was established in *Rosenberger v. Rector & Visitors of Univ. of Va*, which intimated—but only barely—the principle later fully articulated in *Southworth* that viewpoint neutrality does not apply to a university's own speech. 515 U.S. 819, 834 (1995).

26. *Southworth,* 529 U.S. at 234–35 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)); *see also Rosenberger*, 515 U.S. at 833.

27. *Southworth*, 529 U.S. at 229 ("University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections . . . .").

28. *Id.* at 235.

29. *Rust*, 500 U.S. at 194.

30. The use of the word 'privilege' may seem unusual here but reflects the Hohfeldian reality that the Court is indicating that objection by some citizens to a government policy does not mean that the government has a legal duty not to undertake the policy. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16, 21 (1913).

31. *Southworth*, 529 U.S. at 229 ("The government, as a general rule, may support valid programs and policies by taxes or other exactions . . . .").

dislike the policies implemented with their tax dollars.[32] The appropriate place to advance a view of how government income should be spent is through democratic process.[33]

The foundations of the doctrine reveal how it emerged as a core principle from constitutional consideration of marginal cases: having the limited right of citizens *qua* private citizens to object to compelled speech (*i.e.*, *Abood*, *Keller*, and *Southworth*),[34] and the inability of First Amendment challenges to limit government policy that conditions speech (*i.e.*, *Rust*),[35] the Court advances the logical synthesis (on its own internal terms) that when the public speaks, it faces no constitutional scrutiny (though also no protection).[36]

2. The Government Speech Doctrine, Fully-Formed: State Emancipation from Viewpoint Neutrality

*Johanns'*s holding that the "[g]overnment's own speech . . . is exempt from First Amendment scrutiny"[37] is the first precedential articulation of the government speech principle.[38] The facts of the case and the opinion's reasoning both reflect the doctrine's circuitous origins. The case involved a government policy of marketing beef, funded by targeted levies on beef producers.[39] Some beef producers did not wish to participate in the program, and objected to it, and the levy in particular, as compelled speech.[40] The Court noted "[w]e have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns," a proposition which the plaintiffs appeared to concede.[41] The Court concluded the beef propaganda was government speech, as the facts indicate the speech was controlled by the government and funded by government exaction.[42] As government speech, the beef propaganda did not need to pass the purpose-of-organization test put forth in *Abood* and *Keller*,[43] nor satisfy programmatic viewpoint neutrality as indicated in *Southworth*.[44] *Johanns* is thus the first case to "squarely . . . h[o]ld" that government speech does not face constitutional scrutiny,[45] but ironically enough only after and in contrast to a far closer set of cases in which the Court had laid the groundwork for the logic of the case.

32. *Id.*
33. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563 (2005).
34. *See, e.g.*, Abood v. Detroit Bd. of Educ. 431 U.S. 209, 209 (1977).
35. Rust v. Sullivan, 500 U.S. 173, 173 (1991).
36. *See generally* Dave Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1638 (2006).
37. 544 U.S. at 553.
38. *Id.*
39. *Id.* at 553–55.
40. *Id.* at 555–56.
41. *Id.* at 559–60.
42. *Id.*
43. *Id.* at 558.
44. Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000).
45. *Johanns*, 544 U.S. at 559.

Two subsequent cases have ensconced the principle that the government need not satisfy viewpoint neutrality in its own speech. *Pleasant Grove City v. Summum* held that a city's rejection of a donated monument in public spaces was constitutional because the placement of such monuments was government speech.[46] Citing *Johanns*, the Court held that the "Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[47] Likewise, by classifying the decision to authorize (or refuse to authorize) a license plate message as state speech, *Walker v. Sons of Confederate Veterans* reinforced that the Free Speech Clause does not "determin[e] the content of what [the government] says."[48]

Looking at the ancestors of these core cases, the idea that the government is free from viewpoint neutrality when it expresses its ideas should not be a surprise: the Court had explicitly indicated its commitment to this principle in *Keller* and *Southworth*—both cases that generated little controversy on the bench.[49] It thus might be more accurate to call the government speech doctrine 'circuitously minted' rather than "recently minted";[50] the peculiarity of its provenance is that it is the core principle that was established after, rather than before, the liminal principle of when state action compels (or limits) personal speech.

B. The Theoretical Justifications of the Speech Doctrine: Democratic Self-Rule and Its Constitutional Limits

That the government speech doctrine has a longer legacy than typically acknowledged might only be a historical curiosity if a parallel, well-established constitutional logic did not undergird the justification for the doctrine. The Court has developed a justification for state freedom from viewpoint neutrality based in democratic accountability,[51] with normative roots that draw from the same wellspring of political liberty that justifies traditional First Amendment constraint of the state.[52]

The specific shared antecedent that connects the 'core' government speech doctrine to the First Amendment tradition is its contrast with the 'compelled' personal speech (which does face some constitutional scrutiny) exemplified by *Abood*, *Keller*, and *Southworth*.[53] To explain why state-compelled speech faces greater constitutional scrutiny—a guarantee that speech would not be compelled where the procedures behind it did not conform to viewpoint neutrality—the

46. Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).

47. *Id.* at 467.

48. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015). *Walker* was a fiercely contested opinion, but because the conservative Justices on the Court objected to the conclusion that a license plate message is government speech, not because they disputed the government speech doctrine. *See* Jason Zenor, *Viewpoint Endorsement Equals Viewpoint Neutrality: The Circular Logic of the Government Speech Doctrine*, 46 CAP. U. L. REV. 1, 7 (2018).

49. *Southworth*, 529 U.S. at 235; Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990).

50. *Summum*, 555 U.S. at 481 (Stevens, J., concurring).

51. *Id.* at 481–82.

52. *See id.*; *see also* Section II.A.

53. *See supra* Subsection II.A.1.

Court has conceived of compelled speech as on a midpoint between unequivocally personal expression (which receives strong First Amendment protection, thanks to the classic role of rights protection as a defense of persons from the state) and state speech.[54] To support treating compelled speech on this midpoint (instead of simply declaring any policy that compelled speech to need to satisfy the same viewpoint neutrality that speech restrictions face), the Court needed to develop some explanation for why 'core' state speech was exempt from constitutional scrutiny. This led to the proposition that democratic process rather than constitutional review was the appropriate means for policing 'core' state speech.[55]

The foundations of the non-applicability of viewpoint neutrality to government speech were articulated as early as *Keller*: "[g]overnment officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents."[56] The seminal formulation of the government speech doctrine's democratic logic is provided in *Southworth*: "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[57] This legally offhand but normatively laden dictum has been cited as the authoritative proposition for the democratic basis of government speech doctrine adopted by *Johanns*,[58] *Summum*,[59] and *Walker*.[60] As *Walker* states, the lack of constitutional constraint entailed in the government speech doctrine "reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech."[61] However, this explanation for the government speech doctrine threatens to marginalize constitutionalism by declaring democratic accountability to be a sufficient check on state action.

The government speech doctrine elicits the competing authority of judicial constitutionalism and of popular autonomy.[62] It more specifically presses the

54. *See* David L. Hudson, Jr., *Compelled Speech*, FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/933/compelled-speech [https://perma.cc/WMR6-ZAZB].

55. *Summum*, 555 U.S. at 235 (majority opinion).

56. Keller v. State Bar of Cal., 496 U.S. 1, 12 (1990).

57. Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000).

58. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559, 563 (2005).

59. *Summum*, 555 U.S. at 467–69.

60. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

61. *Id.*

62. Judicial constraints on the conduct of popularly accountable officials is prospectively anti-democratic, or, in Alexander Bickel's phrasing, countermajoritarian. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Vail-Ballou Press, Inc. 2nd ed. 1986). More recent critics of judicial oversight of popular self-rule include Jeremy Waldron and Samuel Moyn. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1346 (2006); Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*, 52 VAND. J. TRANSNAT'L L. 1335, 1338–39 (2019). More foundationally, one can identify the judicial enforcement or rights as eliciting the balance between free popular self-rule and citizen equality. *See* JOHN RAWLS, POLITICAL LIBERALISM 3 (1993).

distinction between private speech and state action,[63] and why citizens' own speech (which has a right to viewpoint neutral regulation) and the speech they authorize through the state should endure differing constitutional treatment.[64] In a liberal democratic polity, persons express their freedom both as private individuals and as public, state-controlling citizens.[65] There is no ontologically bedrock distinction between speech that is undertaken in the private capacity, and speech that is taken by the state on their behalf (though as a matter of practice must draw this distinction, as they do in many arenas in parsing state versus private action).[66]

In exempting governmental speech from viewpoint neutrality because electoral accountability provides a sufficient check, the judiciary threatens to dissolve this distinction. This reasoning depends upon the premise that persons speaking in their private capacity and persons speaking by proxy as the principals of the state need not be differentiated, because both are reflective of a personal inclination towards free expression. This analysis, generally applied, would dissolve the distinction between private and public action, and with it any clear way of distinguishing when action is private and thus needs to enjoy constitutional protection as opposed to when action is public (*i.e.*, governmental) and thus needs to be subject to constitutional scrutiny. It exemplifies the tension that results from differentiating between constitutional self-rule and democratic self-rule, which is that both are directed towards the liberty of the individual persons who make up the polity—but that this liberty, from a single wellspring, can clash based on whether citizens are acting directly or through the state.[67]

Approaching the problem through compelled speech circumvented direct consideration of this problem. The Court framed the dispute as a technical question of determining how protection of a private person's rights (unequivocally activated when private persons invoked their right to silence) would shift based on their relationship to the potentially coercive institution, rather directly confronting citizens' positions on both sides of the public/private divide.[68] The more clearly the compelled speech at issue reflected individual will, the more urgent it was to afford it the protection of viewpoint neutrality.[69] Speech by the

63. *See generally* Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L. REV. 427 (2015).

64. Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000).

65. *See Walker*, 576 U.S. at 221 (Alito, J., dissenting).

66. In the context of the government speech doctrine, this point is most vociferously elicited by Alito's dissent in *Walker*. *Id.*

67. It might be argued that speech—whether undertaken by a private person or the state—is special, insofar as it does not directly intrude upon others' rights, but only provides others with information that they can acknowledge, critique, or dismiss as they wish. As such the treatment of speech (protection of speech rights for private persons, and lack of constitutional scrutiny for the state) can be treated as a unique case, because speech (as compared to restraint of speech) is uniquely non-coercive among activities. This is, however, a simplistically libertarian understanding of the relationship between personal freedom (including as expressed by politics) and the impact of speech from authoritative or powerful sources does not accord with either social realities or a nuanced liberal understanding of democracy (as described in Section III.C *infra*).

68. *Southworth*, 529 U.S. at 230.

69. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977), *with Southworth*, 529 U.S. at 233–34.

government only served as a point of contrasting reference as being undertaken by the entity that is typically the subject of restraint rather than protection. The normative paradox that government speech also ultimately reflects private will was not at issue in these cases.[70] This allowed the Court to develop its theory of government speech as policed by popular accountability.

C. The Judicial Posture and the Scholarly Response: Favoring Greater Constitutional Scrutiny of State Speech

The government speech doctrine thus forces consideration of the two normative pillars of liberal democratic constitutionalism: democratic electoral accountability and judicial enforcement of constitutional right. The rule that has emerged unequivocally favors electoral accountability.[71] This general position can be defended as legitimately founded in the classical liberal capacity of citizens to process and evaluate information, and subsequently demand responsive action from their representatives, even if the Court has not itself fully articulated it or worked out its limitations.[72] The prevalent scholarly response, however, has been to challenge the premise of this balancing and to argue that there are or should be judicially enforced, constitutionally grounded principles that limit government speech that have not been doctrinally acknowledged.[73]

The solutions are diverse and creative. Helen Norton has argued that the Equal Protection Clause should (and has been used to)[74] limit discriminatory or hateful state speech.[75] Nelson Tebbe has synthesized a number of contexts to argue that diverse constitutional foundations—due process, as well as equal protection and First Amendment viewpoint neutrality—yield an overarching principle that the state may not endorse views that denigrate the equality and freedom of citizens (the core values of a liberal democracy).[76] Michael Dorf has implied possible constitutions to government speech in the violation of the Equal Protection Clause that may occur through purely 'expressive' harms.[77] Joseph Blocher has argued that the consequential ramifications of government speech, in light of the constitutional mandate for viewpoint neutrality, may provide a structural argument for equality-based limitations.[78]

70. *See supra* note 66 and accompanying text.

71. *See, e.g.*, *Walker*, 576 U.S. at 207 ("[I]t is the democratic electoral process that first and foremost provides a check on government speech.").

72. *See supra* Section III.C.

73. *See, e.g.*, *infra* notes 74–78.

74. See Norton, *supra* note 8, 107–09 for this proposition. While the cases she adduces do reflect speech in a technical sense, they may do as much to evince the artificial line between speech and action, as one involved equal protection review of state speech that was merely an intermediary to implementing a segregationist policy (*Lombard v. Lousiana*) and another involved direct modification of electoral ballots (*Anderson v. Martin*). Neither of these cases has been considered as part of the precedential line in the government speech cases.

75. Norton, *supra* note 8, at 159.

76. Tebbe, *supra* note 4, at 652.

77. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1293 (2011).

78. Blocher, *supra* note 8, at 699, 752–54 (2011) (identifying prior structure-based arguments for restrictions on government speech).

These diverse and meritorious proposals all share one high-level feature: they identify standalone requirements of justice (whether constitutional or purely moral) that should constrain government speech. As such, they seek to alter the balance between democratic accountability and judicially-enforced constitutionalism that underlies the government speech doctrine. This is, at points, intrinsic to their reasoning. Norton, for example, argues that majoritarian electoral process couched in the free speech tradition may not be satisfactory to protect vulnerable minorities from destructive state speech;[79] Tebbe's argument ultimately grounds his non-endorsement principle in a theory of "full citizenship,"[80] a political analog to Norton's argument for the need to introduce equal protection principles into oversight of government speech.

The challenge of these approaches is that they justify the greater scrutiny of government speech through competing substantive values.[81] As such, they are necessarily traded off against the reliance on democratic process to police the state. It might be argued that, without greater constitutional oversight of state speech, the electorate (particularly vulnerable groups and persons within the electorate) is incapable of realizing its full political and reflective potential to react to government speech (a claim related to the proposal adopted below in Section III.C). Yet this itself justifies the introduction of first-order substantive values by asserting, at a minimum, the invalidity of the capacity of the electorate to adequately self-govern from agonistic or interest group pluralist conceptions of democracy. These alternate preconditions for democratic self-governance may be valid, but they involve significant commitments to, or at least rejection of major alternatives of, systems of democracy.

A critical question becomes whether any principles would justify constitutional oversight without substantive precommitments to particular values of democracy or the constitutional order, given the Court has shown in its theorizing of the government speech doctrine a strong preference for democracy serving as the primary limit on government speech. This would suggest a wholly *procedural* constraint in the government speech doctrine, rather than one that involves the introduction of new substantive principles. Such principles would not exclude the substantive proposals such as those advanced by Norton, Tebbe, Blocher, or Dorf.[82] But they might be easier to justify on the terms adumbrated by the Court in its sketch of the government speech doctrine; and, given the composition of the Court, offering a justification that would sound in deferring to the electorate, rather than judicial advancement of liberal democratic values, might find a more welcome reception.

79. Norton, *supra* note 8, at 170.

80. Tebbe, *supra* note 4, at 653.

81. Blocher, *supra* note 8, at 753 (arguing that this is inevitable, and that viewpoint neutrality has necessarily been compromised).

82. *See supra* notes 74–80 and accompanying text.

III. THE TRUMPIST STRESS TEST AND ITS LESSONS FOR FREE SPEECH LIBERALISM

Trump's blatant and unapologetic defiance of long-respected, seemingly inviolable civic conventions, combined with a tendency to encourage or condone anti-social or illegal behavior, makes the legal status of government speech especially urgent. This Section briefly summarizes some of Trump's prospectively problematic speech and then explores how the current doctrine poses challenges for constitutional oversight.

A. Trump's Provocations and Norm-Defiance

Others have written extensively about how Trump has undermined presidential norms through his speech, conduct, and the broader atmospherics surrounding his time in office.[83] This Section draws in particular off Michael Klarman's and Neil Siegel's accounts to summarize how Trump's speech[84] has threatened American democracy and civic society.

1. False Statements

One form of Trump's norm violation consists of outright, descriptive, readily falsifiable lying. As Neil Siegel notes, "[a]lmost all politicians spin the truth to some extent, but at least it is the truth they are spinning. And politicians do utter false statements on occasion, but President Trump's frequency is so different in degree as to be different in kind."[85] Siegel notes the origins of Trump's political career in the baseless "birtherism" claim that Barack Obama was not American-born and thus could not occupy the presidency, a claim with strong racist overtones as well.[86] Substantively, Trump's falsehoods range from the highly granular (including claims about his own past conduct that are readily falsifiable)[87] to inaccurate, baseless, or conspiratorial claims about political and social realities, whether highly specific (claiming Obama wiretapped him) or matters of policy (claims of mass illegal immigrant voter fraud).[88] As Klarman notes, because these falsehoods could be attributed to any number of mental states—an intention to mislead, apathy towards the truth, or ignorance and confusion—it is difficult to authoritatively classify Trump's intentionality,[89] though

83. *See generally, e.g.*, Siegel, *supra* note 1; Klarman, *supra* note 1.

84. There is one threshold distinction regarding Trump's norm-defiant conduct that this account will, for the moment, leave to the side: statements he undertook as a candidate in 2016 would not qualify as government speech (at least when made), but rather as a core instance of political private speech, while his statements as president, if directed to matters of political relevance, could qualify as state conduct. Most scholars have grouped together Trump's pre-election and in-office statements. *E.g.*, Siegel, *supra* note 1, at 192. For the purposes of the particular challenge posed by and to the government speech doctrine, the broader impact of Trump's rhetoric on governance, combined with his assumption of office, is the relevant characteristic in the first instance.

85. *Id.* at 196.

86. *Id.* at 190.

87. Klarman, *supra* note 1, at 36.

88. Siegel, *supra* note 1, at 196–97 (2018); Klarman, *supra* note 1, at 36–37 (2020).

89. Klarman, *supra* note 1, at 36.

his consistency in classifying any public contradiction or criticism as "fake news"[90] suggests either intentionality or debilitating pathology. What is unequivocal is that, speaking as a public officeholder authorized through an electoral process, Trump repeatedly and aggressively made false claims that bore on both his own political fate and his responsibilities as an officeholder.[91]

2. Ideological Provocations

More readily assigned intentionality is Trump's repeated making of statements that seem designed to provoke ideologically passionate (and strategically convenient) responses—loyalty from his followers and fear or loathing from his opponents. These statements are most characteristic of Trump's leadership; his inclination for provocation seems boundless, and he appears entirely unconstrained by principles of liberal constitutional democracy or by more quotidian expectations of decorum. He has shown a predilection for assertions that are both explicitly discriminatory and have discriminatory overtones (typically attacking groups that have leaned Democratic or appeasing the stereotypical prejudices of Trump's voter base).[92] He has also attacked or denigrated those he has perceived as defying him, with particularly troubling vitriol directed towards informal but vital joints of democratic governance. Reporters and the media, to the drumbeat of "fake news," are perhaps his most frequent target, with the apparent goal of delegitimizing alternate, objective sources of information;[93] he has also assailed rank-and-file political figures such as labor union leaders.[94] Within the state, Trump has famously assailed the judiciary, attacking both the status and integrity of judges and the substantive merit of individual decisions;[95] this violates the respect typically accorded the judicial branch, which comprises a central pillar in rule of law constitutionalism.[96] Trump has also attacked regulatory agencies and officials, typically when they make decisions that do not accord with Trump's own preferences (even if independence is typically a guiding norm or convention of their operation).[97]

This tendency has perhaps been most alarming regarding Trump's statements that are directed towards politics and his political opponents. He notoriously suggested he would investigate and seek to imprison his opponent in the 2016 election,[98] thereby contravening a specific norm against politicization of campaigns to mistreat political opponents (a marker of autocratic regimes) and contravening a general norm about political exploitation of the executive control

90. *Id.* at 20.

91. *See id.* at 20–22, 36–37.

92. *Id*. at 33–35; Siegel, *supra* note 1, at 191; Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2192 (2018).

93. Klarman, *supra* note 1, at 20–21; Siegel, *supra* note 1, at 192.

94. Klarman, *supra* note 1, at 22.

95. *Id.*; Siegel, *supra* note 1, at 193–95.

96. *See* Klarman, *supra* note 1, at 22; Siegel, *supra* note 1, at 193–95.

97. Siegel, *supra* note 1, at 97.

98. Klarman, *supra* note 1, at 23; Renan, *supra* note 92, at 2192.

of law enforcement.[99] And most famously, Trump prospectively attacked the legitimacy of the 2016 election (should he have lost)[100] and has baselessly declared—and continued to baselessly declare—the result of the 2020 election to be fraudulent, with what one famously neutral news source described as a "repeated litany of baseless assertions."[101] He has thus sought to undermine the very procedural basis of liberal democracy—the integrity of electoral process itself.

3. From Ideological Provocation to Incitement

Trump's most infamous statements, however, have gone beyond ideologically charged statement of opinion and encouraged specific, often illegal, behavior. The most notorious instance of such conduct involved Trump's encourage of protestors during the January 6, 2021 protests, in which Trump, reiterating claims of widespread electoral fraud, encouraged his followers to "fight like hell" to "stop the steal" and to march on the Capitol to persuade (or coerce) Republican senators to refuse to support Biden's confirmation.[102] Whether Trump should face liability for his conduct is the subject of current litigation (*Blassingame v. Trump*) brought by officers hurt by rioters following Trump's speech,[103] with Trump arguing most germanely from a constitutional perspective that his conduct is both protected political speech and fails to qualify as incitement.[104] The January 6th conduct, however, was only the culmination of a long history of incitement by Trump. Most similar was Trump's encouragement by participants in a rally during his 2016 campaign to violently mistreat peaceful protestors at the rally, speech that was deemed to enjoy First Amendment protection.[105] Trump has also, with some level of explicitness, encouraged his supporters (as well as government agents) to resort to violence to advance his political agenda,[106] and—in conduct that synthesizes incitement to violence with undermining the role of media in civic governance—called for violence directed against reporters.[107]

99. Siegel, *supra* note 1, at 200.

100. Klarman, *supra* note 1, at 43–44.

101. Hope Yen, Ali Swenson, & Amanda Seitz, *AP FACT CHECK: Trump's Claims of Vote Rigging Are All Wrong,* AP NEWS (Dec. 3, 2020), https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5 [https://perma.cc/7URP-8H6A]. For an example of Trump continuing to assert voter fraud, *see, e.g.*, Andrew Stanton, *Trump Claims 'Voter Fraud Beyond What Anyone Can Believe' in Michigan, Pushes for Audit*, NEWSWEEK (Oct. 9, 2021, 1:36 PM), https://www.newsweek.com/trump-claims-voter-fraud-beyond-what-anyone-can-believe-michigan-pushes-audit-1637327 [https://perma.cc/YG8N-WSUX].

102. *See* Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/XT4K-HUZ8].

103. Amended Complaint, Blassingame et al. v. Trump, No. 1:21-cv-00858-APM (D.D.C. Apr. 28, 2021).

104. Defendant's Memorandum in Support of His Motion to Dismiss at 22–26, Blassingame et al. v. Trump, No. 1:21-cv-00858-APM (D.D.C. June 24, 2021).

105. Nwanguma v. Trump, 903 F.3d. 604, 606 (6th Cir. 2018).

106. Klarman, *supra* note 1, at 32.

107. *Id*. at 21.

B. Speech and Truthseeking: The Traditional View and Its Limits for Constraining Trumpism

Trump's speech provides impetus to discipline the government speech doctrine on the terms of popular political accountability advanced by the Court. Yet the idea that the First Amendment would constrain such speech as a principled matter faces a first-order obstacle: the dominant principle that has justified the breadth of First Amendment protections is that permitting citizenship to sort through competing viewpoints for the sake of self-rule is a paramount value.[108] This is closely akin to the principle of popular accountability that the Court has used to justify the government speech doctrine.[109] Acknowledging how established constitutional treatment of Trumpist speech would address "typical" government regulation provides insight as to the type of innovation necessary to provide constitutional scrutiny in the more structurally reflexive context of state actors themselves speaking.

1. The Broad Constitutional Defense of Speech: Lies and Political Accountability

One aspect of Trump's speech that appears, as a normative matter, to justify its regulation is its falseness. Untrue statements are, by the orthodox recognition of the value of speech, of "slight social value" such that, even though they are not one of the categories explicitly excluded from protection (such as libel and obscenity), they do not receive the typically robust protection from governmental regulation.[110] This view might suggest that Trump's lies would be ripe ground for some sort of constitutional oversight. Yet in *United States v. Alvarez*, a plurality of the Court suggested that regulation of lies comprises a "content-based restriction[]" which should face strict constitutional scrutiny.[111] The Court went on to suggest that false statements will only fail to receive typical First Amendment protections where their falsity is combined with falling into one of the articulated categories of low-value and thus less-protected speech: incitement (discussed below), defamation, obscenity, and speech that is part of a criminal enterprise, for example.[112]

As scholars have noted,[113] *Alvarez* yielded a somewhat muddled legal landscape, as only the plurality would generally subject regulation of lies to strict scrutiny; other Justices would only subject it to intermediate scrutiny, and the

108. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1448 (2015).

109. *Id.*

110. Chaplinsky v. New Hampshire*,* 315 U.S. 568, 572 (1942); for a contextualizing analysis, see Chen & Marceau, *supra* note 108, at 1442. The orthodox treatment of lies specifically—that "there is no constitutional value in false statements of fact" was articulated in Gertz v. Robert Welch, 418 U.S. 323, 340 (1974). It is based on an understanding of the First Amendment as based in truth-seeking and the failure of lies to contribute to such truth-seeking, though as scholars have noted this is more complicated in practice than in principle. *See* David S. Han, *Categorizing Lies*, 89 COLO. L. REV. 613, 616, 620 (2018).

111. United States v. Alvarez, 567 U.S. 709, 717 (2012).

112. *Id.*

113. Chen & Marceau, *supra* note 108, at 1437; Han, *supra* note 110, at 614.

dissenters would have continued to treat lies as low-value speech that received relatively little constitutional protection.[114] The dissenters' lack of regard for lying might seem, on first glance, normatively appealing and structurally intuitive.[115] If a statement is a lie, it seems incapable of contributing to the pursuit of truth and hence of accountable governance and social ordering. As such, lies seem unworthy of social protection. Yet as scholars have noted, for multiple reasons, the reality of lying in political and social practice, and thus of its regulation, is more complicated.[116] Some lies (particularly those used in truth-seeking practices) contribute to the broader pursuit of truth;[117] other lies may serve a particular role that is seen as socially beneficial;[118] and most generally, identifying the status of statements which are lies, and thus can be more easily regulated without running afoul of the constitution, itself requires evaluating the bedrock ontology of statements that is itself a problematic exertion of government power.[119] The primary limitations that is recognized is that where a lie causes direct harm, its social value (and thus its prospective value as a subject of constitutional protection from regulation) is lost.[120]

Trump's power and the possible pervasively destructive political consequences of his lies might seem to justify limits the scope of *Alvarez*. Yet the political accountability of such a visible political figure cuts against conceiving of presidential lies as the *sort* that should not receive constitutional protection. Highly visible lies by political figures are the most likely to be vetted for truthfulness by civil society (media, competing politicians, etc.); the visibility of the role becomes a type of crucible that makes state regulation less necessary.[121] Furthermore, it might be argued that in such a context lies in fact yield the benefit of inducing public reflection upon the truth. The standard concern with lies is that they may be relied upon reasonably by the listener, leading to problematic reliance of some sort. Accordingly, for example, lies that involve *falsely* claiming a mantle of governmental authority are typically beyond constitutional protection.[122] That lies by a prominent governmental leader are likely to be subject to scrutiny and thus political consequence connects to a more fundamental difficulty with treating lies as constitutionally distinctive. Lies require knowledge of truth; requiring the judiciary to evaluate the truthfulness of statements by another branch would potentially usurp the typical role of evaluating political circumstances that is the domain of the electorate, as well as raise difficult questions of intra-branch competency. As a generic category, lies are perhaps the most core

114. *Alvarez*, 567 U.S. at 731–32.

115. *Id.* at 739 (Alito, J., dissenting).

116. Chen & Marceau, *supra* note 108, at 1448.

117. *Id.* at 1437; *see also* Han, *supra* note 110, at 652 (expanding the categories).

118. Tung Yin, *National Security Lies*, 55 HOUS. L. REV. 729, 729 (2018).

119. Han, *supra* note 110, at 624.

120. Chen & Marceau, *supra* note 108, at 1493; Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 378 (2017).

121. Yin, *supra* note 118, at 732.

122. United States v. Alvarez, 567 U.S. 709, 721 (2012); Chen & Marceau, *supra* note 108, at 1493.

domains in which the engine of democracy—political accountability and voter discernment—must be trusted if democracy itself is to be sound.

2. The Broad Constitutional Defense of Speech: Incitement and Free Speech Libertarianism

The second characteristic of Trump's speech that might move it beyond constitutional protection is one of the traditional low-value categories of incitement to harm. The seminal case that articulates the substantive quality (*i.e.*, content) that speech must have before it can be legally restricted as incitement is *Brandenburg v. Ohio*.[123] The case (involving a highly unsympathetic appellant advocating for systemic but not immediately imminent racist violence) queried the legality of a statute that criminalized "advoca[ting] or teach[ing] the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform."[124] Because it "punish[ed] mere advocacy", the statute did not survive constitutional scrutiny.[125] The terse, *per curiam* opinion has come to stand for the proposition that inciting speech is illegal only if it would lead to "imminent lawless action," as opposed to advocating for a general type of behavior or mode of social change.[126] "[M]ere tendency of speech to encourage unlawful acts" will not legitimize speech regulation;[127] only specific advocacy to take unlawful action will justify prohibition.[128] These principles were cited in *Nwanguma v. Trump* to exonerate him from suffering legal consequences for his generalized—though not, by the Sixth Circuit's lights, sufficiently specific—hostility and call to action against protesters at a 2016 rally.[129] Entailed in *Brandenburg*'s logic is the neutrality of the free speech principle: the legality of speech does not depend upon its moral merit, but rather if it prompts imminent violence.[130]

Brandenburg remains a touchstone for the expansive protection of even ideologically toxic or socially destructive free speech,[131] even as scholars have noted the ways the principle has been eroded or undermined by new challenges and debates,[132] or left some hard cases unclear.[133] Yet at its core, in demanding that speech encourage imminent violence before it can be subject to legal

123. *See* Brandenburg v. Ohio, 395 U.S. 444, 444 (1969).

124. *Id.* at 448.

125. *Id.* at 448–49.

126. *Id*. at 449. *See* Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 665 (2009).

127. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

128. Hess v. Indiana, 414 U.S. 105, 109 (1973).

129. Nwanguma v. Trump, 903 F.3d 604, 613 (6th Cir. 2018).

130. Kathleen Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 204 (1994).

131. In *U.S. v. Stevens*, 559 U.S. 460, 468 (2010), the Court affirmed that content-based restrictions are few, and that incitement sweeps closest to Trump's typical norm-violative statements—they may be offensive, but they are not obscene; they may be insulting, but they would likely not qualify as defamation; and they do not tend to qualify as fraud or participation in a criminal enterprise (at least, not yet).

132. *See, e.g.*, Healy, *supra* note 126, at 655; Sullivan, *supra* note 130, at 203.

133. Mark Strasser, *Advocacy True Threats, and the First Amendment,* 38 HASTINGS CONST. L.Q. 339, 339 (2011); Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1670 (2015).

regulation, *Brandenburg* exemplifies the "free speech libertarianism"[134] that is the established orthodoxy of the Supreme Court jurisprudence. In its bedrock presumption that persons have the capacity to process and manage ideas and that it is the business of citizens rather than the state to vet them, this principle provides the basic justification for the deference to electoral accountability that undergirds the government speech doctrine.[135] Even if the structural dynamic in the government speech doctrine is the obverse of the *typical* deployment of free speech to protect private parties, rather than the state, the same principle of personal autonomy provides the foundational justification both for the government-restricting libertarianism of *Brandenburg* and the government-emancipating (from judicial review) rule of the government speech doctrine.[136]

Brandenburg and subsequent cases would thus seem to cut off most avenues for creating constitutional scrutiny of Trump's speech, or similarly destructive speech even taken by a state actor in an official capacity. As private speech, it enjoys the typical (and laudable, by classical liberal lights) breadth of the First Amendment.[137] Treated as speech in an official capacity, it endures little constitutional scrutiny and no obligation to conform to viewpoint neutrality, thanks to deference to electoral oversight, forged in the same principle of the competence of rank-and-file citizens and voters.[138]

C. The Liberal Justification: Speech as a Path to Truth, the Electorate as the Ultimate Authority, and the Ultimate Logic of the Government Speech Doctrine

The dominant doctrinal understandings of free amendment suggest that the government speech doctrine is a logic extension of orthodox constitutional principles. The basis of the First Amendment is trust in the people to sort through ideas themselves (and a corresponding mistrust of government regulation).[139] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[140] There is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[141] These propositions are uncontroversial as core principles of First Amendment doctrine, even if the margins are debated.[142] *Brandenburg*'s own determination of the point at which inciting speech does not enjoy such protections is precisely one of those marginal debates.

134. Sullivan, *supra* note 130, at 203.

135. *See id.*

136. *See id.* at 207.

137. *Id.* at 211.

138. Buchhandler-Raphael, *supra* note 133, at 1671.

139. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (noting that "mistrust of governmental power" is the premise of the First Amendment).

140. Mills v. Alabama, 384 U.S. 214, 218 (1966).

141. N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* Buckley v. Valeo, 424 U.S. 1, 14 (1976).

142. *See* Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J. L. HUMANS. 35, 51 (2010).

Further scrutiny of the foundations of free speech libertarianism in popular competence, however, creates an unexpected avenue for disciplining the government speech doctrine internal to its basic justification. The value of open speech has a clear origin—the ideal of classical liberalism. Classical liberalism famously values the capacity of individuals to process information without external constraint or coercion and uses this as a mechanism for truth-seeking, including in political affairs.[143] Its impact on free speech libertarianism, particularly with regards to political speech, is foundational. Yet treating the liberal instruction to protect free speech as a crude, normatively first-order instruction that speech restriction is intrinsically illegitimate disregards its position in a moral and political framework, and thus its more subtle doctrinal ramifications.[144]

Considering the most influential figure in the Western understanding of liberal freedom,[145] John Stuart Mill, illuminates this. Mill's defense of non-interference in speech and the benefits for the development of ideas (most seminally laid out in *On Liberty*) remains seminal to the understanding of liberalism,[146] but as Alan Ryan has observed, Mill's account has become terrain for others' disputes.[147] Yet returning to Mill's own account of the value of liberty in speech and in the formation of ideas adds one particular layer of depth to the standard, state-restricting liberal justification for free speech.[148] Mill valued liberty, not as mere non-interference by state authority, but as a substantive opportunity to develop and ultimately to practice "intelligent self-mastery."[149] This requires not only absence of governmental constraint but also the practical non-interference in the expression and formation of individual views by softer majoritarian social pressures. "[D]espotism of opinion,"[150] "when society is itself the tyrant,"[151] can be as dangerous as the formal political modes of oppression.

This idea opens up a vast question of what conditions are necessary to avoid such "soft" collective coercion as well as to develop the capacities of individuals to substantively think freely.[152] Recent scholarship on free speech and its role in democracy has yielded a wide variety of proposals, which share the feature of

143. *See Classical Liberalism*, SCIENCE DAILY, https://www.sciencedaily.com/terms/classical_liberalism.htm (last visited June 10, 2022) [https://perma.cc/E9M3-Y7U5].

144. NADIA URBINATI, MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT 169 (2002) (noting that Mill's protection of liberty "was not trying to create an ontology of self-regarding actors nor a moral doctrine of individual liberty as indifference to others").

145. *See* Ten Cate, *supra* note 142, at 35 (observing the Millian legacy in First Amendment scholarship); Joseph Blocher, Institutions in the Marketplace of Ideas, 57 DUKE L.J. 821, 871 (2008) (noting that Mill's concept of free speech was an 'ancestor' of the Holmesian idea).

146. URBINATI, *supra* note 144, at 158 (2002); JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 13–14 (Oxford World's Classics 1998) (noting seminal passage); *see* JOHN SKORUPSKI, JOHN STUART MILL 341 (Routledge 1989).

147. SKORUPSKI, *supra* note 146, at 497 (quoting Alan Ryan); *see also* URBINATI, *supra* note 144, at 158–65 (2002) (describing how Mill's reception became foundational for other prominent scholars of liberalism).

148. *Cf.* SKORUPSKI, *supra* note 146, at 348.

149. *Id.* 348–49.

150. ALAN RYAN, J.S. MILL 134 (1974).

151. MILL, *supra* note 146, at 8.

152. In the sphere of political theory, the most influential proponents of these values have been QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998) and PHILIP PETIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1999), who have advanced a philosophical notion of liberty as non-domination by outside forces.

suggesting that a truly effective understanding of the First Amendment requires considering not merely restraint but also the conditions that yield effective expressive participation from the citizenry.[153] Yet in the context of the government speech doctrine, the question returns to the more familiar proposition of when government conduct should be required to conform to the traditional doctrinal obligation of viewpoint neutrality.

More immediately for the government speech doctrine, recognizing that sound practice of free speech requires absence of social pressure that forces conformity, as well as lack of formal restraint.[154] This does not entail that the government should participate in the process of "balancing" out private speech,[155] because this would involve precisely the use of coercive governmental oversight.[156] But it does suggest that when the government speaks, the liberal principle of the free development of ideas is not adequately addressed by adverting to electoral oversight with no further consideration of what would make such democratic accountability effective. Such an approach treats the constitutional and democratic aspects of self-rule as complementary means of advancing voter capacity, rather than as exclusive alternatives. It would also recognize the unity of citizen autonomy that underlies the democratic-constitutional order, rather than awkwardly compartmentalize the private (constitutional) and public (democratic) manifestations of this freedom.[157] This in turn would enable a consistent application of viewpoint neutrality, rather than (as is the current state of the doctrine) the similarly awkward distinction between private speech freedom that receives viewpoint neutrality protections and public speech freedom that does not.

This analysis could also bring internal coherence to the substantive treatment of voter decision-making that justifies both viewpoint neutrality as a constitutional principle and democratic oversight as a means for policing government speech. Free cultivation of ideas requires that, insofar as coherently possible, individuals enjoy substantive, rather than merely formal, absence of coercion—including (beyond state coercion) from pressures that may obliquely or indirectly induce conformity of thought.[158] While direct governmental restriction of speech to try to combat this conformity itself becomes coercive, and thus evokes the higher-priority principle of no political despotism, using this

153. *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 488 (2011) ("Interpreting 'the First Amendment according to the value of democratic self-governance . . . .'"); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 37–56 (2005) (observing the value of democratic governance as undergirding free speech); Simone Chambers, *Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?*, 37 POL. THEORY 323 (2009) (querying the tensions in the pursuit of satisfactory political discourse in deliberative democratic trends); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 31–33 (1986) (querying the need for richer social conditions to allow for free discourse); Richard H. Fallon, Jr., Commentary, *What Is Republicanism, and Is It Worth Reviving?* 102 HARV. L. REV. 1695, 1726 (1989) (analyzing the speech implications of Michelman's view).

154. Michelman, *supra* note 153, at 25.

155. Buckley v. Valeo, 424 U.S. 1, 48 (1976) (rejecting, famously, and controversially, any such balancing, even with regards to wealth).

156. *See id.*

157. *See* discussion *supra* Section II.B.

158. *See* discussion *supra* Section II.C.

principle to guide government speech *itself* faces no such obstacle.[159] Thus the undergirding liberal principles of the First Amendment could be employed to advance an independent constitutional limit on governmental speech that works *within* the logic of electoral self-determination that the Court, since *Southworth*, has advanced to vindicate the government speech doctrine.[160] The subsequent principle can be stated in general: when government speech threatens to undermine independent reflection by citizens, it contravenes First Amendment viewpoint neutrality.

This proposed principled revision to the government speech doctrine nicely dovetails with the approach to the compelled speech reflected in *Keller* and *Southworth* which gave rise to the doctrine in the first place.[161] Those cases were motivated by concern that collective participation in activities (a logistical necessity in contemporary society) could be twisted to force individuals to participate in the adoption of mass opinion, which is as much a hazard for liberalism as direct coercive oppression.[162] The same underlying concern serves as a basis for disciplining the government speech doctrine when pathological state speech distorts or disrupts popular accountability.[163] Where state speech impairs rather than contributes to electoral oversight, the resources of the body politic are being abused in a manner that the electorate itself presumably would not condone and which, if the distortive impacts on electoral outcomes from the state speech come to pass, becomes coercive.[164] This concern with non-voluntary speech and coercion parallels the concern with compelled speech, only speaking to the entire polity instead of merely persons acting in their individual capacity. Thus, the underlying logic of compelled speech supports disciplining the government speech doctrine, only with even greater urgency.

IV. POLARIZATION, PARTISANSHIP, AND THE FRACTURED SOCIETY: FIRST STEPS IN DEVELOPING FIRST AMENDMENT LIMITS TO THE GOVERNMENT SPEECH DOCTRINE

That the First Amendment demands government speech not undermine the autonomous development of citizen ideas and that this is necessary to preserve the electoral foundations of the government speech doctrine is only a high-level principle. Its substantive development into a coherent theory requires a rich conception of when government speech threatens to limit the ability of individuals to form their own views free not only from government coercion but from expectations of conformity.

159. *See* RYAN, *supra* note 150, at 134.

160. *See e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

161. *See generally* Bd. of Regents v. Southworth, 529 U.S. 217 (2000); Keller v. State Bar of Cal., 496 U.S. 1 (1990).

162. *See generally Southworth*, 529 U.S. 17; *Keller*, 496 U.S. 1.

163. *Cf.* Caroline Mala Corbin, Essay, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 245 (2021).

164. *See* discussion *supra* Section III.B.

Trump's own ideologically charged speech, and his use of it to fragment American society to achieve his political ends, however, comprises an extreme case of such autonomy-threatening speech. The remainder of this Section explores how Trump's divisive speech—whether lies, ideologically charged statements, or borderline provocations—might be legitimately subject to constitutional scrutiny under the dominant premise of the government speech doctrine: that electoral accountability is the appropriate mechanism for policing government speech.

If electoral responsiveness provides the justification for government freedom of speech, as we have contended, it also provides limitations to that freedom of speech. To the degree that government freedom of speech follows from the manifestation of democratic responsiveness, support for government freedom of speech cannot be justified when it begins to compromise electoral integrity necessary for democratic responsiveness.[165] This logic identifies one basic restriction on government speech—a prohibition on official government partisanship.

Simply put, the government and government actors in their official capacities cannot endorse a political party or electoral candidates.[166] To do so puts the weight of government authority on one side of an election and against another in a way that compromises citizens' democratic independence and agency. This democratic independence and agency of individuals to be free from government coercion distinguishes genuinely free elections from state orchestrated reaffirmations of public approval.

We have previously identified this principle as a constitutional norm against government partisanship.[167] Most fundamental are the First Amendment restrictions on content-based or worse, viewpoint-based, regulation of speech.[168] These restrictions prioritize government neutrality as a general matter, with special sensitivity for government discrimination respecting political speech.[169] The judiciary has likewise identified salient political contexts where the government is specifically required not to discriminate on partisan grounds.[170] Statutory prohibitions on partisan patronage now have a constitutional dimension, and the government may not, for instance, deviate from one person, one vote in the redistricting context for partisan reasons.[171] The judiciary's reluctance to extend this familiar distrust of government political discrimination to legislative redistricting on a wider basis only stands out as a bizarre exception to the usual norm.

This constitutional norm is so ingrained by statute, regulation, and unwritten understanding that courts rarely need to enforce it beyond its legislative

165. *See e.g.*, Derek Langhauser, *Campaign Finance Reform, Free Speech and the Supreme Court*, 12 ME. POL'Y REV. 28 (2003).

166. 5 U.S.C. §§ 1501–08.

167. *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017).

168. *See id.* at 380.

169. *See id.* at 383.

170. *See id.* at 380–83.

171. *See id.* at 384–85.

codifications. The constitutional bar against partisan patronage today is already enforced against civil service employees by statutory prohibition.[172] From the federal level, the Pendleton and Hatch Acts enjoin lawmakers and their employees from leveraging their government authority for partisan ends.[173] As the Supreme Court explained in upholding the Hatch Act, government officials "are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof."[174] For the same reason, federal campaign finance law similarly prohibits them from using government resources and auspices to fundraise and electioneer.[175]

What makes the norm confusing when applied to government speech is its application to individual senior officials. Senior government officials remain largely free and retain constitutional rights to campaign and electioneer in their individual capacities.[176] The constitutional, and statutory, restrictions apply when they presume to use their government office and exercise state action for explicitly partisan purposes.[177] The Hatch Act,[178] for instance, prevents "partisan political activity undertaken as a government employee—such as by using an official title in connection with one's political activity—which risks implying that the government itself has a preference for one political party or candidate over another."[179]

In other words, executive branch employees may not engage in partisan political activity while on duty, on federal property, or using federal resources. They may, however, campaign for and against candidates, endorse parties and candidates, engage in most campaign finance activities, and generally engage in partisan speech, provided they do so in their private individual capacities, outside their federal employment.[180] A cabinet secretary therefore *may* appear at a campaign rally or endorse partisan candidates but *cannot* use their official title, do so while on duty, or be on federal property while doing so.[181]

This formalism is easy to criticize. The legality of a cabinet secretary's endorsement or political activity turns on a formal distinction that bears little

172. 5 U.S.C. §§ 1501–08.

173. *See* Hatch Act, 5 U.S.C. §§ 1501–08; Pendleton Act, 22 Stat. 403 (repealed 1952).

174. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973).

175. 5 U.S.C. §§ 1502.

176. *See* Andrea Bernstein, *It's Illegal for Federal Officials To Campaign on the Job. Trump Staffers Keep Doing It Anyway.*, PROPUBLICA (Aug. 12, 2020), https://www.propublica.org/article/its-illegal-for-federal-officials-to-campaign-on-the-job-trump-staffers-keep-doing-it-anyways [https://perma.cc/P65L-V86P].

177. *See id.*

178. 5 U.S.C. §§ 1501–08.

179. U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 9 (2021) [hereinafter OSC INVESTIGATION].

180. *Cf.* U.S. OFF. OF LEGAL COUNS., OFF. OF SOLIC., DEP'T OF LABOR, POLITICAL ACTIVITIES AND THE HATCH ACT 8 (2021).

181. Joe Davidson, *Opinion: Hatch Act—Too Complicated for a Cabinet Secretary? Not Really*, WASH. POST (July 20, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/07/20/hatch-act-too-complicated-for-a-cabinet-secretary-not-really/ [https://perma.cc/G7Q3-J6AU].

substantive weight.[182] A cabinet secretary is recognized in significant part because of her position whether she uses her official title or appears on federal property while doing so.[183] The Hatch Act's complicated rules therefore lead to basic confusion about when and how it applies.[184]

The basic distinction between action using official title or authority and acting in one's personal capacity under the Hatch Act, however, is a faithful extension of the logic undergirding government freedom of speech. It is the same constitutional distinction between private and public action that runs through the constitutional doctrine for government freedom of speech. Government actors generally enjoy freedom of speech, particularly so in their individual capacity, but can be barred from leveraging their government authority to endorse the success or failure of a political party or candidate.[185]

Of course, the Trump Administration's violations of the Hatch Act were not close calls that required careful parsing of official and personal capacities. Under the Trump Administration, senior officials routinely violated the Hatch Act with what the Office of Special Counsel's office characterized as "willful disregard."[186] Cabinet level appointees and other senior officials appeared to take little care in distinguishing between their official and individual capacities, advocating for candidates, promoting campaign slogans, and, among other things, while acting in their official duties.[187] Kellyanne Conway, for instance, had engaged in "persistent, notorious, and deliberate Hatch Act violations."[188] President Trump, however, defiantly dismissed the Office of Special Counsel's ("OSC") formal recommendation to fire Conway and refused to permit her even to testify before the House Oversight and Reform Committee over her violations.[189] As the Office of Special Counsel explained, "[t]he President's refusal to require compliance with the law laid the foundation for the violations [and] [b]ased upon the Trump Administration's reaction to the violations, OSC

182. OSC INVESTIGATION, *supra* note 179, at 56.

183. *See id.*

184. *See, e.g.*, Cal Thomas, *Harris and the Hatch Act*, NEWS-HERALD (Oct. 21, 2021, 8:02 AM), https://www.news-herald.com/2021/10/21/harris-and-the-hatch-act-cal-thomas [https://perma.cc/2TSG-QCWF] (alleging Vice President Kamala Harris violated the Hatch Act even though the Vice President is technically exempt from the Act for most purposes).

185. OSC INVESTIGATION, *supra* note 179, at 378–79.

186. *Id.* at 3.

187. *See, e.g.*, Jessica Campisi, *Hatch Act Complaints Jumped Nearly 30 Percent Trump's First Year in Office: Report*, HILL (May 15, 2019, 9:56 AM), https://thehill.com/homenews/administration/443773-hatch-act-complaints-jumped-nearly-30-percent-trumps-first-year-in [https://perma.cc/JZC9-29XD]; Brett Samuels, *Watchdog Cites 13 Trump Officials Who Violated Hatch Act Before 2020 Election*, HILL (Nov. 9, 2021, 12:43 PM), https://thehill.com/homenews/administration/580736-federal-watchdog-cites-13-trump-officials-who-violated-hatch-act [https://perma.cc/Y7CF-9AXU].

188. *See* Neil Vigdor & Charlie Savage, *What Is the Hatch Act? Explaining Why Trump Was Urged to Fire Kellyanne Conway*, N.Y. TIMES (June 13, 2019), https://www.nytimes.com/2019/06/13/us/hatch-act.html [https://perma.cc/U3LL-VV96].

189. *See* Brett Samuels, *White House to Block Conway from Testifying over Alleged Hatch Act Violations*, HILL (June 24, 2019, 6:02 PM), https://thehill.com/homenews/administration/450107-white-house-to-block-conway-from-testifying-over-alleged-hatch-act [https://perma.cc/S86V-AFE4].

concludes that the most logical inference is that the administration approved of these taxpayer-funded campaign activities."[190]

The Trump Administration's disregard for the Hatch Act exposed a fundamental vulnerability for enforcement of a constitutional norm of nonpartisanship. To the degree that enforcement requires executive branch action, it is contingent on the willingness of executive actors to abide by and enforce such norms. The Trump Administration was entirely unwilling to do so. The Trump Administration therefore presented novel questions of the Hatch Act's application that had not been seriously contemplated under more deferential and compliant presidential administrations.[191]

The constitutional norm against government partisanship, however, provides a limiting principle to government freedom of speech. The application of the Hatch Act to the Trump Administration is a relatively easy analysis compared to the challenges of considering the constitutionality of any potential restrictions on presidential speech and political activity. Even if the Hatch Act generally does not apply to the President, the Trump Administration raised questions about the limits of expansive government freedom of speech beyond those previously articulated.

For our purposes here, we are agnostic about the ultimate advisability about greater restrictions on government freedom of speech, but we argue that the constitutional norm against government partisanship provides an important restriction on government freedom of speech. The Hatch Act is merely an application of the norm, which provides a broader logic for limitations on government actors when they leverage government authority for their partisan ends. Without question, government actors are often political animals who serve political and partisan ends as a matter of course, but we contend that the constitutional norm against partisanship provides a restriction on how far they can go in terms of explicit endorsement.

V. CONCLUSION: THE PAST, PRESENT, AND FUTURE OF THE GOVERNMENT SPEECH DOCTRINE

The principle of neutrality in government partisanship, following on the heels of the Trump presidency, provides an exemplary joint between the past development and future origins of the government speech doctrine. The doctrine, after all, emerged not from a commitment to state freedom (a commitment that lacks legitimacy in a democracy) but as an incidental offshoot of a classically liberal commitment to personal freedom of speech. While the doctrine has taken on a life of its own, it should be disciplined by its foundations in democratic and constitutional norms.

190. OSC INVESTIGATION, *supra* note 179, at 41.

191. *See, e.g.*, Savannah Behrmann, *RNC: Trump Criticized for Using White House as a Backdrop for the Convention*, USA TODAY (Aug. 26, 2020, 12:05 AM), https://www.usatoday.com/story/news/politics/elections/2020/08/25/rnc-white-house-convention-speeches-ethics-hatch-act-trump/5628864002/ [https://perma.cc/34WY-VPZZ].

The essential norm is the freedom of a people to rule itself. The legacy of the government speech doctrine reflects the competing sides of this norm in constitutional application: the freedom of individuals must be protected from state intrusion (including the right of individual silence that generated the government speech doctrine),[192] but the action taken by the polity as a collective through the state must not be excessively constrained (giving rise to the practical rule that state speech should be held accountable by tools of democratic accountability rather than judicial oversight).[193]

The twin-faced character of the government speech doctrine thus counsels flexibility and pragmatism in its application. This is particularly true given that the complexity of contemporary governance, considered both narrowly as a matter of electoral administration[194] and broadly in terms of the state as an entity that is both coercive of and responsive to the franchise. The risks of rigid thinking that would ossify the government speech doctrine into an unreflective applied rule are exemplified by the possibility of government partisan speech. Enforced without nuance, the government speech doctrine would enable a government to dominate individuals without the typical precautions and recourse provided by constitutionalism. The excesses of the Trump presidency show that this threat is real rather than hypothetical.

This Article offers a tentative path forward, rather than a categorical or universal solution to how the government speech doctrine should be nuanced as the Court further opines upon it. Turning to the foundational theory that underlies First Amendment protections of free speech provides an illuminating frame. Mill himself was not committed to a rigid conception of free speech as simple noninterference but focused on the broader social conditions that enable individuals to form views freely and flourish as citizens—and in particular to avoid the "soft" domination by popular or majoritarian viewpoints.[195] It is precisely this right to formation and expression of views free from collective coercion that underlies the Court's nuanced treatment of citizen silence, which in turn provided the context for the development of the government speech doctrine.[196]

Recognizing that speech freedoms should serve this end of enabling genuine opportunity to reflect and form views provides a fruitful approach for further nuancing the government speech doctrine. Its development must be sensitive to the capacity of the government to use its powers of speech not only to express citizen views, but also to advance the self-interested or partisan interests of in-group actors or political cliques. The capacity of this prejudiced speech to constrain citizen freedom indicates that the government speech doctrine must be scrutinized through a substantive conception of citizen liberty and franchise self-rule if it is to advance the spirit of the First Amendment.

192. *See supra* Subsection II.A.1.

193. *See supra* Section II.B.

194. This complexity is, at a high level of abstraction, the driver behind the anti-lockup approach that has dominated contemporary election law scholarship. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998).

195. *See supra* Section III.C.

196. *See supra* Section II.B.