Article

Government Nonendorsement

Nelson Tebbe[†]

INTRODUCTION

What are the constitutional limits on government endorsement? Judges and scholars typically assume that when the government speaks on its own account, it faces few restrictions. Officials may say almost anything they like without constitutional difficulty.

That belief has gained support from two doctrines and their accompanying literatures. First, the Supreme Court has fostered it in the course of developing its "recently minted" government speech doctrine.[1] That rule holds that when the government speaks, the First Amendment's Free Speech Clause simply does not apply.[2] In particular, officials may engage in viewpoint discrimination, favoring specific ideas without fear of committing a constitutional violation.[3] In the process of explaining the government speech doctrine, the Court has given

† Professor of Law, Brooklyn Law School. Thanks to Frederic M. Bloom, Joseph R. Fishkin, Owen M. Fiss, Chad W. Flanders, Richard W. Garnett, Brandon L. Garrett, Frederick Mark Gedicks, Kent Greenawalt, Abner S. Greene, B. Jessie Hill, Paul Horwitz, John D. Inazu, Brian Angelo Lee, Christopher C. Lund, Gregory P. Magarian, Dan Markel, Helen L. Norton, Christopher Serkin, Lawrence M. Solan, Olivier Sylvain, and participants in workshops at Cardozo, Cornell, Florida State, North Carolina, Pepperdine, and Vanderbilt law schools. I am grateful to the Dean's Summer Research Stipend Program at Brooklyn Law School for generous support of this project.

[Editor's Note: For further discussion of *Government Nonendorsement*, see Abner Greene, *Government Endorsement: A Reply to Nelson Tebbe's* Government Nonendorsement, 98 MINN. L. REV. HEADNOTES (forthcoming December 2013), http:// www.minnesotalawreview.org/headnotes.]

1. Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (calling the doctrine "recently minted"); *id.* at 485 (Souter, J., concurring in the judgment) (same).

2. *Id.* at 467 ("If [the government is] engaging in [its] own expressive conduct, then the Free Speech Clause has no application.").

3. *Id.* at 468.

the impression that the only real constitutional restriction on official expression is the Establishment Clause.[4] So Congress could not pass a law declaring, for instance, "America is a Christian nation," but it could applaud democracy or denigrate smoking. Scholars of free speech, for their part, have likewise been working under the assumption that only the Establishment Clause meaningfully restricts government expression.[5]

Second, experts on religious freedom often assume that there is no Establishment Clause for secular matters. Familiar doctrine holds that government may not endorse a particular faith (or religion generally) in its expression.[6] This "endorsement test" ensures that members of the political community are not devalued because they hold unpopular religious beliefs—it protects equal citizenship with respect to religion.[7] The existing test stops there, but judges and scholars frequently go further and say that there is no such restriction on official endorsement of secular ideas.[8] Religion is special in this respect, according to the usual way of thinking about church-state arrangements. While the government cannot embrace a theology, it remains perfectly free to approve any secular outlook, subject only to ordinary political constraints.

So the assumption that the government is free to endorse and denigrate secular ideas is widespread, thanks in part to the Supreme Court and in part to scholarship on free speech and

4. *Id.* For a detailed discussion of the Court's language, see *infra* Part I.

5. For examples from deservedly prominent writers, see Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 747 (2011) (calling the Establishment Clause "the one clear limitation on government speech"); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 605 (1980) (naming the Establishment Clause as "the one provision of the Constitution that clearly prohibits some government speech"); Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 953 (2010) (calling nonestablishment "the only concrete, enforceable (albeit sporadic), constitutional limit on government speech").

6. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 593–95 (1989); Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

7. *Allegheny*, 492 U.S. at 593–94.

8. *See* Lathrop v. Donohue, 367 U.S. 820, 852 (1961) (Harlan, J., concurring) (noting the "clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against 'establishment'"); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 12 (2000) ("The Constitution forbids the establishment of religion, but it does not forbid the establishment of secular conceptions of the good . . . ."); Shiffrin, *supra* note 5, at 606 ("[T]here can be no room for a nonreligious establishment clause.").

religious freedom. But that belief is mistaken. In this Article, I argue that in fact the Constitution properly imposes a broad principle of *government nonendorsement*. That principle cuts across multiple provisions—including equal protection, due process, and free speech itself—and it brings them together to prohibit any endorsement that abridges full and equal citizenship in a free society.[9] Strangely, the government nonendorsement principle is missing from both case law and academic discussion. Today, the need to correct that oversight is particularly acute because the Court is expanding the concept of government speech with little regard for the constitutional limitations on such expression.[10]

9. *Cf. Summum*, 555 U.S. at 482 (Stevens, J., concurring) (arguing that "even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses"). The Constitution also limits government speech explicitly in several places, including the Title of Nobility Clause and arguably the Ninth Amendment, which forbids "disparag[ing]" unenumerated rights. U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. amend. IX.

10. This Article differs from existing work in at least three ways. First, it discusses specific substantive limits on government speech based on its *content*, unlike scholarship on government speech that raises more general concerns, such as the worry that government speech will drown out private speakers. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 3–4 (1983); Blocher, *supra* note 5, at 695; Greene, *supra* note 8, at 68. Second, the Article addresses limitations on government expression across the full range of constitutional doctrines, identifying common commitments, whereas other works are confined to discrete areas. *See, e.g.*, Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1267 (2011) (addressing government expression that violates equal protection and religious nonestablishment, with a focus on same-sex marriage, and explicitly bracketing broader constitutional restrictions on such speech); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1104 (1979) (proposing a "Political Establishment Clause" that is limited to First Amendment restrictions on political speech); Helen Norton, *Campaign Speech Law with a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 215 n.16 (2011) [hereinafter Norton, *Campaign Speech Law*] (looking solely at government electioneering under the Free Speech Clause); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 162 n.4 (2012) [hereinafter Norton, *Government's Hateful Speech*] (discussing an earlier draft of this Article and distinguishing her project, which focuses on equal protection); Shiffrin, *supra* note 5, at 605 n.199 (declining to analyze racist and sexist government communications). Similarly, expressive theories of law focus on two core provisions, equal protection and religious nonestablishment, probably because those works seek to establish the basic proposition that expressive harms can work constitutional harm at all. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–51 (2000) (addressing only equal

I begin in Part I by briefly defending my descriptive claim that the rule against government endorsement of religion is commonly thought to stand alone. In Part II, I then lay out the argument for a general constitutional principle of government nonendorsement. Chiefly, I support that contention by arguing for five specific limitations on government speech, drawn from diverse areas of constitutional law. Throughout, I contend that the principle of government nonendorsement is driven by a coherent commitment to full and equal citizenship in a free society. Not every instance of government nonendorsement involves all three aspects of this concern (full citizenship, equal citizenship, and a free society). Yet each example deploys one or more of them, and each therefore helps to demonstrate the existence and attractiveness of a general principle of government nonendorsement.

I start with a basic example. Imagine that Congress passed a statute or resolution declaring "America is a white nation."[11] Even if that action were purely exhortative, it would violate equal protection. Freedom of speech principles also would arguably limit that racialized message, which constitutes nonwhite Americans as something less than full participants in political life. Reasoning under one or both of these provisions, many people will share the view that racialized endorsements are properly regarded as invalid.

Or consider an official campaign urging citizens to "Vote Democrat" in the days leading up to a critical election.[12] Government electioneering of that sort would violate the Constitution, even if it consisted of only a simple statement with no regulatory consequences or funding implications. It would distort basic democratic arrangements. The best doctrinal hook for this conviction is the Free Speech Clause. That is because government would be influencing debate surrounding elections,

protection and religious nonestablishment, among rights provisions); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000) (equal protection); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 511–12 (1993) (equal protection and nonestablishment). Third, this Article uncovers an underlying principle of government nonendorsement for the first time, and it identifies new ramifications for debates in the areas of political morality and First Amendment theory.

11. *See infra* Part II.A. This hypothetical is stylized, but real instances of racialized government speech have cropped up in court decisions. *See id*. (citing cases).

12. *See infra* Part II.B.

thereby violating an aspect of the Free Speech Clause that protects structural features of a free society. I conclude below that freedom of speech limits public endorsements in the context of elections, and it does independent work in that context.

Part II proceeds by supplementing these two basic examples with three others. I have two goals in offering these additional illustrations. First, I aim to show that instances of government nonendorsement are not anomalous within equal protection and free speech law. Second, I hope to demonstrate that constitutional provisions beyond equal protection and free speech are in play—due process in particular.

Equal protection cases are relatively easy to come by. Perhaps the most interesting examples right now involve laws that exclude same-sex couples from civil marriage.[13] One reason to think that such bans are unconstitutional is that they send a government message that the people who seek these unions have a disfavored stature. That meaning is particularly clear in states where couples may acquire all the material benefits of marriage by forming a civil union or a domestic partnership.

Although free speech examples are harder to find, political gerrymandering presents a critical one.[14] I argue that gerrymandering can express partisan disfavor in a way that crosses a constitutional boundary. Here too, free speech operates independent of other provisions. Gerrymandering's constitutional harms are not easily captured by equal protection, the main alternative to free speech, because political parties are not usually suspect classes, and because statewide gerrymanders often result in representation that is roughly proportionate to public opinion in the state, resulting in overall parity. I argue that extreme gerrymandering infringes on voters' *full* citizenship—on their interest in robust political participation—and not mainly their concern for *equal* citizenship.

Regarding due process, consider the right to terminate a pregnancy.[15] Any free nation should place some limits on extreme efforts by the government to dissuade women from having abortions. Directing a government employee to stand outside an abortion clinic and shout discouraging remarks may well be unconstitutional, for instance. Substantial interference with the basic right to terminate a pregnancy violates not only freedom for its own sake, but also "a woman's autonomy to de-

13. *See infra* Part II.C.
14. *See infra* Part II.D.
15. *See infra* Part II.E.

termine her life's course, and thus to enjoy equal citizenship stature."[16]

Part II ends by anticipating likely questions, the most important of which ask (1) when speech is attributable to the *government*, (2) whether official action counts as *expressive*, and (3) what *limits* government nonendorsement. While these issues are interesting, none of them undermines the project. In the end, the basic argument is just that a general principle of government nonendorsement applies to official expression wherever it concededly occurs. Whether something counts as government expression, therefore, is secondary. So is the question of limits, but nevertheless I describe how the proposal is in fact confined to those few instances of government endorsement that implicate full and equal citizenship in a free society.[17]

Part III shifts gears and draws out implications of government nonendorsement for political and constitutional theory. Three stand out. First, constitutional limitations on official endorsement tell us something about the nature of American democracy. Government nonendorsement obviously resists political theories that envision limitless government endorsement of moral values, yet it could also be understood to resist theories that require strict state neutrality as to comprehensive conceptions of the good. It thus suggests a path between these two paradigmatic conceptions of political theory. Second, the Article augments free speech theory. Unlike existing work, it identifies discrete places where the government might face restrictions, even where it obviously is contributing to public debate. Less conventionally but perhaps more powerfully, it begins to articulate a new rationale—a *full citizenship* theory—for limiting government action that constitutes speakers as disabled. Third, the argument mostly supports contemporary scholars of religious freedom who argue that religion should not have a special position in constitutional law. Yet some differences remain between religious and nonreligious government speech in this regard. As I show, religious nonendorsement remains more re-

16. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

17. Another framing point concerns audience. I only address people who adhere to the mainstream view that government endorsement of *religion* itself can be unconstitutional. Working from that core case, I contend that government messages on secular topics may raise analogous constitutional questions. For a defense of the basic idea that government expression can be unconstitutional, see Anderson & Pildes, *supra* note 10. For discussion of one argument against even the basic principle of religious nonendorsement, see Part II.A.

strictive than secular nonendorsement. Part III ends by asking why that might be, and it answers that some of the values driving the Establishment Clause do not in fact have secular analogues.[18]

Let me pause here to address methodology, for those attuned to it. My approach is evaluative but situated. It does not hew to precedent closely, trying to make the best sense of positive constitutional doctrine. But neither does the method argue for pure normative preferences. Rather than either of these, it seeks a worthwhile way forward from an embedded perspective that interprets basic constitutional arrangements, with an eye to convincing contemporary actors.[19] Throughout, it aims for a reflective equilibrium, working back and forth between common intuitions about concrete scenarios and theoretical evaluations of them.[20] Finally, and critically, it is concerned with constitutional argumentation wherever it may occur, not only or even primarily in courts.

I. CURRENT UNDERSTANDING

The descriptive claim that the Establishment Clause is widely thought to provide the only clear constitutional restriction on government speech requires a defense. This Part provides that defense, albeit briefly.

In *Summum*, the Court declared that the Free Speech Clause "does not regulate government speech," but only "government regulation of private speech."[21] In other words, when it comes to official expression, "the Free Speech Clause has no application"[22] and the government "is entitled to say what it wishes."[23] In particular, the government may favor certain viewpoints over others when it is communicating on its own behalf rather than regulating the expression of private citizens. The idea seems to be that communication is necessary for gov-

18. That last section develops an argument that I first suggested in *Nonbelievers*, 97 VA. L. REV. 1111, 1140–49 (2011).

19. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 87–90 (1986) (describing an interpretive approach to legal argumentation).

20. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 46–53 (1972) (explaining the concept of reflective equilibrium); Hellman, *supra* note 10, at 6 (building on Rawls's reflective equilibrium).

21. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

22. *Id.*

23. *Id.* The idea had been prefigured in other cases. For example, the Court here quotes *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1998).

ernance, and that entails selecting among points of view.[24] Both content and viewpoint discrimination are essential to the government's daily operation.[25]

This is true even where officials must burden or disfavor private messages in order to clarify the government's own position. So in *Summum* itself, the Court upheld a town's refusal to erect a permanent monument that a private religious group had donated for inclusion in a public park. Justice Alito, writing for seven others, said that the existing monuments expressed the town's conception and celebration of its own history and that including the private display would confuse that message. It was necessary to disfavor a private message—to engage in viewpoint discrimination—in order to preserve government speech. Moreover, the state could enlist private actors to articu-

24. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . ."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001); Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1321–22 (2004).

25. The term "government speech" is misleading, at least as it is used in the government speech doctrine. This Article does not concern government speech in that sense. Let me briefly critique the concept and frame my project in alternative terms.

When the Court calls something government speech in a case like *Summum*, it is really concluding that the rule against viewpoint discrimination should not apply. After all, the government is an entity and it necessarily communicates through individuals, many of whom are arguably private. So the real question in these cases is not whether an expression really is attributable to the government, but rather whether the rule against viewpoint discrimination ought to apply. That is a normative matter, not a descriptive one. Frederick Schauer, *Principles, Institutions, and the First Amendment,* 112 HARV. L. REV. 84, 101 (1998). An influential effort to identify the normative principles that govern that determination is Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 153 (1996). For instance, Post argues that when the government is contributing to public debate, rather than managing its own affairs or setting down rules to guide government employees, it has greater constitutional leeway to say what it likes. *Id.*

By contrast, I am interested here in situations where the government admittedly can engage in viewpoint discrimination—and therefore is deploying government speech in that sense. I ask whether, even in those situations, there are constitutional values or provisions that restrict what government can say. That too is a normative question, but the evaluative criteria are different from those that are relevant to answering whether an utterance or expression counts as government speech for purposes of the government speech doctrine. Put in conventional terms, this Article articulates constitutional limits that apply even when everyone agrees that the government is contributing to public debate on issues of the day, so that viewpoint discrimination is permissible.

late and broadcast its worldview.[26] After all, the park also included a Ten Commandments monument that had been donated by a private group.[27]

In the course of its discussion of the government speech doctrine, the *Summum* Court created an impression that the Establishment Clause stands virtually alone in its restriction of official expression. In a noticeable final paragraph, the Court said, "This [inapplicability of the Speech Clause] does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause."[28]

Of course, nothing in this passage *required* the interpretation that nonestablishment is the only limit on official expression.[29] Nevertheless, the Court's strong formulation of the government speech doctrine, combined with the fact that it named only one constitutional limitation, has furthered the perception that religious messages are the only ones that the government must avoid when it is communicating its own views. That understanding has been received, and reinforced, by lower courts.[30] Observers have contributed to it as well.[31]

Proposed limits on government speech have usually been more general, meaning they have not been specific to the content of the particular message. For example, some have argued

26. *Summum*, 555 U.S. at 468 ("A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.").

27. Although the Ten Commandments monument had been adopted by the town, the obvious Establishment Clause challenge was not before the Court. In any event, it likely would not have succeeded after *Van Orden v. Perry*, 545 U.S. 677, 677 (2005) (upholding a Ten Commandments monument).

28. *Summum*, 555 U.S. at 468.

29. In fact, the very next sentence gestured toward another possible boundary, the restriction on electioneering that I will explore in Part II.B. Without explicitly invoking the Constitution, the Court said that the "involvement of public officials in advocacy may be limited by law, regulation, or practice." *Id*.

30. *See, e.g*., ACLU of Fla. v. Dixie Cnty. Fla., 797 F. Supp. 2d 1280, 1285 (N.D. Fla. 2011) ("The Free Speech Clause restricts government regulation of private speech, it does not regulate government speech. This does not mean that there are no restraints on government speech. Government speech must still comport with the Establishment Clause.").

31. *See* sources cited *supra* note 5; *see also* Daniel W. Park, *Government Speech and the Public Forum*, 45 GONZ. L. REV. 113, 145–46 (2009) (arguing explicitly that because the Constitution sets one express limit on government speech, it implicitly rejects all others).

for transparency.[32] That principle prevents subterfuge, in which officials invoke the doctrine to effectively regulate private speakers. It also prevents ventriloquism, where the government transmits its message through private speakers without alerting listeners to the real source of the message.[33] Others have expressed a concern that official broadcasts will drown out competitors, monopolizing certain speech markets.[34] They therefore have called on the government to ensure that there are adequate alternatives for private voices, and even to provide those alternatives if necessary.[35] Still others have pointed out that public schools and universities cannot tailor their messages (or their support for private messages) as freely as other policymakers.[36] These are all valuable contributions, but they differ from the one I am making here.

Scholars certainly have proposed constitutional limitations on official expression in specific doctrinal areas and factual settings,[37] and I will return to their arguments below when I discuss particular restrictions. But no one has assembled a full set of substantive constitutional limits on government endorsement—religious and secular—and no one has shown how these limitations are connected by commitments to full and equal citizenship in a free society. Meanwhile, the impression that the Establishment Clause stands alone, or virtually alone, has persisted. The remainder of the Article challenges that assumption.

II. GOVERNMENT NONENDORSEMENT

In this Part, I demonstrate the existence and contours of the government nonendorsement principle with the help of five illustrations. Throughout, I argue that the principle properly guards against government expression that infringes on full and equal citizenship in a free society. This theme is drawn not only from political theory, but also from an interpretation of existing law, beginning with the endorsement test for religious expression that I have already described. After using relatively uncontroversial examples to highlight the commitment to gov-

32. *See, e.g.*, Norton, *Campaign Speech Law*, *supra* note 10, at 255–56.

33. Greene, *supra* note 8, at 49–52.

34. *See, e.g.*, YUDOF, *supra* note 10, at 38–50.

35. Blocher, *supra* note 5, at 701.

36. Rust v. Sullivan, 500 U.S. 173, 200 (1991); David Cole, *Beyond Unconstitutional Conditions*, 67 N.Y.U. L. REV. 675, 716 (1992).

37. *See* sources cited *supra* note 10.

ernment nonendorsement and to show that its boundaries track commitments to full and equal citizenship, I then extend the argument in less obvious directions.

Two examples in particular are paradigmatic and less controversial than others: racialized expression and government electioneering. Sections A and B argue for nonendorsement in these areas. The next three Sections defend the argument with respect to more controversial situations. Those additional examples concern not only equal protection and free speech, but due process as well. Section F concludes by addressing objections to the analysis and by setting up the argument for theoretical ramifications in Part III.

A. RACIALIZED SPEECH

Racialized government expression can be unconstitutional. Imagine that Congress issued a joint resolution declaring that "America is a white nation."[38] Even if the statement carried no legal consequences, but instead simply expressed lawmakers' sense of the national ethos, it would violate the Constitution.[39]

Why exactly would that communication be unconstitutional? There are several ways to answer, and disentangling them provides a framework for identifying limits on government speech in subsequent examples.

Equal protection obviously grounds the principal objection, namely that such expression wrongly discriminates on the basis of race. Yet there is diversity of opinion on the exact nature of the violation. Views cluster roughly around two interpretations of equal protection: anticlassification and antisubordination. I use them as ideal types, which are constructed to isolate important arguments for purposes of analysis, and not necessarily to describe positions adopted in pure form by existing constitutional actors. Ultimately, I argue that a ver-

38. For a similar hypothetical, see Dorf, *supra* note 10, at 1322.

39. That scenario is stylized, but it isolates a dynamic that has operated in real cases as well. A relatively straightforward example is *Anderson v. Martin*, in which Louisiana required ballots to display the race of each candidate. 375 U.S. 399, 400 (1964); *see also* YUDOF, *supra* note 10, at 261–62. That measure was invalid because it sent an official message to voters that race should matter in their decision making. *See* 375 U.S. at 402 ("[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice . . . ."). Of course, *Anderson* came down the way it did partly because the law harmed the electoral chances of minority candidates, but the expressive component provides an independent ground for the result.

sion of the antisubordination approach better justifies government nonendorsement in a way that links up with a broader concern for full and equal citizenship in a free society. But I go further and show that the anticlassification approach also stands in the way of racialized pronouncements, and therefore that the two main approaches to equal protection converge around the principle of government nonendorsement, at least in this doctrinal context.

1. Antisubordination Theory

Antisubordination theorists believe that equal protection presumptively prohibits government actions that harm equal citizenship.[40] This is similar (but not identical) to the Establishment Clause inquiry into whether government endorsement of religion carries a social meaning that constitutes outsiders as disfavored members of the political community.[41] Specifically, both approaches apply not only to government conduct, but also to official endorsement. So proclaiming that "America is a white nation" is presumptively unconstitutional because it renders nonwhites subordinate as citizens.

Brown was rightly decided, on this view, not simply because segregation involved government classification on the basis of race, but largely because it relegated nonwhite citizens to an inferior legal status.[42] As Charles Black put the point somewhat more generally, *Brown* was correct because "the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority."[43]

40. Dorf, *supra* note 10, at 1294; Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154–55 (1976).

41. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) (articulating the modern endorsement test). One difference is that the endorsement test often highlights feelings, whereas the strain of antisubordination theory that I am describing asks whether the government has *constituted* minorities as second-class—an inquiry that is legal, not psychological. Anderson & Pildes, *supra* note 10, at 1524, 1528, 1548; Hellman, *supra* note 10, at 10.

42. *See* William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 25–36 (2011) (arguing that colorblindness alone cannot explain *Brown*, but only the social effect of the state message in the context of a particular history).

43. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426–27 (1960); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 302–03 n.11 (2007) (quoting Black, *supra*); Dorf, *supra* note 10, at 1293 (same).

For similar reasons, antisubordinationists would condemn the holding of *Palmer v. Thompson*.[44] There, the city of Jackson, Mississippi closed its public swimming pools after a court ordered them desegregated. The Court upheld the action on the theory that nonwhites had not been impacted, since they did not have access to public swimming pools in the first place, and because no discriminatory regulation remained in effect after the facilities were closed.[45] But for antisubordinationists, the city's decision to close the pools rather than desegregate them helped to send an unmistakable message that minorities occupied a subordinate status within the political community.[46]

Of course, social meaning is often disputed, and so adherents of the antisubordination theory will face difficult determinations.[47] Think for instance of the confederate flag, which elicits divergent interpretations when it is flown by state governments.[48] There is no easy way around this problem, which is also faced by the standard prohibition on government endorsement of religion. I will have more to say about ambiguities in social meaning below.[49] Regardless of this difficulty, antisubordination theorists doubtless will oppose racialized endorsements by the government. And they will do so precisely because of the harm to equal citizenship—a crucial component of the government nonendorsement principle. More surprising is that anticlassificationists likewise should prohibit such endorsements on their own theory.

2. Anticlassification Theory

Those whose view of equal protection focuses on whether the state has classified on an impermissible basis disapprove of departures from colorblindness. Because racialized endorse-

44. 403 U.S. 217, 224–26 (1971).

45. *Id.* For similar reasons, antisubordinationists would argue that incompetent racism, which tries but fails to negatively affect minorities, could violate equal protection. Only concerns of judicial management would disturb this result, but again I put them aside.

46. Carter, *supra* note 42, at 23 (calling the meaning of Jackson's action "unmistakable"). If anticlassificationists found the government's purpose to qualify as a classification, they too would object to the holding in *Palmer*.

47. *See* Dorf, *supra* note 10. For more on Dorf's proposal, see *infra* Part II.C.

48. *See* NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (upholding display of the confederate flag above Alabama's capitol dome); James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 514–15 (1991).

49. *See infra* Part II.D.

ments necessarily classify on prohibited grounds, anticlassificationists ought to join antisubordinationists in opposing them. For example, they should object to the pronouncement that "America is a white nation" simply because it deploys a prohibited distinction.

Of course, the reasons for enforcing race blindness vary somewhat within this camp. One sentiment is that government classifications encourage citizens to view one another according to their race and not as individuals.[50] Another is that government classifications foment social divisiveness.[51] Whatever the precise rationale, this theory resists official organization of citizens according to their race.

Some members of this school may object that only *actions* by the government are constitutionally worrisome—that pure speech, or government expression unaccompanied by material injury, can never amount to a violation of equal protection. They might point to cases on standing that seem to support this position, insofar as these cases indicate that racialized government messages do not work constitutional harm without more.[52] Or they might invoke decisions that seem to require both discriminatory purpose and disparate impact to make out an equal protection claim.[53] Building on such decisions, some scholarship has suggested that current law does not condemn government endorsement of racial bias,[54] and that the Court's willingness to adjudicate claims of religious endorsement is anomalous in constitutional law.[55]

50. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) ("[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (internal quotation marks omitted)). Carter uses that case to argue that the Court now objects to the expressive impact of racial classifications, independent of any tangible effects. Carter, *supra* note 42, at 12–13.

51. *See* Anderson & Pildes, *supra* note 10, at 1537 (discussing divisiveness); Reva Seigel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1307 (2011).

52. *See* Allen v. Wright, 468 U.S. 737, 755–56 (1984) (citing cases).

53. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

54. *See, e.g.*, Norton, *Government's Hateful Speech*, *supra* note 10, at 163–64 (arguing that current equal protection doctrine does not outlaw "racist or other hateful speech" by the government, critiquing that law, and suggesting reforms).

55. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 165 (1992) (arguing that just as courts refuse to adjudicate claims of government stigmatization on the basis of race, so too they should refrain from striking down religious endorsements).

A first response is that standing doctrine speaks to problems of judicial enforcement and administration that I have set to one side in this Article. My concern is whether constitutional arguments can be made against unlimited government endorsement and disparagement—on the substance and wherever they may occur. Below, I therefore highlight examples of constitutional restrictions on official speech imposed by the political branches, rather than by the courts.[56] Importantly, constitutional debate regarding *religious* endorsement is moving to the political branches as well, now that the Court is strengthening standing restrictions on Establishment Clause claims.[57] But outright religious endorsements are still widely thought to be constitutionally problematic, even where they now cannot be litigated.

A deeper response is that whatever the state of current law, the position that government speech *never* raises constitutional concerns is difficult to support even under the anticlassification theory of equal protection. At least according to the dominant version of that theory, the main worry is precisely that government classification on the basis of race sends the odious message to society that membership in a racial group matters more than individuality. That concern holds regardless of whether the message is accompanied by action that disproportionately affects persons in a more tangible way.[58] A few examples support the conclusion that anticlassification theorists should and in fact do often object to racialized government expression, without more.

Evidence comes first from cases concerning state classifications that are designed to promote, rather than deny, racial equality. Those decisions are paradigmatic; they separate theorists who are focused on subordination from those focused on classifications. And in them, judges enamored of colorblindness

56. *Allen v. Wright* could raise a relevant concern, even though standing is not my focus, if it was understood to say that expressive harm alone raises no constitutional problem on the merits. However, that decision is probably better read to address standing alone. The Court acknowledges that "[t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action," and it goes on to describe the harmful consequences of allowing standing in a way that arguably has more to do with court administration than with substantive constitutionality. 468 U.S. at 755–56.

57. *See* Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

58. *See* Carter, *supra* note 42, at 13–14 (arguing that adherents of colorblindness on the Court are objecting to an expressive harm); Dorf, *supra* note 10, at 1294 ("[W]hat is classification if not a form of expression?").

have resisted racial distinctions without regard to their effects, which can be negligible or nonexistent. Decisions concerning majority-minority districting fall into this category. In *Shaw v. Reno*, for instance, the Court discounted evidence that redistricting designed to bolster minority representation in the legislature did not harm nonminorities through vote dilution.[59] In fact, nonminorites retained control of a disproportionately *large* number of voting districts, even after the plan at issue took effect.[60] Instead of focusing on tangible harm, Justices sympathetic to anticlassification theory highlighted the social message that the bizarrely-shaped districts conveyed, namely that race was the sole or predominant factor in political decision making.[61] Therefore, the Court in *Shaw* quite clearly rectified a constitutional harm associated with expression alone when it deemed the redistricting unconstitutional.[62] Another, more recent, example is *Parents Involved*, where the reasoning of the plurality—a group dominated by anticlassificationists—focused on the expressive harm of school policies that deployed racial categories in order to diversify public schools, even though those policies did also affect nonminorities in concrete ways.[63]

59. 509 U.S. 630, 649–50 (1993).

60. Pildes & Niemi, *supra* note 10, at 494.

61. *See id*.; Anderson & Pildes, *supra* note 10, at 1538–39; Dorf, *supra* note 10, at 1294–96; Hellman, *supra* note 10, at 17–18, 26–27. Note that it was the expressive signification of the district that mattered, rather than the subjective intent of its architects. After all, race-conscious line-drawing was permissible. *See* Hellman, *supra* note 10, at 27.

62. *See Shaw*, 509 U.S. at 649 ("[W]e conclude that a plaintiff challenging a reapportionment statute . . . may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."); *see also* Hellman, *supra* note 10, at 40–41; Pildes & Niemi, *supra* note 10, at 514 (identifying broad implications of *Shaw* for standing and expressive theory). *See generally* B. Jessie Hill, Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999) (discussing the interaction between expression and standing law).

63. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); *see also* Carter, *supra* note 42, at 19 ("*Parents Involved*, *Shaw*, and *Ricci* hold that the Equal Protection Clause is presumptively violated whenever the government acts in a race-conscious manner, even if there is no unequal treatment or tangible injury, because such action allegedly expresses a divisive social message or provokes resentment."); *id.* (arguing that the Court has overturned government classifications that were purely expressive only in the affirmative action context, while requiring tangible harm in cases challenging discrimination *against* minorities).

Brown itself could be read as involving a limitation on government endorsement, even for classificationists.[64] Assume for a moment that material conditions in segregated public schools were perfectly equivalent. Assume further that any psychological consequences of segregation were negligible. Even under those (robust) assumptions, people focused on colorblindness would doubtless conclude that segregated schooling offended equal protection simply because it involved sorting students according to a racial criterion.[65] In other words, differentiation would have been sufficient to justify the result.[66] Justice Thomas, for instance, has said that "*Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race."[67] Furthermore, Justice Thomas emphasized that even unequal school quality was unnecessary to the decision, which rested solely on the classification.[68] *Brown* therefore should support the view that expression alone can violate equal protection, even for anticlassification theorists.[69]

In sum, anticlassificationists converge with antisubordinationists around the conviction that the Equal Protection Clause should and often does restrict the government's ability to telegraph racialized purposes.[70] Perhaps even more surpris-

64. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

65. *See* Dorf, *supra* note 10, at 1296 (arguing that the social meaning of segregated schools was enough to justify *Brown* for anticlassificationists); *cf.* Anderson & Pildes, *supra* note 10, at 1542 (articulating an expressivist reading of *Brown*, although not from an anticlassificationists perspective); Hellman, *supra* note 10, at 9–10 (same).

66. *See, e.g.*, *Brown*, 347 U.S. at 483 (highlighting the psychological and other intangible consequences of segregated schooling, although those aspects of the decision have not been emphasized by anticlassificationists).

67. Missouri v. Jenkins, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

68. *See id*. at 121 ("Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race.").

69. *Cf.* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) ("In *Brown v. Board of Education* . . . we held that segregation deprived black children of equal educational opportunities . . . . It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954." (citations omitted)).

70. How would anticlassificationists limit this approach? They could restrict their concern to classifications that endorsed racial differences in the relevant way (depending on the particular justification for the theory), rather than simply recognizing their social currency. That might allow the government to continue to ask about race in the census, for instance. But ultimately,

ingly, the Free Speech Clause provides an independent ground for that conclusion.

3. Free Speech

Certain influential conceptions of free speech would also oppose such pronouncements. I will simplify here again and describe two ideal types of free speech theory that I believe capture the basic features of the debate that matter for my purposes. *Libertarian* theories emphasize the right of citizens to express themselves, free of government control or influence.[71] Several rationales may be given for limiting the power of government in this realm, including the importance of encouraging a search for truth and the value of advancing individual autonomy and self-actualization. *Democratic* theories, on the other hand, allow greater room for government regulation of speech, chiefly when it is necessary to ensure the quality and quantity of public deliberation.[72] On this second view, democratic self-determination is hindered when public debate is distorted. Government can take action to reduce that distortion, sometimes by restricting certain speech itself.[73]

Libertarians likely think that the Speech Clause has no application to situations where the government is communicating on its own account. Individual speakers are not harmed, or are not harmed in their speech, when the government takes positions on controversial questions. In a different context, Michael Dorf has referred to something like this as the "sticks and stones" baseline.[74] After all, public policy offends people all the

whether and how anticlassificationists could work on this problem cannot be my concern in this Article.

71. This category of free speech theory is well established. *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1659–60, 1661 n.119 (2006) (distinguishing between libertarian and systemic theories of free speech); *see also* OWEN M. FISS, THE IRONY OF FREE SPEECH 3 (1996) (juxtaposing libertarian and democratic views). For a fuller description of free speech theories, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 3–89 (1982).

72. *See* FISS, *supra* note 71, at 2–4 (defending a version of democratic free speech theory); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–25 (1948) (putting forward a classic democratic theory of free speech); SCHAUER, *supra* note 71, at 35–46 (exploring a theory of free speech grounded in democracy).

73. *See* FISS, *supra* note 71, at 3–4 ("[T]he state may have to act to further the robustness of public debate . . . .").

74. *See* Dorf, *supra* note 10, at 1277 ("I call this . . . the sticks and stones baseline: absent special circumstances, government is entitled to employ la-

time—government could not function at all if it had to avoid insulting anyone. Dorf gives the example of a campaign against smokers, who may find the suggestion that they engage in "smoky thinking" to be insulting or stigmatizing.[75] According to libertarian speech theory, the solution to insulting speech is simply more speech.

Although racialized messages might be more offensive, they too can be answered with words, on this view. Thus, hate speech laws not only abridge the speech rights of people with racist messages, but they also are unnecessary to protect the speech of targeted citizens. While it is possible to imagine libertarians taking greater offense to racialized speech *by the government*, my sense is that these thinkers are not inclined to silence any such expression. So free speech is not an area where theorists of different stripes will converge around a principle of government nonendorsement.

Democratic theorists, however, would likely find constitutional harm in racialized government speech—and they would ground their opposition in the Free Speech Clause itself. Owen Fiss, for example, has argued that hate speech laws can be defended insofar as they combat the silencing effect of racialized speech on members of the targeted group. Because racial slurs "diminish the victims' sense of worth" and impede their ability to participate in public debate, and because such insults devalue any expressive contributions that victims do manage to make, state action against hate speech may do more to preserve free speech than to hinder it, in the aggregate.[76] And if private speech can distort democratic deliberation in that way, then government pronouncements can too—and doubtless even more strongly. So while Fiss himself is concerned with *permitting* state action to protect against racialized speech by *private* actors, his analysis sets up an even stronger reason to *prohibit* similar speech by the *government* itself.[77] After all, any distor-

bels that cause incidental economic, psychological, or other harms to persons . . . ." (internal quotation marks omitted)).

75. *See id*. at 1284–86; *see also* Hellman, *supra* note 10, at 59–60 (considering state expression of moral disapproval of smokers).

76. FISS, *supra* note 71, at 16. I bracket here the question of whether the government itself can have speech rights. *See* Fagundes, *supra* note 71, at 1637 (questioning whether the government itself can have speech rights). Even if it does, those rights may be outweighed by the silencing effect of racialized speech, just as the rights of private individuals can be.

77. Fiss seems to assume at times that racialized speech by the government itself would be unconstitutional. FISS, *supra* note 71, at 17. Other scholars have made similar points more explicitly. *See, e.g.*, Carter, *supra* note 42,

tion on minority speech will presumably be even greater if the disparaging speech comes from an official source rather than merely from private individuals without government authority or legitimacy. In sum, democratic theorists would say that the Speech Clause provides independent justification for limiting racialized government speech, even without considering equal protection values.

Democratic free speech theory could be reconstructed as a concern for what I am calling *full* citizenship—for meaningful participation in political and social life.[78] To my knowledge, this citizenship theory of free speech is new to the literature, but it offers advantages for understanding why government speech can be limited by the Speech Clause itself. Unlike other versions of democratic speech theory, this focus on citizenship does not depend on psychological responses to racialized speech by the government, nor does it emphasize silencing, a phenomenon that is contestable as an empirical matter. Rather than worrying that disparaged people will feel devalued and therefore be silenced, a free speech theory focusing on full citizenship argues that government disparagement *constitutes* targeted citizens as disregarded or disabled participants in the political process. Just as others have argued that government expression can violate equal protection by constituting citizens as disfavored, independent of their subjective reactions,[79] so I contend that racialized expression can constitute speakers as disregarded or disabled participants in political life.

Although the citizenship concept generally is invoked in the context of equality concerns, it could be seen to involve liberty as well. To be meaningful, citizenship must not only be equal, but also full. Citizens must have the capacity for robust exercise of the freedoms that are essential to participation in

at 50 ("Government hate speech can carry a sufficiently strong social meaning of official racial hostility that members of certain racial groups are effectively excluded from participation in the political process.").

78. See *infra* Part II.B and Part II.D for other examples of the full citizenship approach to free speech, and Part III.B for a fuller theoretical account of that understanding.

79. *See* Anderson & Pildes, *supra* note 10, at 1524–25 ("[J]udgments concerning whether laws create unconstitutional 'stigma' are not controlled by the experiential response of the alleged targets of those laws . . . ."); *id*. at 1528 (pointing out that listeners need not agree with a government message for it to have legal impact—they need only understand it); *id*. at 1544–45 ("[S]tigmatizing laws can inflict expressive harms apart from the psychological trauma or reputational damage they cause . . . ."); Hellman, *supra* note 10, at 10 (same).

the political community, including the freedom of expression. And just as government disfavor can constitute citizens as unequal, so too government disrespect can mark speakers as disregarded or disabled. Not every government endorsement will carry this risk. For example, smokers will not be rendered inconsequential political actors by government messaging that disapproves of their habits, just as they will not be relegated to a subordinate status. This is a matter of contingent social meanings, as I explained above. But messages that cast racial minorities as disabled political participants do run afoul of the Speech Clause in this way. And that is one way for official communications to violate the principle of government nonendorsement.

Again, not everyone will accept this free speech argument. Libertarian theorists in particular are likely to deny that government speech interferes with private expression, or that it does so in a way that is constitutionally cognizable. For now, however, I only want to argue that one major school of free speech theory would challenge the *Summum* view and embrace the principle of government nonendorsement.[80] Other examples—particularly the next one, concerning government electioneering—will invoke freedom of expression in a way that does not depend as readily on a particular interpretation of free speech.

B. ELECTIONEERING

It would be unconstitutional for the government to urge its citizens to "vote Democrat" or "vote Republican." Nor could it endorse particular candidates.[81] It is important to identify the precise constitutional justification for this conclusion—my contention will be that the best doctrinal hook for this proposition is the Free Speech Clause. But regardless of that doctrinal

80. *See generally* Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

81. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring in the judgment) ("I suppose it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party—but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party . . . ."); Lathrop v. Donohue, 367 U.S. 820, 853 (1961) (Harlan, J., concurring in the judgment) (stating that a legislature could not constitutionally "create a fund to be used in helping certain political parties or groups favored by it to elect their candidates or promote their controversial causes" (internal quotation marks omitted)). These quotations are about funding, but they would apply just as readily to expressive endorsements.

point, the fundamental argument of this Section is straightforward and virtually uncontroverted: the government faces real limitations on its own speech when it comes to electioneering. Those limits properly reflect concern for maintenance of a free society in which citizens enjoy the capacity to participate fully.

Although courts have regularly policed government electioneering—usually in the context of issue campaigns[82]—most of the constitutional action regarding electioneering has occurred outside courts. For example, the Hatch Act of 1939, along with its progenitors and successors, bars public officials from using their offices to political advantage in various ways,[83] and it thereby provides a significant barrier against official electioneering. And even though this traditional principle against government politicking has largely been extrajudicial, it has carried a constitutional valence.[84]

Why would official involvement in electoral politics be problematic? One concern is that the government has such an outsized influence over politics, and such a powerful set of platforms for its messages, that its participation could significantly skew debate, deliberation, and ultimately decision making at the polls. More precisely, the worry is that official electioneering will both unduly sway individual constituents and unfairly

82. Historically, state courts sometimes invalidated government interventions in issue campaigns, but they usually did so on nonconstitutional grounds or without identifying any clear legal authority. *See, e.g.*, Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673 (N.J. 1953) (striking down a school board's efforts to persuade voters to vote for a bond referendum to finance school construction on state law grounds). *But see, e.g.*, City Affairs Comm. v. Bd. of Comm'rs, 41 A.2d 798, 800 (N.J. 1945) (upholding municipal advocacy). More recently, federal courts have upheld government advocacy on issue campaigns against federal constitutional challenges. *See, e.g.*, Page v. Lexington Cnty. Sch. Dist. No. 1, 531 F.3d 275, 288 (4th Cir. 2008) (holding that a school district's opposition to a school voucher proposal was government speech not amenable to free speech challenge); Kidwell v. City of Union, 462 F.3d 620, 626 (6th Cir. 2006) (turning away a constitutional challenge to a city's advocacy on a ballot initiative).

83. *See, e.g.*, 5 U.S.C. § 7323 (2012) (prohibiting public employees from using their official authority for the purpose of "affecting the result of an election").

84. For example, President Thomas Jefferson condemned the involvement of federal officers in political activities, and a circular at the time prohibited government officials from "attempt[ing] to influence the votes of others [or] take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and [their] duties to it." Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 229 (2005) (internal quotation marks omitted).

disadvantage dissenters.[85] But the rationale for this concern is not completely obvious. If government may endorse policy positions—as it obviously can, even if it exercises outsized influence over debates and even if its preferences overlap substantially with those of a particular party or candidate—then why is electioneering problematic?

Government politicking flouts at least two foundational values or commitments. First, it undermines an important component of popular sovereignty in a free society, namely that the people enjoy significant independence from the government that they hold to account. Without that independence, electoral politics could collapse into a feedback loop of power reinforcement.[86] Second and related, the principle of collective self-determination prohibits political agents from deploying their office to further their own professional interests, rather than those of the people.[87] Official action should by public-regarding, on this account, even when it takes the form of endorsement rather than regulation or appropriation.[88] Electioneering is particularly dangerous in this regard because self-regarding speech can be used to entrench officials and their allies, blocking the pathways of political change that are essential to the health of a free society.[89]

Interestingly, it follows from both of these norms that politicking should be subject to constitutional limitation even where it is desired by a majority of citizens. Restricting collective self-determination in the short term protects it in the long term, because otherwise government electioneering could discourage the development of ideological novelty. Here, limiting government speech protects dissenters from denigration by those in power out of a recognition that today's malcontents

85. *See* Norton, *Campaign Speech Law*, *supra* note 10, at 218 (noting these two typical objections).

86. *See* Post, *supra* note 25, at 153–54 (highlighting the independence of citizens from the government).

87. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 120 (1980) ("We cannot trust the ins to decide who stays out . . . ."); *id*. at 135 ("[T]hose with most of the votes are in a position to vote themselves advantages at the expense of the others . . . .").

88. Propaganda is an overdetermined term that nevertheless captures something of the disjuncture between government speech geared toward retaining power and the American form of constitutional democracy. Kamenshine, *supra* note 10, at 1126–27 (discussing the traditional antipathy toward propaganda in the United States).

89. *See* SCHAUER, *supra* note 71, at 43; Greene, *supra* note 8, at 38.

may become the thought leaders of subsequent political mobilizations.[90]

What provision of the Constitution is implicated by government electioneering? Government partisanship undermines the basic architecture of the representative democracy, but it is not obvious which provision best protects that architecture here. One possibility is that government campaigning unfairly disadvantages some voters in violation of equal protection.[91] Yet voting law typically concerns actual restrictions on *whether* a citizen casts a ballot, not government actions that warp debate or influence *how* a citizen will use that ballot. Another natural candidate is the Guarantee Clause, but that provision has been enfeebled by the Court and other constitutional actors.[92]

The strongest remaining contender is free speech, read in light of underlying concerns about democratic structure. After all, the deepest worry in these situations is that speakers and listeners—candidates and citizens—will suffer constitutional harm if the government is allowed to endorse particular politicians or parties. That concern goes to a core free speech value, namely that democratic discourse should remain sufficiently independent of the political agents that it evaluates. To locate concern in the Speech Clause is not to say that it focuses solely or even principally on an individual right, because the First Amendment protects structural values as well as ones grounded in citizen liberties. For reasons like these, most scholars and judges have located the prohibition on official electioneering in that clause.[93]

90. Practically, too, it would be difficult to determine in a particular case whether public officials' speech reflected the views of a majority of their constituents. *See* Fagundes, *supra* note 71, at 1665.

91. *See* Lathrop v. Donohue, 367 U.S. 820, 852 (1961) (Harlan, J., concurring) ("[A]s to the Fourteenth [Amendment], viewed independently of the First, one can surely agree that a State could not create a fund to be used in helping certain political parties or groups favored by it to elect their candidates or promote their controversial causes . . . any more than could Congress do so . . . ." (internal quotation marks omitted)).

92. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 849 (1993) ("It is a well-settled principle that cases brought under [the Guarantee Clause] must be dismissed as posing a nonjusticiable political question.").

93. *See* Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985) (en banc) (relying on "principles of representative government enshrined in our constitutions" as well as the Speech Clause); LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 90, 101–02 (2005) (accounting for the impulse that a government message urging citizens to "vote Republican" would be unconsti-

Would this sort of electioneering by public authorities be impermissible even if it were ineffective? Most people think it would be. Perhaps the most powerful way of capturing this intuition is in terms of my theory of full citizenship—the idea being that government endorsement of a candidate or party itself constitutes political outsiders as disregarded or disabled participants. Government support of a particular candidate or party, on this account, abridges the speech rights of opponents and citizens, regardless of any empirical effects on public discourse. This account helps to explain the strong, even undisputed, belief that state electioneering betrays constitutional principles despite the equally common view that citizens are capable of achieving critical distance from government argumentation in a wide variety of other situations.[94] In sum, a concern for full citizenship explains the otherwise puzzling impermissibility of government electioneering that denigrates particular candidates or political groups, even if the electioneering is ineffective and even though the state is free to denounce the groups' ideas or policies.

In the rest of this Section, I will offer clarifications and caveats. First, it is of course perfectly permissible for an elected official—say, the president—to endorse particular candidates (including himself or herself). A president does this as an individual or party leader, not as an official. That distinction holds even though the president of course gains credence from his or her office, authority that he or she leverages implicitly or explicitly. And it holds even though public funds may incidentally benefit those individual endorsements. I will say more about

tutional and limiting himself to the Speech Clause); Norton, *Campaign Speech Law*, *supra* note 10, at 215 (focusing on free speech); *id*. at 213 (acknowledging other possible claims); Shiffrin, *supra* note 5, at 620 (arguing that free speech, and not equal protection, should be the primary source of restrictions on government speech and noting that "a major concern with government speech is its impact on the total system of freedom of expression"). *But see* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring in the judgment) (noting that although "it would be . . . unconstitutional for the government itself to promote candidates nominated by the Republican Party . . . I do not think that unconstitutionality has anything to do with the First Amendment"). Justice Scalia's view here seems to be that government funding of speech promotes rather than dampens expression, and that it is therefore permissible even if it is viewpoint discriminatory, so long as a public forum is not created. *See id.* at 598–99.

94. *Cf*. Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 382 (1983) ("Governmental support of particular candidates, for example, is not likely to be a great problem if we assume that at least some information about all of the candidates is available to the electorate.").

the problem of identifying a speaker in Section F. Here, I simply want to reiterate that my main argument seeks only to establish that there are in fact constitutional limits on whichever utterances are ultimately attributable to the government.

A second clarification is that a legislature may express support for particular policies, perhaps including much of the platform of a particular party that constitutes an overwhelming majority of the body. So it is a mistake to say that all "partisan" speech by the government is prohibited in this broad sense.[95] It is electioneering or campaigning, not partisanship as such, that abridges government nonendorsement.[96]

Third, some might agree that endorsement of candidates or parties is invalid, but object that electioneering is *sui generis*, so that its lessons do not extend beyond this particular area of constitutional law. There actually are two versions of this objection. On the one hand, the concern might be that the free speech doctrine governing electioneering is distinct from other areas of *speech* law. This would not defeat my argument. After all, one of my aims here is relatively modest—it is just to show that there is at least one free speech restriction on government expression, in contrast to what the Court has recently said. However, I will show further that the ban on government electioneering manifests a broader principle of government nonendorsement which in turn implements concerns for full citizenship and for avoiding the entrenchment of political power in a free society. On the other hand, someone might object that free speech law is *utterly inapplicable*. I resist this claim for the reasons I have already given, and I reiterate that many courts and scholars have already recognized the speech ramifications of government electioneering.[97]

95. Here I differ from Kamenshine, whose "Political Establishment Clause" would prohibit virtually all partisan speech, meaning not only explicit endorsement of a party but also adoption of all controversial policy positions. Kamenshine, *supra* note 10, at 1114; *see also* Greene, *supra* note 8, at 37–38 (disallowing all government speech that "favors views supportive of the current administration or majority party while disfavoring views of the opposition"). This would amount to something similar to a strict rule of neutrality for government endorsements. *See* ALEXANDER, *supra* note 93, at 91 (describing Kamenshine's approach). I address neutrality in Part III.A below.

96. That said, partisanship outside elections also may cross constitutional lines. For instance, the government could not fund art supporting the administration while refusing to fund work critical of it. Greene, *supra* note 8, at 37–38.

97. *See supra* note 90.

Fourth, it is reasonable to wonder whether the more familiar versions of free speech theory would oppose government electioneering. Certainly democratic theorists would be most sympathetic, because they are most attuned to the functional importance of free speech for politics.[98] And insofar as my theory of full citizenship overlaps with theirs, democratic theorists would sign on. Libertarians might be less enthused, because they might believe that individual voters and candidates are perfectly capable of critiquing state endorsement, even in this context, and of pointing it out to others.[99] Yet even they might oppose a pronouncement like "vote Democrat" that constitutes Republicans as devalued speakers. Electioneering of that sort might well be seen to result in constitutional harm even if the relevant conceptual unit is the individual. If that interpretation of libertarian speech theory is right, it could also explain why Justices who otherwise hew to an absolute view of free speech nevertheless seem concerned with at least egregious forms of official intervention in electoral debate.[100] Still, the notion that libertarian writers would be troubled by government electioneering will be more controversial than the argument with respect to adherents of democratic speech theory, mostly because the former are more likely to think that the solution to worrisome speech is just more speech, even when it comes to government endorsements of candidates.

Finally, special considerations arise with regard to issue campaigns, as opposed to candidate campaigns. Courts have indicated that it is more acceptable for public authorities to persuade voters on the former (including both ballot initiatives and legislative proposals).[101] After all, if officials may take posi-

98. *See* SCHAUER, *supra* note 71, at 35 (explaining democratic theorists' opposition).

99. *Id.* (explaining libertarian theorists' acceptance).

100. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring in the judgment) ("[I]t would be . . . unconstitutional for the government itself to promote candidates nominated by the Republican Party . . . ."); Int'l Ass'n. of Machinists v. Street, 367 U.S. 740, 788 (1961) (Black, J., dissenting) ("Probably no one would suggest that Congress could, without violating [the First] Amendment . . . create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes."). It is probably fair to say that Justice Black's position on free speech aligns most closely with free speech libertarianism. *See* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE 23 (2007) (noting that Black displayed a "robust libertarianism" on speech issues).

101. *See* Norton, *Campaign Speech Law*, *supra* note 10, at 216 (taking the position that it is acceptable for government to campaign for ballot initiatives,

tions on policy questions, perhaps they should be able to encourage citizens to enact those positions into law.[102] Government speech in campaigns like these appears to carry many of its traditional benefits—e.g., increased information that can enhance political accountability, a counterbalance to powerful private advocates, and a valuable policy perspective that can enrich public debate.[103] It may also entail fewer drawbacks—in particular, it may entail a lower risk that self-regarding motives will predominate over public-regarding ones.

Nevertheless, government endorsements regarding issue campaigns should be viewed with skepticism. State advocacy in situations of direct democracy has the potential to skew or dampen democratic deliberation at precisely the place where citizens have an opportunity to check their elected representatives through independent evaluation. This is true even when it comes to ballot initiatives. Moreover, direct initiatives will often be closely associated with particular candidates in those same elections, so that electioneering on the former can distort debate on the latter. Distinguishing permissible from impermissible initiatives could (and probably should) involve consideration of whether the campaign concerns an initiative at the same level of government,[104] whether a referendum was sponsored by a private party or the government itself,[105] and whether local rules subject all policy initiatives to public approval.[106] This Section's main contention, however, is simply that the Free Speech Clause meaningfully restricts government endorsement in the context of electioneering.

So far in this Part, I have shown government expression faces constitutional restrictions not only in the core case of religious endorsement, but also in situations of racialized expression and electioneering. From these examples, which are relatively uncontroversial, I have inferred a principle of government nonendorsement, which is best understood to implement a cross-cutting concern about all government expression that infringes on full or equal citizenship in a free society.

---

but not for individual candidates).

102. *See* Kidwell v. City of Union, 462 F.3d 620, 626 (6th Cir. 2006) (approving a city's decision to urge voters to support its initiative to establish a fire department).

103. *See* Norton, *Campaign Speech Law*, *supra* note 10, at 245–55.

104. Shiffrin, *supra* note 5, at 592.

105. Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 820 (N.D. Ala. 1988).

106. *Kidwell*, 462 F.3d at 626.

In the remainder of the Part, I consider situations that are more closely contested. I test the principle of government nonendorsement against these current examples, working back and forth between each situation and the principle that I am distilling from the full set. At the end of the discussion, it will be possible to see more clearly not only the existence but also the contours of this vital constitutional commitment.

In addition to those general objectives for the overall argument, the next three Sections have two particular aims. First, they show that the examples I have offered concerning equal protection and free speech are not anomalous. Section C contends that equal protection restricts government teachings on same-sex marriage, while Section D on partisan gerrymandering augments my argument that government nonendorsement sometimes restricts state expression through the doctrine of free speech itself. Second, these additional examples aim to demonstrate that government nonendorsement does not operate solely through equal protection and free speech, but may involve other constitutional provisions. To that end, Section E examines government discouragement of abortion and argues that it suggests a prohibition rooted in due process. In these additional examples, just as in the ones above, the constitutional requirement of government nonendorsement promotes one or more aspects of full and equal citizenship in a free society.

C. SAME-SEX MARRIAGE EXCLUSIONS

One way of understanding why different-sex requirements for access to civil marriage are unconstitutional is that they run up against a restriction on government endorsement. This expressive dynamic is particularly evident in states where virtually all the material benefits of civil marriage are extended to gay and lesbian couples through laws providing for civil unions or domestic partnerships. Certainly in those situations, and more generally as well, the constitutional harm worked by the bans could be seen as expressive, at least in part. That perspective helps to answer an objection to the equal protection argument, namely that same-sex couples are not harmed by exclusions from civil marriage in any material way, but "only" through speech. Even if same-sex marriage exclusions are purely expressive, the principle of government nonendorsement limits that communication, just as it limits many others. The concept is that excluding same-sex couples from civil marriage

sends an impermissible signal that their unions are not morally valued. In this Section, I show how state disparagement of same-sex marriage thereby violates equal protection.[107]

Simply put, the argument is that excluding same-sex couples from civil marriage carries a social meaning of moral denigration or disfavor that damages their members' equal citizenship stature.[108] That message presumptively violates equal protection even when it is unaccompanied by more tangible effects. Different-sex marriage requirements send such a message when they exclude gay and lesbian couples from a valued status or role.[109]

Many people see a message of official denigration in these laws. In *United States v. Windsor*, the Supreme Court found that "[t]he avowed purpose and practical effect of [the Defense of Marriage Act] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages."[110] DOMA's impact is expressive, for it "instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[111] Similarly, the Ninth Circuit in *Perry v. Brown* said that California's ban

107. Free speech could be implicated as well, insofar as members of same-sex couples are prevented from sending the message that they are married in the fullest sense or are otherwise silenced, but I leave that possibility to one side because it involves mainly private speech.

108. Of course, saying that such laws denigrate same-sex unions is not exactly the same as saying that they denigrate members of those unions, or gay and lesbian people generally. Reasonable people disagree on this question. *See* Dorf, *supra* note 10, at 1311–15. That disagreement is part of the more general contest over the meaning of marriage exclusions that I explore in this Section. Consider in this respect the Ninth Circuit's statement that "It will not do to say that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people. Just as the criminalization of 'homosexual conduct . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres,' *Lawrence*, 539 U.S. at 575, so too does the elimination of the right to use the official designation of 'marriage' for the relationships of committed same-sex couples send a message that gays and lesbians are of lesser worth as a class—that they enjoy a lesser societal status." Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012), *vacated and remanded for lack of standing by* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

109. Note that it is the *unavailability* of civil marriage that matters constitutionally. Different-sex couples who choose not to marry are not disadvantaged in the same way as couples who are prevented from making that choice.

110. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013). The rest of the sentence reads "made lawful by the unquestioned authority of the States" but it is not clear what import this nod to federalism actually has. *Id.*

111. *Id*. at 2696.

"serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[112] Likewise, the district court in *Perry* found that civil marriage carries a distinctive "social meaning" in American society not shared by other legal unions.[113] That court found that the exclusion "does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples"[114] and that it "places the force of law behind stigmas against gays and lesbians."[115] State courts have isolated similar messages.[116] Even some lawmakers that have supported marriage restrictions have appreciated their expressive significance.[117]

112. *Perry*, 671 F.3d at 1063.

113. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010) ("Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States."); *see also id.* at 974 ("Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples."). California's domestic partnership status extends "almost all of the rights and responsibilities associated with marriage." *Id.* at 994. Lawyers will argue that there is a material difference between the two statuses, but also that the expressive impact constitutes a constitutionally cognizable harm.

114. *Id.* at 1003; *see also id.* at 1002 ("Proposition 8 *enacts a moral view* that there is something 'wrong' with same-sex couples." (emphasis added)); *id.* at 1001 ("[M]oral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples."); *id.* at 1002 ("Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples.").

115. *Id.* at 973.

116. *See, e.g.*, Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) ("The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.").

117. The House Report recognized that "DOMA *expresses* 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'" United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (emphasis added) (quoting H.R. REP. NO. 104-664, at 12–13 (1996)). Moreover, a member of the U.S. House of Representatives said "[u]nless we pass the Defense of Marriage Act, we will [be] putting our stamp of approval on gay marriages." David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 951 (2001) (quoting 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski)). Also, Senator Gramm argued "[t]o say that we should stay out of this issue is to simply endorse same-sex marriages." *Id.* (quoting 142 CONG. REC. S10,106 (daily ed. Sept. 10, 1996).

Michael Dorf helpfully articulates the expressive argument against same-sex marriage bans. He begins by establishing that state-imposed expressive harms can sometimes trigger constitutional protections, even when they do not carry more concrete consequences. So he asks readers to imagine that after *Loving*, states allowed interracial couples to form civil unions with all the benefits of marriage, while still excluding them from civil marriage.[118] Even assuming such laws imposed no tangible harm on interracial couples, almost everyone today would find them to be unconstitutional. Antisubordinationists would predictably oppose them,[119] and anticlassificationists would recognize that endorsing the overriding importance of racial identity can work constitutional harm, as I have noted.[120] Dorf concludes that there is noticeable agreement that state expression can work constitutional harm.[121]

Yet that leads to a further question, namely *which* social meanings are invalid? I fear the consensus might well dissolve here. Anticlassificationists believe among other things that the Constitution stands against state efforts to delineate people in suspect ways rather than treat them as individuals.[122] In their view, what makes groupings suspect has relatively little to do with whether second-class citizenship results. With regard to same-sex marriage, they may not worry about unequal citizenship for members of gay and lesbian couples. Even if marriage bans are tantamount to classifications on the basis of sexual orientation rather than just classifications of unions or ceremonies, people of this view might well conclude that they are permissible because sexual orientation *is* morally relevant. In fact, a major thrust of their argument seems to be precisely that sexuality is a proper focus for policymaking, according to mainline American traditions and beliefs.[123] Therefore, my suspicion

118. Dorf, *supra* note 10, at 1271.

119. *Id.* at 1293. See my discussion of antisubordination theory above in Part I.A.

120. *See supra* text accompanying notes 40–56.

121. Dorf, *supra* note 10, at 1296.

122. *See supra* Part II.A.2.

123. *See generally* Lawrence v. Texas, 539 U.S. 558, 589–90 (2003) (Scalia, J., dissenting) ("Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."); United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms.").

is that this particular instance of government nonendorsement will convince only antisubordination theorists.

Next we might ask, how is social meaning identified? Specifically, how can we determine whether marriage exclusions actually subordinate citizens? After all, the significance of the exclusions is disputed. Many people see them as stigmatizing, but many others believe that they serve neutral purposes.[124] Ultimately, there is no methodology for identifying social meaning that is not itself controversial.[125] My basic argument is that there must be *some* constitutional limit to government pronouncements regarding gay and lesbian couples. I believe that same-sex marriage exclusions cross that line into impermissible endorsement, but that further contention must remain contested.

Similar problems bedevil mainstream law on nonestablishment. There, the Court invalidates government actions that impermissibly endorse religion, as I have explained.[126] Again, the endorsement test asks whether a law or policy "sends a message to nonadherents that they are outsiders, not full members of the political community," along with an accompanying message of favored status to adherents of the advantaged faith.[127] Making that determination depends on public meanings.[128] After all, lots of people who feel disparaged by government actions will not have a constitutional claim. But

124. Two justifications have been featured in state court litigation. *See* Nelson Tebbe & Deborah Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1437–38 (2010). First, defenders argue the laws promote "responsible procreation" insofar as they minimize harmful consequences when different-sex couples have children accidentally. *Id.* Marriage stabilizes relationships in a way that is good for couples who bear children without proper planning, a category that generally does not include same-sex couples. *Id.* Second, states say that different-sex marriage provides the "optimal" setting for childrearing, either because there is a parent of each gender in the home, or because the biological parents are involved. *Id.* Regardless of the plausibility of these two arguments, the point here is that there is disagreement over the purposes—and therefore the social meanings—of restrictive marriage laws.

125. Dorf tentatively proposes a "reasonable victim" approach, under which courts will apply a presumption of unconstitutionality to any government action that some identifiable group reasonably regards as a state endorsement of second-class citizenship. Dorf, *supra* note 10, at 1337.

126. *See supra* text accompanying notes 6–7 (discussing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (adopting Justice O'Connor's endorsement test)).

127. *Lynch*, 465 U.S. at 688.

128. *See* EISGRUBER & SAGER, *supra* note 43, at 124–28.

religious establishments matter more than other types of commendations because, under prevailing understandings, government endorsements of religion carry special force.[129] So the success of claims will depend on whether government action carries a social meaning that endorses religion.

Likewise, it is certainly possible to conclude that when states endorse different-sex marriage alone, the resulting message carries special significance. In fact, controversies over availability of the word "marriage" have been so intense precisely because social meanings bestow great importance on civil marriage, as well as on sexual identity. A consequence is that different-sex marriage requirements affect membership in the American political community, at least from the perspective of many advocates for LGBT rights.

Of course, whether to credit that understanding of marriage exclusions is the difficulty that nonestablishment law shares with my approach here. Both the Court and commentators look to objective meanings.[130] That will resolve most problems, but it will still leave situations in which multiple perspectives are objectively reasonable. And it is precisely in those situations that we need a methodology for fixing social meanings.[131] Nonendorsement will face this difficulty in its religious and secular applications alike. Despite this line-drawing problem, interpreters should allow for situations where government teachings obviously do cross constitutional lines.

If all this is correct, then government nonendorsement prohibits states from limiting civil marriage to different-sex couples, because that exclusion communicates disregard for members of same-sex couples and for LGBT citizens generally. That provides another example of a place where equal protection restricts government expression. And it reinforces the idea that the principle of government nonendorsement works to guarantee the equal citizenship component of that commitment. The next example reinforces the other main component, *full* citizenship, and it does so under free speech.

D. POLITICAL GERRYMANDERING

A disquieting aspect of our political system is the fact that electoral districts for politicians are drawn by political bodies

129. *Id.* at 126.

130. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); EISGRUBER & SAGER, *supra* note 43, at 127.

131. *See* Dorf, *supra* note 10, at 1335.

themselves.[132] That has opened the door to overt political gerrymandering. Although the situation raises concerns of self-dealing, the Court has declined to get involved to any significant degree. It has even left undisturbed district designs that were explicitly partisan, largely on the ground that the matter is a political question not susceptible to judicial resolution.[133] Perhaps as consequence of the Court's decision to stay its hand, self-dealing among party strategists is often perfectly patent today, so that district lines are drawn with the explicit purpose of protecting incumbents or assuring electoral victory to one party or another.[134]

This sounds bad, and it may well be, but the constitutional questions are more complicated than many people realize. At root, the difficulty is that it is not clear what drawing boundaries fairly would mean, in a two-party system with single-member districts.[135] Adhering to pure "neutrality" (defined as blindness to parties) could actually be undesirable. For instance, it could result in numerous districts that are split evenly between the two parties, so that small changes in voter opinion could result in large or even complete changes in legislative representation—a result that many people would find unattractive in the House, even though that dynamic currently operates in the Senate.[136] On the other hand, allowing the classic form of political gerrymandering, where an incumbent party seeks to perpetuate its power at the expense of a minority party, could have (and may well be having) deleterious effects, including political polarization in Congress, weakened competitiveness that reduces accountability, and the marginalization of centrist vot-

132. *See generally* ROYCE CROCKER, CONG. RESEARCH SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW (2012); *id*. at ii ("Most redistricting is currently done by state legislatures.").

133. *See* Vieth v. Jubelirer, 541 U.S. 267, 277–81 (2004). For a review of the current state of gerrymandering doctrine, see Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1379 (2012).

134. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 417 (2006) ("The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority . . . ."); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 266 (2006) (noting that party insiders are perfectly candid about the partisan purpose of much redistricting).

135. *See generally* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (raising similar questions).

136. *See id.* at 668–69.

ers.[137] Formal neutrality and partisanship both have costs and benefits, in other words—and the ultimate values underlying districting are contested.

To choose among such values is to favor one substantive vision of American electoral practices over another.[138] Moreover, the answers depend on empirical issues that are themselves unresolved, such as whether gerrymandering furthers ideological polarization and whether safe districts are less responsive to voters.[139] Faced with those kinds of contests over both facts and values, several Justices have concluded that the matter is best left to the political process itself, even though constitutional values may well be implicated.[140] And beyond the Court, the practice of letting politicians police themselves has been defended.[141] Yet the sense has persisted that there is something wrong, something of constitutional magnitude, with at least extreme instances of political entrenchment through districting.[142]

An unexplored way of conceptualizing the constitutional difficulty with partisan gerrymandering is to think of it as a form of government endorsement. When a state draws a district for reasons that are purely or principally partisan, it sends a message to political outsiders within the district that they are inconsequential. Remember that the whole point of a gerrymandered district is to make some voters irrelevant (or dramatically less relevant) to electoral dynamics within its geographic area. Partisan purpose can be gleaned in the usual ways, by

137. Pildes argues that competitive elections—in addition to providing greater political accountability—encourage strong challenges to incumbents, increase voter turnout, encourage political mobilization, strengthen the two-party system, and maintain the House of Representatives as the body most responsive to popular opinion. Pildes, *supra* note 134, at 260.

138. *See, e.g.*, Stephanopoulos, *supra* note 133, at 1390 (arguing that "no potential standard for drawing district lines . . . can be evaluated without taking into account its theoretical underpinnings").

139. *See, e.g.*, John Sides, *Gerrymandering Is Not What's Wrong with American Politics*, WASH. POST WONKBLOG (Feb. 3, 2013, 12:29 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/03/gerrymandering-is-not-whats-wrong-with-american-politics/ (arguing as an empirical matter that gerrymandering does not account for partisanship in Congress).

140. *See* Vieth v. Jubelirer, 541 U.S. 267, 277–81 (2004).

141. Persily, *supra* note 135, at 679–81 (arguing that redistricting involves substantive tradeoffs that are best left to legislatures themselves).

142. *See, e.g.*, Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC, Sept. 19, 2012, *available at* http://www.theatlantic.com/magazine/archive/2012/10/the-leauge-of/309084/; James Polk, *Why Your Vote For Congress Might Not Matter*, CNN (Nov. 18, 2011, 10:19 AM), http://www.cnn.com/2011/11/18/politics/gerrymandering/index.html.

considering factors such as explicit statements of the architects, the shape of the district, its expected and probable effects, the party affiliation of the legislators in charge, and so forth. Districts that are evidently rigged express disdain or disregard for outsider citizen-voters. This is one more place where government expression is constitutionally limited by the principle of government nonendorsement.

One advantage of applying my approach to partisan gerrymandering is that it does not depend on districting's actual effects. Again, many of the hottest debates surrounding political gerrymandering have concerned factual issues such as whether the practice results in legislatures that are polarized or immune from disciplining change, whether incumbents really are protected from challenge in such districts, and, particularly important here, whether political outsiders within a district really are rendered ineffective. These issues matter less when the focus shifts from redistricting's consequences to its messaging. Then, the concern becomes whether political outsiders have been constituted as disregarded speakers, not whether they are able to participate or whether their exclusion generates damaging consequences for the democratic system.

Another benefit of treating gerrymandering as endorsement is that it avoids deeper questions about the underlying values that should drive redistricting. Once a state has cast political outsiders as inconsequential, it has presumptively violated the Constitution, whatever its other motivations for districting might be. Disparaging voters is problematic whenever it happens, in other words, and that is true independent of deep questions about the proper purposes of redistricting. Avoiding those questions makes at least one piece of the constitutional conversation on gerrymandering more manageable (if only as a matter of constitutional politics and not for purposes of adjudication). A corollary is that this claim will rarely be successful. Government nonendorsement serves here, as in other examples, to police only extreme expression.

What constitutional provision is at issue? Equal protection is the traditional answer when it comes to gerrymandering, but the fit is notoriously uncomfortable.[143] Partly that is because members of the two major political parties are not customarily seen to be susceptible to second-class membership status under

143. *See Vieth*, 541 U.S. at 293.

contemporary social meanings.[144] And partly it is because gerrymandered arrangements can exhibit formal equality and rough proportionality of outcome, meaning that the share of each political party in Congress approximates its share of the popular vote.[145] So equal protection only awkwardly captures the constitutional harm when political parties design safe districts.

Another, more natural claim is that manifesting an intent to sideline a group of citizens on the basis of party affiliation abridges First Amendment values, including commitments to free expression, the ability to assemble into political mobilizations, the power to petition the government, and more generally to unfettered political participation. Lately, there has been some interest from Justice Kennedy and others in the possibility of a challenge to gerrymandering based in the values of the First Amendment.[146] Speech values are implicated not principally because gerrymandering silences speakers or otherwise hinders their participation. That sort of burden has been the focus of the few judges and writers who have suggested free speech challenges to political gerrymandering.[147] But such

144. *See id.* at 313–14 (Kennedy, J., concurring in the judgment) (noting the difficulties in applying equal protection law to political gerrymandering cases, which do not involve suspect classifications); Pildes, *supra* note 134, at 269 (noting that the constitutional harm is independent of "the right of the political parties not to be discriminated against in districting" and thus requires an approach different from the equal protection framework of cases like *Vieth*).

145. *See* Pildes, *supra* note 134, at 255–56 (arguing that the harms of gerrymandering—especially the reduction or elimination of political competition in congressional elections—is not captured by the equal protection model, because the resulting districts may be formally equal and because the division of districts among parties may be roughly equitable).

146. So far, however, this interest has not been accompanied by an understanding of the practice itself as expressive. *See, e.g.*, *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering."); Pildes, *supra* note 134, at 270–71 (recognizing the First Amendment implications of partisan districting); Abby Rapoport, *Does Gerrymandering Violate Free Speech?*, AM. PROSPECT, Jan. 30, 2012, *available at* http://www.prospect.org/article/does-gerrymandering-violate-free-speech. *But see* Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 372, 436–41 (2012) (endorsing a structural approach to gerrymandering).

147. Without focusing on government expression, free speech challenges to gerrymandering have failed on the ground that speech by political minorities within these districts is not actually silenced or burdened. *See* Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011); League of Women Voters v. Quinn, No. 1:11-cv-5569, 2011 WL 5143044, at *3 (N.D. Ill. Oct. 28, 2011); *see also Vieth*, 541 U.S. at 314 (Kenne-

claims depend on empirical propositions that are contestable, as I have mentioned. Nor is the concern necessarily that the practice damages political competitiveness and accountability—something that might not be true if primaries are meaningfully contested and incumbents feel vulnerable.[148] My sense is that free speech may be offended instead because evident gerrymanders themselves devalue certain citizens as voters, framing them as disabled speakers and demeaning the exercise of their full capacities as citizens.[149] Citizens' participation in electoral politics is cast as inconsequential. In fact, that is precisely the point of this sort of redistricting. Voters therefore understand that they are being deliberately sidelined and deemed irrelevant (or much less relevant) to electoral politics in the district. Again, I conclude from this example and others that there is a free speech analogue to the equal protection theory of *equal* citizenship, namely that people whose speech is rendered inconsequential by a state are made something less than *full* citizens.[150]

For example, imagine a state controlled by Democrats that redraws its districts using a straightforward partisan gerrymander, so that eighty percent of its congressional seats are won by the party, even though only fifty-five percent of the popular vote went to Democrat candidates.[151] Assume that the partisan motivation is manifest in the state legislature's words and acts. Republican voters have a claim that they have been sidelined by the gerrymander in presumptive violation of the Free Speech Clause. Importantly, they would not have the same claim if they had suffered exactly the same sort of disproportionate loss because of unintentional or natural districting.

dy, J., concurring in the judgment) (envisioning a free speech claim, but only where a gerrymander had both the purpose and the effect of burdening representational rights).

148. *See* Persily, *supra* note 135, at 661 (arguing that primaries are more often contested than recognized by leading critics of gerrymandering).

149. Occasionally Pildes gestures toward the expressive aspect of gerrymandering. *See, e.g.*, Pildes, *supra* note 134, at 271 ("What matters is that the state has treated voters, not as individuals, but as fungible political units whose democratic role is not self-governance, but the allocation of political spoils.").

150. I introduce this novel free speech theory above in Part II.A.3. and I explore it in greater detail below in Part III.B.

151. The example would work just as well if the allocation of seats to the two parties represented overall opinion in the state as long as safe seats were created in various districts, so that minority voters within those districts were rendered inconsequential.

There is a difference of constitutional significance between purposive gerrymandering that manifests disregard for outsiders and incidental disadvantage.[152] Moreover, their claim would work even if competitiveness persisted—that is, even if the primaries were so rigorous that incumbent congresspeople felt that their seats were not in fact safe and that they needed to remain scrupulously responsive to their constituents. And it would work if overall representation in Congress remained proportionate to political opinion in the state, because Republican voters in now-safe Democratic districts would be purposefully made ineffective. It would even work if the excluded group consisted not of Republicans, but of any other identifiable political group, such as urban residents or environmentalists, if the exclusion was designed to render them politically irrelevant because of their views.

Of course, the new inquiry will introduce its own questions, such as whether a district is actually politically gerrymandered. But those are continuous with the sorts of inquiries into the role of social meanings in constitutional analysis that are common to virtually all the examples I have offered, and they are answered by the same sorts of arguments. Moreover, figuring out whether a district has been gerrymandered is something that courts are accustomed to doing in the context of racial gerrymandering—albeit only with contested success and legitimacy.[153] Factors include not only what district architects say, but also considerations like whether the shape of a district is bizarre enough to send the message that it was determined by improper motives.[154]

Let me conclude by reiterating that I am not concerned here with judicial enforcement, so I am leaving to one side the debates over justiciability that have figured so prominently among the Justices. Rather, I am crafting an argument that would allow other constitutional actors, especially state legislators and members of Congress, to combat gerrymandering without having to resort to familiar arguments that have failed to gain traction. They could do that on the floor of the legislature, in the media, or wherever constitutional battles are

152. Pildes, *supra* note 134, at 266 (distinguishing between naturally safe districts and safe districts that are the product of intentional partisan activity).

153. *See generally* Shaw v. Reno, 509 U.S. 630 (1993) (holding redistricting based on race to a strict scrutiny standard).

154. *Id.* at 647.

fought. And of course the main point is to offer another application of government nonendorsement that restricts government endorsement using freedom of expression itself.

E. CONDEMNING ABORTION

So far, I have been addressing ways in which government expression can violate equal protection and free speech principles. But those are not the only provisions that implement government nonendorsement. Here I explore the Due Process Clause and specifically the fundamental right to terminate a pregnancy. Are there limits on a government's ability to dissuade citizens from exercising this constitutional right?[155]

There are such limits. Imagine for instance that the government positioned an employee outside the entrance to a local abortion clinic, with instructions to shout at every woman entering the clinic, saying that abortion is immoral and that she should immediately cancel any plans to end her pregnancy through artificial means. Many people will have an intuition that an extreme form of such action would offend due process. And that would be true even if the government took no tangible steps to thwart the women, such as blocking their way or withholding funding.

I believe this conclusion would hold under current law, although that is uncertain because the doctrine is unfriendly to challenges from women. Under existing law, the government may not place an undue burden on the ability of women to terminate their pregnancies, meaning that a state cannot take an unnecessary action that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking to terminate her pregnancy.[156] "Purpose" incorporates an expressive element, at least in theory, so that officials are prohibited from

155. *See* Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 360–61 (2008) ("[W]hen or to what extent may the state persuade a person not to exercise a constitutional right?"); *see also* Corey Brettschneider, *When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion*, 8 PERSP. ON POL. 1005, 1005 (2010).

I put to one side the argument that government messaging on the topic of abortion violates the speech rights of either medical providers or patients. That contention focuses on government compulsion of speech regardless of its content, whereas I consider limitations on ideas that the state may promote.

156. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

manifesting an intent to thwart women's reproductive initiatives.[157] And the "purpose" prong is independent of "effect," although again this may be more theoretical than real—in practice, the purpose prong has not done much work on its own.[158]

The government would likely argue that the purpose of the shouting program is actually to inform women, not to hinder their choice. And persuasion has been held to be permissible, as long as it is reasonably related to the state's interest in potential life.[159] Affected women would respond that information and persuasion can be communicated in different locations, at better times, and in less confrontational ways, and that these particular messages seem to go beyond persuasion to emotional manipulation, revealing a purpose to burden rather than inform or persuade. Even more powerfully, challengers would argue that delivering an aggressive message at a time and place of heightened emotion for women has the unmistakable effect of deterring at least some of them from going through with the procedure. So there is a chance that such a program could be struck down even under the undue burden regime.

Notably, my hypothetical shouting program is constitutionally problematic even though the government has been allowed to express its distaste for abortion in other settings. For example, Congress has successfully defunded many abortions, while it has continued to support childbirth.[160] And specifically with regard to government speech, Congress crafted a funding program under which doctors could counsel women so long as they did not give advice on terminating a pregnancy[161]—and the Court later characterized that program as permissible government speech.[162] Quite clearly, therefore, federal policy now favors childbirth over abortion on moral grounds.[163] Given those

157. *See* Linda Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 343–46 (2006) (discussing recent doctrine concerning the purpose prong of the undue burden test).

158. The Court seemed to question whether purpose alone could invalidate an abortion restriction in Mazurek v. Armstrong, 520 U.S. 968, 972–73 (1997) (dicta); *see also* Wharton et al., *supra* note 157, at 377.

159. *See Casey*, 505 U.S. at 878.

160. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

161. *See* Rust v. Sullivan, 500 U.S. 173, 179 (1991).

162. Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

163. Similarly, Brettschneider has argued that government must protect hate speech, but should simultaneously denounce it. *See* Brettschneider, *supra* note 155, at 1006. Most of the time, those two proposals do not conflict, but it

facts, someone might reasonably ask: why is the hypothetical shouting program problematic, given the fact that the government can send much the same message in other ways, at other times, and in other places? The answer concerns social meanings, once again. Abortion is an obvious topic of moral and emotional sensitivity, about which many people have deep and often conflicting feelings. Plainly, the shouting program is specifically designed to exploit a woman's susceptibility when it is at its maximum. That purpose differentiates its message—meaningfully and clearly, if contingently—from government attempts to encourage women not to end pregnancies from a greater distance and at less sensitive times.

My example is of course artificial, but it isolates considerations that are at play in contemporary disputes. A particularly salient example today is the requirement that women seeking to end their pregnancies must have an opportunity to view an ultrasound image before they can go forward, and that they must hear a detailed description of that image from their medical provider.[164] Mandatory ultrasound laws send an unmistakable message that fetuses are already human, and that aborting them is tantamount to killing—they also personalize that message by drawing the woman's attention to the image of *her particular* uterus.[165] States' articulated reason for the requirement is to ensure that women's decisions are informed, and there does seem to be an informational element present. But it is impossible to ignore the fact that the laws are also designed to push at least some women to change their minds in the eleventh hour, when many of them are most impressionable.[166]

might be possible to imagine situations analogous to the shouting hypothetical, in which they could be at odds with each other.

164. *See, e.g.*, N.C. GEN. STAT. § 90-21.85 (2012) (so providing). States have passed various versions of ultrasound laws. Right now, twenty-two states regulate ultrasound provision, seven by requiring abortion providers to perform an ultrasound on each woman and offer her an opportunity to view it, nine by requiring every woman to have an opportunity to view an ultrasound if the provider performs one (as virtually all do), and five by requiring generally that a woman be provided an opportunity to view such an image. GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND, (Oct. 1, 2013), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf; *see also Florida and Texas: A Guide to Mandatory Ultrasound Legislation*, NARAL PRO-CHOICE AM. (May 13, 2011), http://www.prochoiceamerica.org/media/press-releases/2011/pr05132011_ultrasound .html.

165. *See* Sanger, *supra* note 155, at 377. I thank Sherry Colb for bringing this work to my attention.

166. Courts have mostly upheld mandatory ultrasound laws, although some have invalidated them. *Compare* Tex. Med. Providers Performing Abor-

Carol Sanger has argued that mandatory ultrasounds cast pregnant women as mothers or expectant mothers, rather than as women deciding whether to end their pregnancies.[167] States thereby interfere with the women's decision-making processes, although perhaps not with the decisions themselves. Although Sanger focuses on visual aspects of the laws, she also depicts the harm as expressive: states mean for the ultrasound to be "a self-evident statement about the meaning of human life."[168] And lawmakers' motivating belief is that a woman who sees the image on a screen, or even hears it described by a doctor, will be less likely to terminate the pregnancy.[169] Courts have treated the laws as instances of mere speech that do not by themselves amount to burdens on the decision.[170] That argument is analogous to the sticks and stones defense in speech law.[171] One way to overcome it is to suggest that in certain extreme situations mere speech can indeed burden the decision, and another is to argue, as Sanger has, that purposefully interfering with the decision-making process is enough to raise significant concerns, even if the ultimate choice is not coerced.[172]

Interestingly, Sanger herself analogizes specifically to religion, figuring that constitutional law would not tolerate a requirement that people who decline to swear on the Bible must be offered an opportunity to hear the Sermon on the Mount, or that nonbelievers must be given notice of nearby church services that they could attend in order to make a fully informed decision.[173] Her analogy does not work perfectly, because there

tion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012) (upholding a law that required physicians to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure), *with* Stuart v. Huff, 834 F. Supp. 2d 424, 432–33 (M.D.N.C. 2011) (declaring a likelihood of success on a free speech claim against a North Carolina statute requiring doctors to perform an ultrasound, make the image viewable to the patient, and describe the image to the patient in specified detail).

167. Sanger, *supra* note 155, at 382–83.

168. *Id.*

169. *Id.* at 358 ("The core and motivating belief is that a woman who sees her baby's image on a screen will be less likely to abort.").

170. Sanger herself is not interested in assessing constitutional arguments, although they inform her moral analysis. Sanger, *supra* note 155, at 360.

171. *See supra* note 74 and accompanying text.

172. It sometimes seems to reduce to a claim that mandatory ultrasounds are intended to be, and are, coercive. *See* Sanger, *supra* note 155, at 352 ("The mandatory ultrasound requirement replaces consent with coercion—not about the ultimate decision, but about how a woman chooses to get there.").

173. *Id.* at 387–88.

is a freestanding ban on state endorsement of religion that does not apply to abortion. Consider that government could never discourage belief or nonbelief in the way that it denounces abortion in general terms. Nevertheless, Sanger has identified a real sense in both areas that officials do not have unlimited ability to endorse certain paths and condemn others.[174]

Stepping back, my ultimate point is that due process may provide a concrete limit on at least *some* government speech about reproductive decision making, in at least *some* (admittedly extreme) situations where strong public condemnation intersects with private sensitivity about a delicate moral and emotional decision. That argument may not be hugely consequential as a practical matter, but it does establish yet another conceptual limit on government disparagement—and one that implicates a different constitutional area, due process. Because this example pertains to fundamental rights, it connects up with other examples where government nonendorsement contributes to the maintenance of a free society. And insofar as limiting official endorsement in this particular context protects the equal status of women—as several Justices have suggested[175]—it also furthers the equal citizenship value that underlies the principle of government nonendorsement.

While it would be possible to go further and describe additional examples of constitutional limitations on official endorsement, these five suffice to establish the existence and scope of a general principle of government nonendorsement. They also show how instances of that principle are tied together by concerns for full and equal citizenship in a free society.

174. Government nonendorsement may suggest due process limitations on other instances of government speech around abortion as well. For instance, the Eighth Circuit found a due process violation in a South Dakota statute that required doctors to "describe 'all known medical risks' of abortion, including '[i]ncreased risk of suicide ideation and suicide.'" Planned Parenthood v. Rounds, 653 F.3d 662, 670 (8th Cir. 2011) (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (2011)). The court found a due process violation, as well as compelled speech that violated physicians' freedom of expression. *Id*. at 673. That ruling was contested, however, and the full court later vacated the decision. Planned Parenthood v. Rounds, 662 F.3d 1072 (8th Cir. 2011) (en banc).

175. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

F. CROSS-CUTTING CHALLENGES

In this Section, I anticipate general questions about my argument so far. The three most interesting ask whether it is possible to identify which speech acts are attributable to *the government*, whether government action constitutes *expression*, and how the principle of government nonendorsement is *limited*. None of these concerns affects the core argument here, but I offer some thoughts on how each of them can be addressed.

1. Is It the Government Speaking?

This question follows from the observation that it is sometimes difficult to tell whether the government itself is engaging in expression. When the president endorses an idea, for instance, it is not always obvious whether the individual or the entity is speaking. A simple response is that resolution of this issue does not affect this Article, whose primary ambition is to correct the impression that *conceded* government endorsement is constitutionally unlimited outside the Establishment Clause. Mapping the line around state speech is not essential.[176]

While that answer is sufficient, it can be augmented. A fuller response begins with the insight that in many situations it is meaningless to say that something "is" government speech. Rather, lines can be drawn only by looking to the constitutional values that are at play in a particular scenario. For many—but not all—of the examples above, a key consideration will be whether a reasonable listener would attribute an expression to the government.[177] That is because the harm of unequal or incomplete citizenship turns on public meaning, which specifies not only the content of a message but also its source. So whether a president's message should be associated with the executive branch depends on whether the relevant audience would reasonably understand it to be governmental.[178] That approach

176. A distinction separates government utterances that *do things* without endorsing ideas. I bracket for example a government utterance "in the name of the state of X, I pronounce you man and wife," which itself accomplishes a legal act.

177. Again, there may be more than one reasonable interpretation of whether a message is attributable to the government. For perceptive treatments of this difficulty, see Carline Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Dorf, *supra* note 10, at 1332 (tentatively proposing a "reasonable victim" approach to resolving such conflicts).

178. Note that it does not matter whether the audience agrees with the message, but only whether they understand it.

would work for antisubordination and anticlassification understandings of equal protection, and also for speech concerns with government electioneering and political gerrymandering. In all those situations, the constitutional principles at play make objective public understanding a touchstone of whether a statement should count as the government's.

Certain concrete characteristics make it easier to attribute expression to the government from the perspective of such an observer. For example, if the president directs public funds to sending a message, then a reasonable member of the political community will be more likely to conclude that the message is not the individual's alone. Messages delivered in certain settings—such as the Oval Office or a joint session of Congress—are also customarily associated with the entity or office rather than the person.[179]

In the religion context as well, constitutional actors must distinguish between official and individual endorsements, because only the former trigger Establishment Clause rules. Lower courts have developed a four-part test for identifying government endorsements.[180] Properly viewed, the test identifies characteristics that a reasonable observer would deem relevant to determining whether the force of government was driving an exclusionary message, so that an unequal citizenship status could have been formed. Factors include the central purpose of the program, the degree of editorial control exercised by public officials, the identity of the literal speaker, and the assignment of ultimate responsibility for the utterance.[181] It is easy to imagine a similar approach in other constitutional contexts, with the caveat that such an approach may not capture all the relevant characteristics in every conceivable context.

2. Is the Government Expressing Anything?

Others might worry that it is difficult to tell when the state is conveying an idea, as opposed to engaging in nonexpressive

179. Of course "the government" is complex, and the President may be speaking only for the executive branch or only for the federal government. That matters little to my analysis because actions by any state entity triggers constitutional barriers.

180. *See, e.g.*, Turner v. Fredericksburg, 534 F.3d 352, 354 (4th Cir. 2008) (citing the leading case, Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001)) (determining whether legislative prayer counted as the government's).

181. *Id.*

conduct.[182] In *Palmer*, for instance, the city of Jackson closed its swimming pools after a court ruled that it could no longer exclude minorities from them.[183] Was that a meaningless action, or did it express racial hostility? People might ask a similar question of different-sex marriage requirements.

My two responses parallel those above. First, the question does not fundamentally affect this project, which simply identifies limitations on state signification wherever it concededly occurs. Identifying when government action carries expressive force is a secondary matter.[184] Second, however, there is more that can be said—namely, that differentiating between expression and conduct may turn on the substantive principle involved. Looking to the social meaning of a government action is one way of determining whether it is expressive, and it is a method that links up with several of the principles underlying the examples I have given. On this view, government actions endorse an idea, and thus fall within the scope of my inquiry, if they are reasonably taken to do so by the relevant audience. A related point is that the relevant distinction for this project is not between speech and conduct,[185] but between expressive and nonexpressive government action.

3. Are there Limits to the Limits?

Finally, someone may wonder whether and how the concept of government nonendorsement can be cabined. How can lines be drawn between government endorsements that are permissible and impermissible under this approach? Here too, the basic objective of the project can be met irrespective of the answer to this question. It is enough to establish, for instance, that authorities may not engage in certain forms of racialized expression. It is critical to remember that because I am not focused on judicial decision making here, the risk that some dis-

182. Note that this is not the same as the question of whether private action is expressive enough to be protected by the Speech Clause. *See* Texas v. Johnson, 491 U.S. 397, 403–05 (1989).

183. Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

184. Note also that I am interested in actions or utterances that express ideas, and not in government declarations that accomplish tasks in themselves. For example, I set aside a speech act that confers citizenship on an immigrant in a naturalization ceremony.

185. *Cf. Johnson*, 491 U.S. at 404 (articulating a test for differentiating private speech and conduct in the context of flag burning).

tinctions will be difficult to draw does not defeat the project out of concerns for administrability or predictability.[186]

Limits can be found, however. Boundaries to the principle of government nonendorsement are provided by the concern for full and equal citizenship in a free society. Not every official endorsement of an idea will trigger even one aspect of this fundamental commitment. So to return to Dorf's example, a campaign to dissuade people from smoking will not run afoul of the principle I am defending, even if it gives offense to smokers by accusing them of "smoky thinking."[187] Unless the campaign engages in extreme communication tactics that effectively burden a fundamental right to smoke under the Due Process Clause, it will not threaten the maintenance of a free society. Nor does denigrating smokers implicate their equal citizenship stature or their significance as full participants in political life. For similar reasons, the vast majority of government communications will not trigger the basic values that shape the principle of government nonendorsement.

In sum, none of these objections threatens the proposal. More interesting to me, and more important, is how government nonendorsement in its various incarnations transforms theoretical debates, including discussions around political theory, free speech, and religious freedom.

III. THEORY

If a general principle of government nonendorsement properly exists in constitutional law, what are the ramifications for legal and political theory? Likely there are several. After all, disagreements over government speech appear to implicate more abstract debates over the proper role of government in modern democracy.[188] Below, I explore three implications. First, I argue that the proposal impacts our understanding of American political morality, resisting two familiar paradigms and pointing toward an alternative. Second, I turn to free speech

186. There is a widening gap between constitutionality and court enforcement in the area of government endorsement, given the Court's increasingly strict standing requirements for Establishment Clause claims. *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 603–05 (2007). Debates about the constitutionality of government endorsements will happen with increasing frequency outside the courts.

187. Dorf, *supra* note 10, at 1284–86.

188. Smith, *supra* note 5, at 946 (suggesting that controversies over government speech reflect "the collapse of any working consensus about the proper domain and functions of government").

theory, where I step back and draw out my suggestions above that government nonendorsement suggests a concern for *full* citizenship in free speech law that is parallel to the more familiar value of *equal* citizenship in equal protection.[189] Finally, in Section C, I show how my account impacts the cutting-edge debate among religious freedom scholars over whether religion deserves special constitutional solicitude. I conclude that while government nonendorsement generally undercuts the special constitutional status of religion, it also reveals that some of the values driving religious nonendorsement do not have easy secular analogues and therefore the nonendorsement principle may remain somewhat more demanding in the area of religion than it is in non-religious contexts.

A. GOOD GOVERNMENT

What does my analysis, if correct, mean for our understanding of American political morality? Possibly, it leaves common theories untouched. It is reasonable to think that government nonendorsement merely sets outer constitutional boundaries, within which a range of political moralities may operate. Another possibility, however, is that government nonendorsement points toward a middle path between two paradigmatic conceptions of how the republic can and should work.

One of these paradigms holds that American government should remain as neutral as possible with respect to conceptions of the good while stoutly defending a framework for supporting those conceptions—a basic system of justice that centers on popular sovereignty and individual rights.[190] *Framework democracy* emphasizes a distinction between the right and the good, with government striving for evenhandedness as to the latter but not the former, which many think can be defended only substantively and on non-neutral grounds.[191] Presumably, the requirement of neutrality extends beyond coercive regula-

189. *See supra* Part II.A.3, Part II.B, Part II.D.

190. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985); JOHN RAWLS, POLITICAL LIBERALISM 190–95 (1993).

191. *See* RAWLS, *supra* note 190 at 190. There is an internecine debate between liberalisms that believe the framework can be defended procedurally or using only very thin substantive commitments, and more robust versions that consider fundamental elements to be substantive convictions that nevertheless leave room for substantial variation among citizens on questions of the good. *See* Greene, *supra* note 8, at 18–26. I leave this dispute to one side, and I disclaim any implication from the term framework itself that the thin conception is more defensible.

tions to cover government communications of approval and disapproval as well.[192] Another important feature of framework democracy is that religion is not given special solicitude, but instead represents just one dimension along which people may form understandings of what makes up a good life. Other deep and broad commitments also must remain free of government advantage or disadvantage.[193]

Framework democracy, it is safe to say, has traditionally appealed to liberals more than to political conservatives in America, particularly since around the middle of the twentieth century.[194] Liberals have envisioned a pluralism capable of welcoming and protecting racial and religious minorities along with other disadvantaged groups, while not sacrificing self-determination or national unity. However, some figures on the left have distanced themselves from that idea out of a mix of motives—one of which surely is the hope of deploying moral arguments for progressive causes.[195] And today some political conservatives are attracted to a political morality that is more formal and less substantive. On the whole and over time, however, framework democracy has been associated with political liberalism.

Government nonendorsement is entirely compatible with this conception. Everything that is prohibited by my analysis would also appear to be prohibited by this way of thinking about the proper role of American government. Certainly, racialized speech by government authorities violates the framework commitment to equal regard. Similarly, framework democracy would not tolerate official electioneering, because the independence of citizen deliberation and determination is one of its key structural features. Part of the function of free speech is to ensure that there is a meaningful distinction between the popular sovereign and the agents that do its bidding in the halls of government. Electioneering by the authorities threatens to collapse that distinction.[196]

192. Rawls would limit this restriction on government to fundamental issues of constitutional magnitude, but he presumably would not distinguish government conduct and expression.

193. Note that here framework democracy is distinct from Rawls's conception, which focuses on *comprehensive* conceptions of the good.

194. DWORKIN, *supra* note 190, at 191–92.

195. *See, e.g.*, STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 97–133 (2009).

196. *See supra* text accompanying note 76.

So government nonendorsement might add little to a framework understanding of American democracy. Yet importantly it does not cover all of the same territory—that is, it does not prohibit everything that framework democracy does. There are situations where government speech would offend the neutrality rule without amounting to impermissible endorsement. Think for instance of official pronouncements that endorse marriage over long-term cohabitation (putting aside same-sex couples), on the ground that marriage not only provides stability that is beneficial for society but also is morally preferable. That sort of position-taking *could* be disallowed by framework democracy (where it implicates comprehensive conceptions of the good), and yet it goes untouched by the constitutional theme of government nonendorsement, at least as I have been constructing it. Similarly, Congress can denounce abortion without crossing a boundary identified in this Article, so long as it avoids extreme tactics. In fact, government can take positions on a wide range of private commitments about which citizens hold passionate views, without implicating any limitations defended above.

Part of the gap might be explained by the difference between constitutionality, which is the concern of government nonendorsement, and political morality. Yet the line between constitutional rules and norms of political democracy may not be that definite. To the degree that a framework conception of political morality guides constitutional interpretation, a conflict between the two could develop. Kamenshine, for instance, has read something like a neutrality requirement for government speech into the First Amendment itself—a principle that is much broader than what I argue for in this Article.[197]

If government nonendorsement were taken to reflect an underlying political morality in a similar way, a true conflict would be set up between its motivating vision of American government and framework democracy. Translated into political morality, government nonendorsement would mean that the limits identified in this Article should function as the *only* re-

197. Kamenshine, *supra* note 10, at 1114. For another position that differs from Kamenshine's, see Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1285 (2007) ("The government, after all, is fully entitled to speak on many subjects, including metaphysics and sexual morality, subjects which may well express or reflect comprehensive viewpoints and about which the government has some obligation to respect the private judgment of individuals.").

strictions on government's power to endorse ideas. Within those limits, government should be free to favor or disfavor a wide range of views, even if they are comprehensive. That political morality would in fact conflict with framework democracy. Although this conflict is not required logically by the argument of this Article, my conclusion is that there is at least a possibility of real tension between the idea of government neutrality as to conceptions of the good and a transposition of government nonendorsement into the key of political morality.

The main alternative view of American political arrangements is even more difficult to reconcile with government nonendorsement. *Engaged democracy* holds that the state can, does, and should take active positions on questions of profound values for many citizens.[198] These issues go beyond framework questions and include ordinary policymaking matters like the importance of physical and spiritual health for society, the benefits of home ownership over renting, what sorts of substances people should be taking into their bodies, which family structures are best, how reproductive choices ought to be limited, what children should be taught in school, and so forth. Popular expression of convictions is the key mechanism here, supported by a conception of government as a central communicator and shaper of the values that appropriately characterize and unite the political community. So long as people are able to debate ideas like these without facing actual regulation or coercion, government can play a role in that debate, broadcasting majority sentiments and otherwise enriching the collective search for good policies and right morals. Any commitment to government neutrality is rejected as unworkable and undesirable.

Engaged democracy has been embraced by many American conservatives, although to various degrees and not universally.[199] Whatever their other political convictions, thinkers of this

198. *See* Greene, *supra* note 8, at 68 ("Government both may and should promote contested conceptions of the good, through direct speech acts and through funding private speech with conditions attached."); *cf.* DWORKIN, *supra* note 190, at 191 (characterizing a political morality that may lead to recognizably "conservative" political positions); Smith, *supra* note 5, at 946–47 (noting the impossibility of government neutrality even on questions of religion, and certainly on broader moral questions); *id.* at 952 (describing a "more robust, classical liberalism").

199. DWORKIN, *supra* note 190, at 192; Smith, *supra* note 5, at 968–69. *But see* Greene, *supra* note 8, at 25 (defending engaged democracy from a progressive perspective, but noting that "for many left-of-center scholars . . . an overriding concern appears to be the use of government speech to advance items on the right-wing agenda").

stripe feel that values or morals ought to have a (more) central role in democratic governance, and that the state ought to be able to (better) reflect and shape the commitments of its citizens. Partly, this attitude concerns religion proper, and is a reaction to the strict separation of church and state as a constitutional and political tenet. But partly, it goes beyond religion and reflects a belief that comprehensive morality is a proper object of legislation and policymaking. Some political progressives share that view,[200] but it is more commonly associated with conservative voices.

A version of engaged democracy may have been implicit in the reasoning of the *Summum* Court. It gave the impression that government can take public positions on a sweeping range of public questions, whenever it acts as speaker rather than censor or regulator. As I have said, there is a distinction between constitutional law and political morality that should be remembered, but even so the Court does seem to be envisioning a strong role for government in political and social discourse. Outside of religion, lawmakers can participate fully in the formation and evaluation of ideas and values among American citizens.

Steven Smith has envisioned something similar to engaged democracy in an impressive article on government speech. There he offers an alternative to the view that public officials ought to be neutral as to fundamental values, inside a framework of rights. Instead, he considers the possibility that the commitment to government neutrality ought to be abandoned, not just with respect to secular values, but with respect to religion as well.[201] Endorsements would only be prohibited where (1) government has been captured or commandeered by a faction and (2) the faction tries to instill teachings that are not closely related to the understood purposes of the government.[202] What purposes are "understood" to properly drive the govern-

200. *See, e.g.*, Greene, *supra* note 8, at 68 (embracing a robust role for government position-taking on moral questions); SHIFFRIN, *supra* note 205, at 197–233 (envisioning a fuller role for government arguments on moral questions than that envisioned by framework democracy).

201. Smith, *supra* note 5, at 964–65. Presumably, this license would extend to secular matters too.

202. *See id.* at 961–62. Part of the impulse seems to be that a captured institution would endorse positions opposed by some members. *Id.* at 959. But of course there is no constitutional restriction on government taking positions that some citizens oppose—even if they constitute a majority, and even if they are taxpayers who object to the way their money is being spent.

ment would depend mostly on public opinion and history.[203] So while the Pledge of Allegiance and the Motto "In God We Trust" would be acceptable—according to public sentiment and tradition—a proclamation favoring the theological doctrine of the Trinity would not be.[204] In other words, government endorsement has plenty of latitude to operate, with respect to religion and nonreligion alike, subject to minimal boundaries. Seemingly, there is no necessary reason a state could not proclaim itself "A God-fearing People" or even "A Christian State," so long as that message had widespread support and could be rooted in its background.[205] That is not entirely inconceivable in the United States today.

Government nonendorsement offers a different view of American democracy. Officials do not have latitude to endorse any and all values or ideas that many deem worthwhile (short of capture). Widespread impulses prohibit such endorsements in areas such as racialized speech, official electioneering, and messaging around same-sex marriage.[206] Commitments to full citizenship, equal citizenship, and the maintenance of a free society are too basic to American constitutionalism.

Putting these arguments together, government nonendorsement suggests a middle path between two ideal types of political morality. With respect to engaged democracy,

203. *Id.* at 964–65. While in theory it might be possible for a majority to constitute a faction—certainly Madison thought so—that seems not to be likely for Smith, because the very test for whether capture has occurred looks to whether it enjoys support that is widespread and longstanding. A consequence is that when a government proclamation is not the result of capture, minorities who disagree with it have little reason for complaint, including religious minorities. That is why the Pledge is unassailable. Yet government nonendorsement points to constitutional values that do protect minority groups precisely from majoritarian impulses, even with respect to pure government expression.

204. *Id.*

205. *Cf.* McCreary Cnty. v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

206. *Cf.* Greene, *supra* note 8, at 37–38 (noting "exception[s]" to his version of engaged democracy for "government speech that either (a) favors views supportive of the current administration or majority party while disfavoring views of the opposition, or (b) favors views extolling the virtues of a particular race, religion, or gender or casting aspersions on a particular race, religion, or gender"). Greene does not dwell on these exceptions, which seem to seriously limit his argument that government should have a fairly free hand to endorse secular commitments. *See id.*

it draws definite—albeit fairly wide—boundaries around the sorts of values that public officials may inculcate. With respect to framework democracy, government nonendorsement suggests a political morality that eschews neutrality on ordinary issues, even though it does not require that view as a matter of logic. So the argument of this Article may provide a fresh perspective on debates within political theory.

Fascinating questions remain about exactly *how* and *when* government may properly instill ideas—particularly questions on the ramifications of government disparagement for free speech principles. The next Section explores those ramifications.

B. FREE SPEECH THEORY

Government nonendorsement has a contribution to make to one important family of free speech thought—democratic speech theory. Specifically, it identifies places where collective expression should be limited in the name of preserving democratic deliberation. In this Section, I first explain this claim. Then I develop my argument from Part II that a commitment to full citizenship might best explain certain limitations on government endorsement grounded in the Speech Clause.

1. Advancing Democratic Speech Theory

Recognizing the principle of government nonendorsement advances democratic speech theory in one important respect. The contribution concerns a tension between two constitutional values that Robert Post once noticed.[207] On the one hand, the Constitution promotes a social space in which citizens may discuss and critique the actions of their elected representatives in government. We think of citizens as independent of government and of one another, and therefore capable of critically evaluating both. Democracy depends on the exercise of that critical evaluation, on the capacity to hold the government accountable, and that in turn requires a society that contains the conditions for its healthy exercise.

On the other hand, the political community must be able to define, express, and advance its collective values.[208] American citizens treasure their ability not only to critique the govern-

207. Post, *supra* note 25, at 193.

208. *Id.* For a similar juxtaposition, see SCHAUER, *supra* note 71, at 40–41.

ment, but also their power to direct their official representatives to articulate a conception of good public policy.

Normally, these two principles—democratic deliberation and collective expression—dovetail. Government officials understand that their prime directive is to implement their constituents' concerns. When they stray from that ideal, citizens hold them accountable through political reprimand or electoral defeat. Consequently, the government's objectives reflect some conglomeration of the considered views of those in the relevant jurisdiction.[209]

But occasionally they push against one another. Government speech presents one source of possible tension, when it works to distort or disable social discourse. That can happen in different ways and for different reasons—when officials articulate majority biases that stifle minority expression, when elected representatives seek to perpetuate their offices or preferences in an election setting, or possibly when public disparagement of ostensibly immoral conduct hampers advocacy of disfavored acts. In those situations, government speech may so disrupt the democratic processes that constitutional law must intervene. To identify those limits is to mediate between these two constitutional values. Under what circumstances will constitutional law refuse the community's desire to express its values in the name of healthy deliberation itself?[210]

Government nonendorsement can help answer that question. This Article has identified discrete places where constitutional law should interrupt government speech, and it outlines considerations that are relevant to identifying those situations in concrete scenarios.[211]

Post himself made only limited attempts to mediate between the two values he identified. He distinguished between conduct rules, which amount to regulations of private speech, and decision rules, which merely tell government actors how to allocate support or financial subsidies.[212] Both of these can operate within the social space of public discourse rather than the

209. Public choice theory complicates this picture, obviously, but not in a way that derails the line of argument that I am engaging.

210. This is a version of the more general paradox for a democratic theory of free speech that the provision sometimes limits the ability of a majority to effectuate its will. *See* SCHAUER, *supra* note 71, at 41. That can happen as readily when government regulates or censors minority speakers, *id.*, as when it speaks in ways that disrupt democratic deliberation.

211. *See supra* Part II.

212. Post, *supra* note 25, at 178–79.

managerial domain of government administration. Where a decision rule is at issue, policymakers have greater latitude to select the viewpoints that they wish to promote or amplify. My concern has been with the limits that need to be observed *even here*—the restrictions on government decision rules that shape its contributions to public discourse.[213]

Post recognized the need to identify a standard for constraining decision rules, and he argued that Owen Fiss had proposed the most promising standard.[214] Fiss had argued that government action may be limited whenever it is "impoverish[ing] public debate by systematically disfavoring views the public needs for self-governance."[215] Both writers acknowledged that implementing that standard would be a complex task, in which multiple considerations would matter.[216] They differed insofar as Post believed that it was too complex to be administrable by courts.[217]

Government nonendorsement locates discrete places where official expression is constitutionally constrained. These limitations are relatively easy to articulate and apply in situations of racialized speech, electioneering, different-sex marriage requirements, partisan gerrymandering, and official condemnation of abortion. In fact, courts have found some of the limits I defend to be administrable, although I have left judicial implementation to one side in this Article. Thinking about government nonendorsement could inspire scholars and courts to identify additional places where government expression works significant harm to democratic deliberation—and thus to freedom of expression itself.

In sum, my examples of limits on government speech provide guidance for resolving the tension between the value of deliberation and the value of collective self-determination. Government nonendorsement suggests places where the Fiss/Post standard should be implemented. This is a contribution in itself. Yet it also points to an altogether different way of thinking about government speech.

213. *See supra* Part II.B; *supra* note 27.
214. *See* Post, *supra* note 25, at 190.
215. FISS, *supra* note 71, at 42.
216. *See id*. at 44–45.
217. Post, *supra* note 25, at 190.

2. Free Speech and Full Citizenship

A different free speech rationale for limiting government expression is suggested by the arguments of Part II.[218] New to the literature, it suggests possibilities that are not available under the familiar libertarian or democratic approaches. Its core insight is that government presumptively works harm of constitutional magnitude when it engages in expression that constitutes citizens as disrespected or disparaged participants in political life. Just as government disfavor can render people unequal in their citizenship stature, so too it can impede liberties that are central to full citizenship.

For example, when the government campaigns against a political party, or against particular candidates, it thwarts their speech, participation, and association—it renders them debilitated as citizens. And when politicians gerrymander districts in order to sideline particular voters, it marks them as politically inconsequential.

Key to this understanding is that it is independent of empirical effects on speech. Even if political outsiders are not in fact chilled by hostile messaging that they likely will reject, they still have a reason to argue that their citizenship has been impeded.[219] So this conception does not depend on social science evidence that targeted people are likely to be silenced, or that their messages will be discounted by other listeners as a consequence of official disfavor. Rather, it recognizes an independent free speech problem with secular endorsements that mark them as ineffective. Moreover, sidelining speakers is constitutionally problematic as such, regardless of whether it compromises the independence of democratic deliberation.

Also important is that this theory focuses on messages by the government. Democratic speech theorists like Fiss address laws that seek to regulate, for instance, hate speech by private parties or indecent artistic expression.[220] But citizens experience a qualitatively different harm to full citizenship when they labeled inconsequential by the state itself. Freedom of expression is particularly concerned about such action by the state.[221]

218. *See supra* Part II.A.3, Part II.B, Part II.D.

219. *See* Anderson & Pildes, *supra* note 10, at 1531, 1538, 1542.

220. FISS, *supra* note 71, at 16 ("[T]he fear is that [hate] speech will make it impossible for these disadvantaged groups even to participate in the discussion. . . . [It] imped[es] their full participation in many of the activities of civil society, including public debate.").

221. This is not to say that a full citizenship theory of free speech neces-

Typically, proponents of expressive theories of law have applied their insights to equal protection and nonestablishment. Their main argument is that government disparagement of recognizably disadvantaged social groups trades on social meanings in a way that renders them subordinate as citizens. That offends equal protection in obvious ways, and it violates the nonendorsement value within Establishment Clause doctrine.[222]

My suggestion here is that government expression can also run up against a free speech value, namely the concern for full citizenship. Government is not now casting members of the targeted group in a social relationship, one that can be assessed as equal or unequal, but rather it is characterizing them with regard to their expressive capacities. It is imposing a legal construction on their political participation that qualifies as a constitutional harm. Partly, the analogy to equal citizenship works because freedom of speech has always included an equality component, which protects against government discrimination.[223] But more creatively, the full citizenship theory draws on the liberty or autonomy aspects of free speech. That is, it recognizes that liberty can be harmed by government disparagement regardless of any actual interference with expression, just as equality values can be offended even if members of targeted groups are not harmed in any tangible way or even if social prejudices are not actually strengthened. In both cases, government disparagement or denigration is objectionable in itself, because it constitutes citizens (as unequal or unfree).

Another way to put the point is to say that citizenship not only has equality aspects, which are already addressed by expressive theories of equal protection and nonestablishment, but also liberty aspects, which are addressed by this new theory of disfavored speakers. Just as it is comprised of membership, citizenship is comprised of political freedoms or capacities, among which freedom of expression is paradigmatic. Constitutional law not only guarantees equal citizenship—it also protects full citizenship.[224]

---

sarily would have nothing to say about situations where the government stands idly by while private parties disable the political participation of others. Yet additional arguments would be needed to show how the theory works in such situations.

222. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

223. *See* SCHAUER, *supra* note 71, at 41.

224. Yet another way to understand this theory is that it focuses on indi-

This full citizenship approach may better account for some instances of government nonendorsement that involve the Speech Clause. After all, racialized government speech may not always silence members of targeted minority groups, as required by democratic speech theory. And again, libertarian theories kick in only once individuals are thwarted in their speech. Yet constitutionality under free speech law need not turn on actual effectiveness.[225] For instance, Republicans may not be muffled every time public officials engage in politicking against them or their candidates. Yet casting Republicans as impeded participants in public debates ought to be constitutionally problematic. And that is true even though equal protection does not seem to be at issue, for the reasons given above.[226] Much the same is true of partisan gerrymandering. There, the devalued-speaker best captures the relevant constitutional harm.

What limits this approach? Like expressive theories in other contexts, it trades on social meanings. Only certain messages will carry the kind of "charge or valence" that triggers constitutional concerns.[227] That will depend not only on the social salience of the denigrated individual or group, and whether disfavoring them will be meaningful, but also on the significance of the message. So condemning smokers as part of a public health campaign will not have the same citizenship impact as sidelining members of racial groups or political actors. Again, subordination is not the lynchpin here, the way it is in equal protection contexts. Instead, the concern is with susceptibility to official designation as an unworthy speaker. But in both contexts objective meanings limit the principle.

Another limit follows from the fact that the approach is much more sensitive to hostility toward *people* than toward *ideas*. There is a meaningful difference between saying, in a

vidual dignity in its liberty aspects as well as its equality ones. Government must express sufficient respect for choices, including for decisions regarding speech or expression.

225. More profoundly, democratic theories of free speech struggle to offer a reason why exactly a majority ought not to be able to direct its elected representatives to utter even racialized messages that silence minorities, whereas a theory premised on full citizenship, comprised partly of the right to be regarded as completely capable of political expression, has little trouble explaining that imperative. *Cf.* SCHAUER, *supra* note 71, at 41 (looking to a principle of "equal participation" to supplement democratic theories of free speech, arguing that such a principle "is even more fundamental to the ideal of self-government than is the idea of majority power").

226. *See supra* Part II.D.

227. EISGRUBER & SAGER, *supra* note 43, at 126.

public school setting, that intelligent design does not count as science, despite claims to the contrary by some evangelicals, and teaching children that evangelicals themselves are unworthy of respect as contributors to public discourse.[228] Similarly, public officials can endorse virtually the entire Democrat platform in a particular locality without telling voters to vote Democrat or against Republican candidates.

Obviously, more work is needed in order to fully articulate a full citizenship theory of free speech, along with its implications for government endorsement. For now, I simply point out the novel theoretical implications of thinking about free speech limitations on government endorsement across a wide range of contexts.

C. IS RELIGION SPECIAL?

Government nonendorsement also impacts a prominent issue in religious freedom scholarship, namely whether religious commitments deserve special constitutional solicitude, as compared to other deep beliefs. Several influential writers have recently argued that it does not.[229] Others have resisted that claim, at least in certain contexts and to some degree.[230]

One of the ways that judges and scholars have long reinforced the exceptional constitutional status of religion is by pointing out that there is no government nonendorsement rule for subjects outside of religion. They assume that while government cannot endorse one religion over another, or religion over irreligion, it remains perfectly free to advocate for secular policies or philosophies.[231] This habit may have influenced the

228. *Cf.* JEREMY WALDRON, THE HARM IN HATE SPEECH 120–21 (2012) (distinguishing between "the respect accorded to a citizen," which must be maintained, and disagreement "concerning his or her social and political convictions," which should be welcomed even when it amounts to "the sharpest attacks").

229. EISGRUBER & SAGER, *supra* note 43, at 126; BRIAN LEITER, WHY TOLERATE RELIGION? 4 (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1355 (2012).

230. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 123–24 (2013) (arguing that religion is associated with a distinctive set of secular goods); Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 77–78 (2013), *available at* http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf (arguing that religion is a distinctive proxy for certain goods); Tebbe, *supra* note 18, at 1140–49.

231. *See supra* text accompanying note 8.

Summum Court when it named only the Establishment Clause as a constitutional limitation on government speech.[232]

Obviously, my argument here generally reinforces the contention that religion ought to be viewed as less constitutionally unique than it typically has been. Government nonendorsement imposes constitutional limits on the government's ability to embrace secular ideas that parallels the familiar prohibition on religious endorsement.

Consider here the ramifications of government nonendorsement for the influential work of Eisgruber and Sager. A central theme of their project is that religion does not deserve special constitutional status.[233] In the free exercise context, that means that religion gets protected from government discrimination only because it has drawn public discrimination that needs to be combatted. Beyond that protection, however, religious observers should not have extraordinary rights—for example, they should not be able to claim special exemptions from general laws.

When it comes to the Establishment Clause, however, the question of religion's specialness largely drops out of their book. Eisgruber and Sager adopt something like the endorsement test.[234] However, they do not dwell on the question of whether the same sort of prohibition applies to government endorsement of nonreligious ideas. Does their theory require that government speech be inhibited whenever it harms equal citizenship?

Government nonendorsement helps to answer that question—in the affirmative. Constitutional law presumptively limits all government speech that deploys social meanings in a way that harms full or equal citizenship in a free society.[235] And in subsequent work, Eisgruber and Sager actually do move in

232. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

233. EISGRUBER & SAGER, *supra* note 43, at 52 (arguing that apart from a concern for antireligious discrimination, there is no reason to give religion special constitutional status).

234. *Id.* at 122–23 ("'The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring))).

235. In fact, I would extend that concern beyond equal citizenship to a wider range of constitutional principles, as in the examples I have given in Part II.

that direction. They say that "[r]ace, sex and sexual orientation should all be constitutionally protected against public disparagement."[236] That move makes their critique of religion's anomalous constitutional statue even more powerful. Just as religious actors are not unusually *advantaged* on the free exercise, so too are they not unusually *disadvantaged* when it comes to nonestablishment.

Beyond the basic point that there are some secular analogues to the Establishment Clause, however, matters become more complicated. That is because the Establishment Clause has been understood to pursue various values in addition to equal citizenship. Some of those include: agnosticism as to religious truth,[237] institutional or jurisdictional separation of church organizations and government,[238] avoiding divisiveness along religious lines,[239] and substantive neutrality.[240] Whether all of these have secular analogues is a complex question.

My own view is that religious freedom law is polyvalent, comprised of constellations of values that vary from doctrine to doctrine within its broad ambit.[241] Some nonestablishment rules have parallels outside the religion context, while others do not. If that is correct, then it becomes difficult to generalize about whether and how religion is special with regard to government endorsement. Detailed analysis is necessary to discern exactly where and how the Constitution draws lines around secular government speech, and how those boundaries compare to the ones imposed by the rule of religious nonendorsement.

Consider a situation where the limits on religious endorsement are likely to be stricter than the limits on secular endorsement. Since Massachusetts legalized same-sex marriage, some public schools have been teaching students that such marriages are worthy of respect, in the sense that they are just as worthwhile for gays and lesbians and their families as traditional marriage is for heterosexuals.[242] That policy pre-

236. Eisgruber & Sager, *supra* note 197, at 1282–83.

237. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 146–53 (2006).

238. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 1–15 (2008).

239. *See* Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

240. Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

241. Tebbe, *supra* note 18, at 1127–28.

242. Religious parents challenged this practice, unsuccessfully. *See* Parker

sumably does not implicate equal protection for Eisgruber and Sager because it does not harm citizenship status. Now imagine that the school began teaching that Islam was worthy of respect in a similar way, namely that its teachings were just as good *for Muslims* as Christianity was for Christians or Judaism was for Jews. Some Christians and Jews would strongly disagree with that proposition—they would say that Islam is not worthwhile, even for Muslims. And such a curriculum would contravene the principle that government may not teach one version of religious truth or another.[243] It would be unconstitutional for reasons that are independent of equal citizenship—it would raise concerns over the theological capacity of government actors, as well as worry over entanglement. So this is a place where the constitutional standing of religion remains distinct, even accepting my argument for government nonendorsement.

In sum, the principle of government nonendorsement generally supports the argument that religion is not special, but it does not bolster that view in every particular.

CONCLUSION

The *Summum* Court was mistaken when it said that government speech is never limited by the Speech Clause, and it was wrong to give the impression that the only other constitutional restriction on official endorsement is the Establishment Clause. Instead, official speech is limited by a principle of government nonendorsement that cuts across various constitutional provisions and that brings them together to protect full and equal citizenship in a free society. Thinking carefully about how and why the Constitution constrains such expression also generates important insights into the nature of American democracy, into the operation of free speech protections, and into the special place of religion in constitutional law and politics.

v. Hurley, 514 F.3d 87, 90, 107 (1st Cir. 2008).

243. For detailed support of the principle that government may not take positions on questions of religious truth, see 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 57–60 (2008); Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1144 (2010).