

March 25, 2008

Dear Workshop Participants,

Please find attached a draft of my paper, *Free Speech Deference*. In response to comments during workshops last week, my thoughts have evolved, and I now plan to rework the draft substantially. Though I will present my revised ideas during the workshop, I would like to flag the main changes for you in advance. First, the current draft contrasts the approaches to judicial deference in government-as-manager and government-as-sovereign free speech cases, and then argues that the latter is the appropriate model for deference in all free speech cases. Instead of positing a proper model for free speech cases, I will contrast the two approaches to argue that the approach to judicial deference in government-as-manager cases provides insufficient protections for free speech values. Second, the current draft points to a variety of factors, including the existence of speech policies, that courts ought to evaluate before deferring in the government-as-manager cases. Instead, I will argue that courts ought to condition their deference in those cases on a finding that the challenged decision was made pursuant to an institution's speech policy. In other words, before deferring, courts should make two findings: (1) that the relevant institution has promulgated a speech policy, and (2) that the challenged decision is reasonably consistent with that policy.

Thank you for reviewing my draft, and I look forward to your comments.

Very best,

Gia Lee

# Free Speech Deference

Gia B. Lee\*

## Introduction

Free speech law has given short shrift to the issue of judicial deference. By “judicial deference,” I mean the practice by which courts, in deciding cases, privilege the legal and factual determinations of other decision makers over their own. Though courts considering free speech challenges regularly disagree on whether, and to what extent, they ought to accept, as given, the judgments of other institutional actors, neither free speech doctrine nor scholarship has articulated a coherent theory to explain the proper application of judicial deference or its limits. Indeed, conceptions of judicial deference in constitutional law remain largely under-theorized, and the limited attention to this topic thus far draws primarily on administrative law.<sup>1</sup> This Article seeks to begin developing an approach to judicial deference that focuses specifically on free speech law. Concentrating on situations in which *governmental* decision makers seek deference, the Article aims to specify both *when* courts ought to defer and *how* they ought to do so.

Free speech scholars often claim that judicial deference is largely the exception, rather than the rule, in cases involving free speech claims. A common view is that courts typically exercise their own, skeptical review of free speech claims, except in a limited category of cases involving speech within government institutions or funded by government resources.<sup>2</sup> In those cases, where the government is understood to be regulating speech in its “managerial” rather than “sovereign” capacities, the courts abandon “ordinary principles of first amendment jurisprudence” and largely defer to the judgments of other government decision makers. Such cases include those involving the military, government employees, prisons, and children in schools. C. Thomas Dienes, for example, argues, “[i]n these special exception cases, the Court abandons any special presumptions designed to protect free speech values—which are usually not even considered—in favor of a deferential posture which frequently appears to be nothing more than the general requirement of minimal rationality or a ‘hands-off’ policy using the rubrics of rationality review.”<sup>3</sup> Similarly, Stanley Ingber contends, “while first-amendment doctrine has developed to expand expressive liberty against the state acting

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<sup>1</sup> See, e.g., Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. \_\_\_ (forthcoming 2008). Daniel Solove provides a thoughtful historical account of deference in constitutional law. See Daniel D. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999).

<sup>2</sup> See, e.g., C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other “Special Contexts,”* 56 U. CIN. L. REV. 779, 784 (1987); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990).

<sup>3</sup> Dienes, *supra* note \_\_.

as sovereign, Supreme Court opinions over the past decade suggest that courts are to defer to rather than scrutinize the judgments of governmental decision makers when regulating expressive activity in institutional contexts such as public employment, school, and the military.”<sup>4</sup> Though free speech scholars espouse a broad range of views on whether, and, if so, to what extent and in what circumstances, courts ought to defer in cases arising in such institutional settings, they agree that judicial deference is a subject of particular concern when the government regulates speech in its managerial, rather than sovereign, capacity.<sup>5</sup>

But judicial deference is not limited to that setting. Even when the government acts in its sovereign capacity to regulate the speech of ordinary citizens, courts also regularly defer to the judgments of government decision makers. For example, when government decision makers regulate the time, place, and manner of speech in public forums, or limit symbolic conduct, courts commonly decline to apply strict scrutiny in favor of intermediate scrutiny and accept, with little question, the decision makers’ judgment that such restrictions are necessary and appropriate. In other words, under the ordinary principles of First Amendment jurisprudence, courts exercise varying degrees of judicial deference. In light of the sustained attention in the free speech literature to the practice of judicial deference in cases involving “government-as-manager” claims, it is noteworthy that no scholar has considered, as a matter of comparison, the myriad other situations when courts defer in free speech cases.

The different justifications for deference in the “government-as-manager” and “government-as-sovereign” cases might account for this unexamined phenomenon. In the former context, courts employ what I call “agent-based deference.” As they routinely do in administrative law cases, courts defer to the judgments of others because of the competences, roles, or status of the original decision maker. In the latter context, by contrast, courts practice what I call “action-based deference.” Deference turns not on the original decision maker’s attributes, but instead the nature of the challenged action and the constraints under which it takes place. Courts defer because they have “anti-censorial confidence,” or a reason to believe that official censorship is not afoot. Courts defer, in other words, when they perceive a diminished need for judicial review to preserve first amendment interests.

To be clear, the doctrine and scholarship relating to government-as-sovereign cases do not always speak in explicit terms of judicial “deference.” The doctrine usually calls for deference only implicitly by requiring courts to eschew strict scrutiny review in favor of varying degrees of less rigorous review. The scholarship refers to this less

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<sup>4</sup> Ingber, *supra* note \_\_.

<sup>5</sup> See, e.g., *id.*; Dienes, *supra* note \_\_, Horwitz, *supra* note \_\_, Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 U.C.L.A. L. REV. 1713 (1987); Robert Post, *The Management of Speech: Discretion and Rights*, 1984 S. CT. REV. 169, 196-201; Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L. J. 685; Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 U.C.L.A. L. REV. 1635 (2007).

exacting scrutiny as examples of more deferential review, but does not generally conceptualize the practice in terms of courts favoring other decision makers' judgments over their own. Indeed, some might question whether it is appropriate to categorize the application of lower level, and in particular intermediate, scrutiny as a form of judicial deference. As courts retain their own judgment to evaluate the ends and means of governmental action, some might argue that the courts do not defer to others' judgments, but simply rely on their own judgment to apply less exacting standards. Though applying intermediate scrutiny does not entail unquestioned acceptance of others' views, it nevertheless results in a greater willingness to accept them. As a matter of practice, moreover, courts in free speech cases are substantially less likely to challenge or override the original decision maker's judgment when they apply intermediate, rather than strict, scrutiny. Applying less exacting scrutiny thus constitutes a form of judicial deference, albeit not an absolute or robust form.

This Article argues that the approach exemplified in government-as-sovereign cases is the appropriate model for judicial deference in free speech cases. First, anti-censorial confidence grounds provide the most attractive reasons for courts to defer in free speech cases. Though there are other valid justifications for judicial deference in general, they generally have less force in free speech cases, or tend to prioritize non-free speech interests over free speech ones. Second, courts should base their deference determinations on the challenged decision or action, and the circumstances that gave rise to them. Consistent with free speech principles, courts should resist trusting government decision makers' tendencies or inclinations and assess instead the dependability of types of decisions. Instead of focusing narrowly on institutions and their decision makers, moreover, courts should consider more broadly the larger regulatory contexts that channel or limit governmental decisions.

In light of those prescriptions, the Article also argues for a revised approach to judicial deference in government-as-manager cases. After explaining the unique risks to first amendment values in such cases, it contends that courts ought always to practice "prudential deference," or judicial deference informed by prudential considerations. In particular, the Article maintains that courts should decline to defer unless they are reasonably confident that the government decision makers in question have acted in a good faith, first amendment-sensitive manner. The Article further argues that government institutions' adoption of publicly available, easily accessible speech policies should give courts sufficient, though by no means absolute, confidence to defer.

This Article proceeds in three parts. Section I maps out the terrain of deference arguments in free speech law doctrine and scholarship. It classifies the quite different types of arguments made by courts and commentators to justify judicial deference in government-as-manager versus government-as-sovereign contexts. Section II normatively assesses those arguments. Introducing the concepts of anti-censorial confidence and action-based deference, section II explains why the arguments made in government-as-sovereign contexts are generally more attractive from a free speech

perspective. Section III then makes the case for prudential deference in government-as-manager cases. A brief conclusion follows.

## I. The Free Speech Divide: Two Approaches to Deference

### A. Government as Manager: Agent-based deference

Free speech doctrine and scholarship provide a multitude of perspectives on whether, and to what extent, courts ought to defer to the judgment of government decision makers who regulate speech in their managerial capacities. Yet, regardless of their respective positions, the analyses share what I call an “agent-based” theory of judicial deference. By “agent-based,” I mean that the arguments for deference turn on attributes associated with the original decision maker or the institutions of which they are a part. In other words, the decision to defer turns in large part on who made the initial judgment. Contemporary free speech law doctrine and scholarship emphasize three bases for agent-based deference.<sup>6</sup>

#### 1. Epistemic concerns

A common set of arguments advanced to justify courts deferring in “government-as-manager” cases stresses the initial decision maker’s superior knowledge or judgment in a particular field. On this view, executive and administrative officials such as school administrators, prison wardens, and military officials have the relevant experience and expertise to reach decisions that ensure well-functioning institutions. Along with legislators, they also have superior institutional resources to study and acquire knowledge to achieve their organizational ends. Courts, by contrast, lack such specialized knowledge and resources, and thus are less capable of assessing the extent to which challenged speech-infringing actions are necessary or appropriate. Absent some clear indication of unreasonableness, courts thus ought generally to defer, and not second-guess, the more informed decisions of others.

This view pervades free speech doctrine. In the prison context, for example, while emphasizing the “‘inordinately difficult undertaking’ that is modern prison administration,”<sup>7</sup> the Supreme Court has repeatedly invoked the “professional expertise”<sup>8</sup>

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<sup>6</sup> Some courts and commentators have suggested a waiver-based argument for judicial deference. *See Connick v. Myers*, 461 U.S. 138, 143-44 (1983) (discussing the waiver argument as “unchallenged dogma” for most of the twentieth century); Moss, *supra* note \_\_ (critiquing this argument). They maintain that courts ought to accept the judgments of the initial decision makers because the parties raising the challenge have effectively agreed to be subject to those judgments. On this view, for example, courts should not intervene in public employment cases because, in choosing to work for the government, individuals have waived any right to object to employer restrictions on their speech. The waiver-based argument does not constitute an agent-based theory of judicial deference. Because this view has largely receded from the doctrine and commentary, I do not discuss it here.

<sup>7</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 85 (1987)).

of prison officials and the “planning[] and commitment of resources . . . which are peculiarly within the province of the legislative and executive branches of government.”<sup>9</sup> Those considerations, coupled with the fact that “the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management,” the Court has explained, call for courts to give broad deference to prison administrators.<sup>10</sup> In the military context, the Court has similarly emphasized the need for courts to “give great deference to the professional judgment of military authorities.”<sup>11</sup>

Some scholars, both explicitly within free speech law and not, have also focused on epistemic capacities as grounds for deference. First Amendment scholar Bruce Hafen, for instance, makes this point with respect to school officials. School administrators, rather than courts, understand “educational philosophy,” he argues, and courts thus ought to be “cautious about assuming that the blunt tools of legal (even ‘constitutional’) analysis are a preferred substitute for the subtle, personal, extended process we call education.”<sup>12</sup> Similarly, education law scholar David A. Diamond, maintains that courts should defer to “the good faith judgment of the expert authorities” because “[t]he judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning.”<sup>13</sup>

Often, the doctrine and scholarship posit that deference is due because of the decision maker’s superior knowledge on matters that are apart, or distinct, from free speech values and interests. That is, for instance, the prison warden knows about the dangers endemic to correctional institutions,<sup>14</sup> or the military official understands the order and discipline to which uniformed service members must be subject.<sup>15</sup> In these situations, the warden and official receive deference because of their better knowledge of the interests that weigh against vigorous enforcement of the First Amendment. Courts defer not because of, but in spite of, the others’ appreciation of free speech values and interests.

On other occasions, by contrast, the superior knowledge or expertise attributed to the initial decision maker concerns free speech interests and values themselves. Acting

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<sup>8</sup> Bell v. Wolfish, 441 U.S. 520, 548 (1979) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)); see also Thornburgh, 490 U.S. at 407-08.

<sup>9</sup> Turner, 482 U.S. at 85.

<sup>10</sup> Thornburgh, 409 U.S. at 407-08 (citing Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)).

<sup>11</sup> See Goldman v. Weinberger, 475 U.S. 503, 507 (considering free exercise claim). Notably, in a recent case, the Supreme Court did not defer to a law school’s judgment or expertise about how best to implement its educational mission. See Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 U.C.L.A. L. REV. 1613 (2007) (discussing *FAIR v. Rumsfeld*, CITE)

<sup>12</sup> Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 663, 702-03 (1987).

<sup>13</sup> David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497 (1981).

<sup>14</sup> See sources cited in notes \_\_\_\_.

<sup>15</sup> See sources cited in notes \_\_\_\_.

within special “First Amendment institutions,”<sup>16</sup> government decision makers such as school officials, journalists, or librarians ought to receive deference, some argue, because they have better judgment than do courts on how best to promote and implement free speech values and interests. An early proponent of this view, Bruce Hafen, for example, maintains that, in helping children to develop their minds and expressive powers, “the schools’ primary purpose is to contribute affirmatively to the development of the American system of free expression.”<sup>17</sup> More recently, Frederick Schauer and Paul Horwitz have similarly noted the special roles of editors<sup>18</sup> and university faculty,<sup>19</sup> respectively, in enhancing First Amendment values and interests.

## 2. Democratic concerns

Another set of arguments for deference in free speech cases stresses democratic concerns. Often invoking separation of powers and federalism principles, these arguments emphasize that the Constitution commits some types of government decision-making responsibilities to politically accountable officials. In light of those commitments, they maintain, the judiciary ought to defer to those officials’ judgments and thereby resist encroaching upon distinctly political or local spheres of authority.

Advanced primarily in free speech doctrine, rather than scholarship, democratic arguments serve to justify judicial deference with respect to a broad range of government institutions. For the military, for instance, separation of powers arguments regularly appear in the caselaw. Courts should defer to military officials’ judgments not only because of their expertise, but also because “the military authorities have been charged by the Executive and Legislative branches with carrying out our Nation’s military policy,”<sup>20</sup> and “both of those branches have been conferred that power explicitly by the Constitution.”<sup>21</sup> Similarly, courts should defer to Congress’ judgments about the military because “[j]udicial deference is . . . at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”<sup>22</sup>

For the prisons and schools, courts emphasize both separation of powers and federalism concerns. In *Turner v. Safley*, for example, the Supreme Court explained that beyond

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<sup>16</sup> Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L. J. 685; Paul Horwitz, CITE.

<sup>17</sup> See Hafen, *supra* note \_\_, 1988 DUKE L. J. at 701.

<sup>18</sup> See Frederick Schauer, *Principles, Institutions and the First Amendment*, \_\_ HARV. L. REV. \_\_ (199\_\_).

<sup>19</sup> See Horwitz, *supra* note \_\_, at \_\_.

<sup>20</sup> See *Etheredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986)); *Christoffersen v. Washington State Air Nat. Guard*, 885 F.2d 1437 (9th Cir. 1988) (quoting *Goldman*, 475 U.S. at 508).

<sup>21</sup> See John F O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 270 (2000) (summarizing the doctrine).

<sup>22</sup> *PMG International Division, L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 50 (1981); see also *General Media Communications, Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997) (citing *Rostker*, 453 U.S. at 70).

requiring the expertise, planning, and resources of the legislative and executive branches, “[p]rison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.”<sup>23</sup> It then added, “Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.”<sup>24</sup> In the education cases, the Supreme Court has repeatedly stressed that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”<sup>25</sup>

### 3. Pragmatic concerns

Another set of arguments in support of judicial deference in “government-as-manager” cases emphasizes pragmatic concerns. These arguments fall into two categories.

#### a. Need for speech restrictions

One category of pragmatic arguments focuses on the heightened need for, or inevitability of, speech restrictions within certain government institutions. On this view, courts should give decision makers in government-as-manager cases broader latitude to regulate speech because they require it to accomplish their institutional objectives. As the Court has stated emphatically with respect to public employment cases, for instance, the government has “far broader powers” to regulate speech as an employer than as a sovereign because of “*the practical realities of government employment, and the many situations in which . . . the government must be able to restrict its employees’ speech.*”<sup>26</sup> The Court explained:

The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relative subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.<sup>27</sup>

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<sup>23</sup> 482 U.S. 78, 85 (1987); *see also* Power v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) (“The prison system is under the administration of the Attorney General . . . and not of the district courts. The court has no power to interfere with the conduct of the prison of its discipline.”).

<sup>24</sup> *See id.* (citing Procunier v. Martinez, 416 U.S. at 405).

<sup>25</sup> Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (citing Board of Ed. of Hendrick Hudson Central School Dist. V. Rowley, 458 U.S. 176, 208 (1982); Wood v. Strickland, 420 U.S. 308, 326 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968)); *see also* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

<sup>26</sup> Waters v. Churchill, 511 U.S. 661, 672 (1994) (italics in original).

<sup>27</sup> *Id.* at 675.

Along similar lines, in explaining why First Amendment review of military regulations should be “far more deferential” than constitutional review of similar civilian laws or regulations, the Court has stated, “to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps.”<sup>28</sup>

Stressing the distinct realms of “managerial domains” and “public discourse,” Robert Post has made a similar argument.<sup>29</sup> Within managerial domains, the government acts instrumentally, to achieve “objectives that have been democratically agreed upon.”<sup>30</sup> Because of this “instrumental orientation,” Post argues, government decision makers must have broad authority to regulate speech.<sup>31</sup> “Thus the state can regulate speech within public educational institutions so as to achieve the purposes of education; . . . within the judicial system so as to attain the ends of justice; . . . within the military as to preserve the national defense; . . . [and] the speech of government employees so as to promote the efficiency of the public services [the government] performs through its employees.”<sup>32</sup> Outside of those domains, Post explains, lies the realm of public discourse, in which “a perpetual and unruly process” forges public opinion.<sup>33</sup> Because of the critical role an independently formed public opinion (and the public perception thereof) plays in legitimizing democracy, “the significance and force of all potential objectives are taken as a legitimate subject of inquiry.”<sup>34</sup> In the realm of public discourse, therefore, attaining governmental ends should receive less priority, and government authority to regulate speech should be very limited.<sup>35</sup>

b. Costs of judicial review

The other category of pragmatic arguments stresses the unique costs of judicial review in government-as-manager cases. Some versions of these arguments relate to epistemic concerns. The emphasis here is that judicial error in evaluating government interests to regulate speech can have especially bad consequences. On this view, for example, if courts miscalculate and undervalue a prison warden’s interest in limiting prisoner communications, grave harm such as “riot[s]” or other forms of “violent confrontation and conflagration” may result.<sup>36</sup> Likewise, failure to appreciate the military’s interests may “undermine the effective of response to command,” thus “not only hazarding [men in combat’s] lives but ultimately . . . the security of the Nation

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<sup>28</sup> *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

<sup>29</sup> *See* Post, *Public Forum*, *supra* note \_\_. Post introduces these concepts to explain why government decision makers should have broader authority to regulate speech. He does not focus on this point as a justification for “deference.” He appears to define deference more narrowly, as when courts decline to exercise judicial review. *See id.* at \_\_.

<sup>30</sup> Post, *Subsidized Speech*, 106 YALE L.J. 106, 164 (1996).

<sup>31</sup> Post, *Public Forum*, *supra* note \_\_, at 1788.

<sup>32</sup> Post, *Subsidized Speech*, *supra* note \_\_, at 164 (internal quotations omitted).

<sup>33</sup> Post, *Public Forum*, *supra* note \_\_, at 1788.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Jones v. North Carolina Prisoner’s Union*, 433 U.S. 119, 132-33 (1977).

itself.”<sup>37</sup> In other words, the implicit argument is that, even if courts are equally likely to commit errors in “government-as-sovereign” and “government-as-manager” cases, the potential harm is greater in the latter context and thus judicial deference is appropriate.

Other arguments stress the costs of judicial review independent of courts’ epistemic capacities. On this perspective, even if the courts are as good as, or even better than, other government decision makers in correctly adjudicating the competing First Amendment and government interests in any given case, there are still reasons for courts to defer. This point is implicit in Robert Post’s argument that “the very process of judicial review” poses potentially adverse consequences to institutional authority.<sup>38</sup> Judicial review of institutional rules, he maintains, can “affect not merely the behavior specifically governed by these rules, but also the institutional culture or way of life which the [institution’s] authority structure as a whole is designed to create.”<sup>39</sup> He points to judicial review of military orders, for instance, as potentially “undermin[ing] that ‘instinctive obedience’ thought necessary for the achievement of the ‘military institutions.’”<sup>40</sup>

This theme—that the practice of judicial review itself, regardless of its outcome in any specific case, threatens governmental institutions—also underlies the repeated warnings about encouraging excessive, and often baseless, litigation. Concerning the workplace, for example, courts and scholars have consistently stressed the need for courts to defer to employers’ exercise of managerial discretion and thereby to avoid “constitutionaliz[ing] the employee grievance.”<sup>41</sup> Otherwise, they warn, active judicial superintendence of speech claims “would mean that every remark—and certainly every criticism of a public official—would plant the seed of a constitutional case.”<sup>42</sup> Echoing similar concerns, Justice Breyer has explained the heightened difficulty courts face in providing “practically valuable guidance” for school speech claims:

[T]he more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.<sup>43</sup>

The pragmatic concerns involve considerations of cost to not only the institutions whose judgments are under review, but also the courts. Courts and scholars argue that

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<sup>37</sup> *Parker v. Levy*, 417 U.S. 733, 759 (1974).

<sup>38</sup> Robert Post, *Public Forum*, *supra* note \_\_\_, at \_\_\_.

<sup>39</sup> *Id.* at \_\_\_.

<sup>40</sup> *Id.* at \_\_\_.

<sup>41</sup> *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

<sup>42</sup> *Connick*, 461 U.S. 138..

<sup>43</sup> *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (Breyer, J., concurring in part and dissenting in part).

the flood of lawsuits engendered by active judicial oversight will not only undermine the initial government makers' institutional authority but also overwhelm the courts.<sup>44</sup>

## B. Government as Sovereign: Action-based deference

Free speech law conceives of judicial deference in markedly different ways when the government acts in its sovereign, as opposed to managerial, capacity. Rather than asking who made the decision and whether courts ought to defer to that decision maker, the doctrine and scholarship focus on what decision was made and whether that decision calls for heightened scrutiny. In other words, deference decisions turn on the nature of the decision or the circumstances that gave rise to it, not the status, attributes, or needs of the initial decision maker. The doctrine and commentary emphasize three decision-based factors that should guide courts' deference decisions.

### 1. Censorial Purpose

When the government acts in its sovereign capacity, the most significant factor affecting the degree of judicial deference is the governmental purpose underlying the action. When government decision makers restrict speech because of concerns about its content, or, in other words, its communicative impact or message, then courts normally review the challenged action with the strictest scrutiny. They will effectively substitute their own judgment for the initial decision maker to determine whether a compelling interest justified the restriction and, if so, whether there were any less speech-restrictive means that could have achieved that interest. By contrast, when government decision makers restrict speech for content-neutral reasons, or for reasons other than its communicative impact or message, then courts often apply a less rigorous scrutiny, largely deferring to the initial decision makers' judgment.<sup>45</sup>

The various First Amendment doctrines that rely on this content-based versus content-neutral distinction illustrate this emphasis on purpose. For example, when the government regulates the time, place, or manner of speech, rather than its content, courts normally review such regulations with only a weak form of intermediate review.<sup>46</sup> Yet, when the court suspects that the actual, though perhaps unstated, purpose of a time, place, or manner regulation is to target speech with a certain content, then the courts appear to apply a more searching version of intermediate review.<sup>47</sup> For example, in *Martin v. Struthers*, in which a Jehovah's Witness challenged her conviction under a city ordinance banning door-to-door leafleting, the Court noted that the law would primarily affect "the

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<sup>44</sup> See, e.g. *id.*; *Garcetti*, 126 S.Ct. 1951..

<sup>45</sup> The content-neutral, content-based distinction in First Amendment jurisprudence has received considerable scholarly attention. See, .e.g., Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, CITE; Martin R. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L. J. 727 (1980).

<sup>46</sup> CITE.

<sup>47</sup> See Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 79 (1987).

poorly financed causes of little people.”<sup>48</sup> The city justified the ordinance as a means to protect the city residents’ from “annoyance,” but the Court was skeptical of that justification because the law did not apply to door-to-door salesmen.<sup>49</sup> Though the Court did not explicitly state so, it appeared to doubt the neutrality of the government’s purposes,<sup>50</sup> and held the ordinance unconstitutional after “weigh[ing] the circumstances . . . and apprais[ing] the substantiality of the reasons advanced in support of the regulation.”<sup>51</sup>

For restrictions on symbolic conduct, the Supreme Court has made the search for illicit purposes explicit. There, courts evaluate four factors, including whether the “governmental interest is unrelated to the suppression of free expression.”<sup>52</sup> This purpose inquiry plays a switching function, determining whether strict scrutiny or a weak form of intermediate scrutiny applies. If a court concludes that fear or disapproval of the conduct’s symbolic meaning gave rise to the challenged restriction—as, for example, the Supreme Court concluded with respect to several statutes that prohibited defiling or burning the American flag,<sup>53</sup>—then the court applies strict scrutiny.<sup>54</sup> By contrast, if a court concludes the challenged restriction had no censorial purpose, then the court largely defers to the initial decision makers’ judgment.<sup>55</sup> The same dynamics are at work for what are commonly referred to as “incidental restrictions on speech.”<sup>56</sup> If a government regulation directed at conduct limits speech incidentally—as when, for example, a law’s general prohibition of discriminatory employment practices sanctions penalties for sexually derogatory comments<sup>57</sup>—courts do not normally apply strict scrutiny in reviewing the challenged punishment.

Applicable primarily in the context of restrictions of sexually explicit speech, the “secondary effects” doctrine also makes clear the importance of censorial purpose. According to this doctrine, even regulations that are on their face content-based do not receive strict scrutiny if the government can justify them “without reference to the content of the . . . speech.”<sup>58</sup> Thus, for example, in several cases involving zoning laws targeting establishments offering sexually explicit films or shows, the Supreme Court

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<sup>48</sup> *Martin v. Struthers*, 319 U.S. 141, 146 (1943)

<sup>49</sup> *See id.* at 144;

<sup>50</sup> *See id.* at 153 (Frankfurter, J.,) (noting the “wanting in explicitness” of the Court’s conclusions concerning the law’s underinclusiveness); *see also* Stone, *supra* note \_\_, at 100 (suggesting that the underinclusiveness in *Martin* “raises the spectre of governmental discrimination”).

<sup>51</sup> *See* *Martin*, 319 U.S. at 144; *see also* Stone, *supra* note 48-50 & n. 11 (suggesting that the standard of review applied in *Martin* was relatively stringent, compared to other standards applied to content-neutral restrictions).

<sup>52</sup> CITE. Courts also examine whether XXX.

<sup>53</sup> *Texas v. Johnson*, 491 U.S. 397, 418 (1989); *United States v. Eichman*, 496 U.S. 310, 315 (1990).

<sup>54</sup> CITE.

<sup>55</sup> acknowledge difference between purpose and motive. also acknowledge legislative versus individual administrator

<sup>56</sup> *See generally* Michael C. Dorf, *Incidental Restrictions on Fundamental Rights*, 109 HARV. L. REV. 11 75 (1996).

<sup>57</sup> *See* *RAV v. City of St. Paul*, 505 U.S. 377, 389 (1992).

<sup>58</sup> CITE.

declined to apply strict scrutiny on the ground that the government had not acted because of any hostility to the ideas expressed therein.<sup>59</sup> In the Court's view, the government sought only to avoid the negative impacts, such as higher crime and decreased property values, associated with physical presence of the sexual establishments.<sup>60</sup> The Court thus largely deferred to the zoning bodies, requiring only that they had a reasonable basis to regulate.

## 2. Substantial censorial effect

Under current doctrine, once courts conclude that a challenged action did not result from a censorial purpose, they are generally far less likely to apply strict scrutiny.<sup>61</sup> Several decades ago, the governing doctrine also examined the likely effect of speech restrictions to determine the proper standard of review.<sup>62</sup> If a restriction banned an entire medium of communication, and thus likely had a greater censorial effect on particular speakers or ideas, the courts applied a form of strict scrutiny.<sup>63</sup> Though this concern has largely faded from First Amendment doctrine, it resurfaces occasionally in First Amendment cases,<sup>64</sup> and remains an important consideration for deference in the free speech commentary.<sup>65</sup>

## II. Toward a Free Speech Deference

The previous section mapped free speech doctrine and scholarship's approaches to judicial deference in First Amendment cases. This section turns to a normative assessment of those approaches.

### A. Grounds for Deference

#### 1. Anti-censorial confidence

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<sup>59</sup> See *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976); *Barnes v. Glen Theatre inc.*, 501 U.S. 560, 561 (1990).

<sup>60</sup> As Susan Williams has explained, “[s]econdary effects are, in fact, noncommunicative effects arising from the speech as a physical event in the world, not from the communicative aspect of speech. That is, the causal chain connecting speech to a secondary effect does not include a link that takes place in the mind of a recipient of the speech. . . . A drop in property values is . . . a noncommunicative harm. Even if all of the people who actually entered the ‘adult’ theater were deaf and blind, and therefore unable to receive any message from the speech, the property values in the neighborhood of the theater would still drop as long as the business continued to operate.”

<sup>61</sup> See Williams, *supra* note \_\_, at 624; Stone, *supra* note \_\_.

<sup>62</sup> See *id.*

<sup>63</sup> See, e.g., *Schneider v. State*, 308 U.S. 14 (1939); *Martin v. Struthers*, 319 U.S. 141 (1943); see also *Kovacs v. Cooper*, 336 U.S. 77 (1949) (Black, J., dissenting).

<sup>64</sup> See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994); *Watchtower Bible & Tract Society v. Stratton*, 536 U.S. 150, 151 (2002);

<sup>65</sup> See, e.g., Stone, *supra* note \_\_, Williams, *supra* note \_\_.

In the government-as-sovereign cases, the courts defer for what I call anti-censorial confidence reasons. That is, they defer to the initial decision maker's judgment because there are indicators that reasonably suggest that the government has not acted to censor speech. By "censor" speech, I mean that government decision makers have either (1) sought to suppress speech based on mere fear of, or hostility to, the ideas or messages expressed therein, or (2) acted, without strong justification, in a manner that has the effect of suppressing a substantial amount of speech overall or a particular set of messages or ideas

Anti-censorial confidence reasons provide strong grounds for courts to defer in free speech cases. The argument here is that courts ought to defer because judicial review is largely unnecessary to protect free speech interests; that is, there is less need for courts to monitor government decisions to vindicate First Amendment rights. The argument's force becomes evident in light of the purpose of judicial review in free speech cases. We empower courts to review free speech challenges primarily for deterrence reasons: to reduce the likelihood that government decision makers will violate First Amendment rights.<sup>66</sup> We expect courts to interpret, with their best efforts, what the First Amendment demands of government decision makers, and to assess whether government decision makers have met those requirements. In maintaining that courts should defer because they are reasonably confident that the original government decision maker has neither sought to censor speech, nor effectively censored speech, an anti-censorial confidence argument aligns the reasons for deference with the reasons for judicial review.

Judicial review deters First Amendment violations by threatening government decision makers with the possibility of having to defend their decisions in a judicial forum. Knowing that they may have to give reasons for their decisions and that a court would then determine whether those reasons are adequate, government decision makers are more likely to proceed cautiously before regulating in a way that could infringe on free speech rights.<sup>67</sup> In order to serve as an effective deterrent, judicial review must satisfy at least two pre-conditions. First, government decision makers must perceive courts to be impartial, or at least not partial towards the government. The threat of judicial review will encourage government decision makers to regulate carefully only if they believe that courts will rule cases based on their merits and not unduly favor the government.<sup>68</sup> Second, government decision makers must perceive courts' decisions to be reasonable. Judicial review will encourage government decisions to consider the First

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<sup>66</sup> Judicial review serves other purposes in free speech cases (e.g., formally announcing publicly held constitutional values, or recognizing an individual's dignity to challenge government decision makers in an official forum), but the deterrence function is most significant.

<sup>67</sup> Cite to accountability literature. It is true that some decision makers will react by simply trying to conceal their true censorial motives. Rarely, however, will judicial review encourage decision makers to violate the First Amendment when they would not otherwise.

<sup>68</sup> CITES.

Amendment's requirements carefully when regulating only if courts reach decisions based on reasonable, or understandable, interpretations of the amendment.<sup>69</sup>

Some might question whether deterrence through judicial review is necessary given our political processes and the potential for democratic accountability more generally. But, even assuming fair and open political processes, judicial review inhibits government decision makers in ways distinct from, and in some ways more powerfully than, political pressures. In the judicial context, government decision makers are more likely to face free speech challenges on less widely controversial issues and from less organized or politically powerful individuals. Because the barriers to bringing a First Amendment challenge in courts are relatively minimal, government decision makers must be wary of a challenge for any decision. Also, because courts, unlike political opponents, can immediately invalidate individual decisions, government decision makers have far less room to maneuver to avoid giving reasons; their abilities to change the topic or divert attention towards other subjects are much more limited.

As discussed above, free speech doctrine in government-as-sovereign cases has largely moved away from examining a decision's effects, and has tended to focus exclusively on its purposes for deference decisions. But courts should have anti-censorial confidence to defer only if they are confident that neither the purpose nor the effects of a decision are improper. The First Amendment serves an "eclectic" set of values, including, among others, facilitating the search for truth, enabling the project of self-government, allowing self-realization and self-fulfillment, and limiting governmental entrenchment or incompetence.<sup>70</sup> As Susan Williams has discussed in detail, protecting this broad range of First Amendment values requires scrutiny of both the purposes and effects of governmental speech restrictions.<sup>71</sup> For some values, such as limiting governmental entrenchment, it might be sufficient for courts to root out censorial purposes. For truth or self-realizations aims, by contrast, guarding against the adverse effects of speech restrictions, rather than the improper purposes behind them, is more important. To protect some values effectively, and certainly to promote all of them, courts should take into account both the purposes and effects of governmental decisions in determining whether to defer.

## 2. Epistemic capacities

Judicial review in free speech cases rests on the assumption that courts will reach reasonable decisions, not necessarily the best ones. It does not presume that courts have greater knowledge or wisdom than the original decision maker in assessing the competing governmental interests at stake. Indeed, the initial decision maker often has greater knowledge or expertise about the empirical conditions that might justify limiting free

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<sup>69</sup> To satisfy reasonableness, decisions must at least fall within a predictable range and treat like cases alike. Cf. Scalia, *The Rule of Law as a Law of Rules* (arguing that the rule of law demands, *inter alia*, equal treatment and predictability).

<sup>70</sup> See, e.g., Frederick Schauer, Steven Shiffrin, Susan Williams.

<sup>71</sup> See Williams, *supra* note \_\_, at \_\_.

speech rights, or more capacity to amass that knowledge before rendering a decision. In evaluating whether student expression will interfere with the educational process, for example, educators will have more informed opinions about the nature of the process, and the factors that will hinder it.<sup>72</sup> Similarly, in assessing whether a group of angry listeners is prone to become violent, police officials will have more experience and familiarity in handling crowds and predicting the need for violence prevention measures.<sup>73</sup> Likewise, in determining whether political campaigning by public employees will adversely affect public perceptions of fairness in elections, legislatures will have more time and resources to study the issue thoroughly.<sup>74</sup> In other words, we empower courts to decide free speech cases and to articulate the contours of First Amendment rights not because of, but despite judges' understandings of the regulatory context. Arguments for judicial deference in free speech cases based solely on the initial decision maker's superior epistemic capacities are thus unpersuasive.

Epistemic arguments for deference in a subset of free speech cases would be persuasive only if two conditions were met. First, it must be that courts know significantly less about free speech issues in some regulatory contexts than others that are regularly subject to heightened First Amendment review. The relevant difference is not between the courts' and initial decision maker's expertise, but instead between the degree of specialized knowledge necessary to decide First Amendment questions in some regulatory contexts rather than others. Second, the courts' inferior knowledge of those contexts must be so insufficient that courts are unable to render reasonable decisions on the First Amendment questions presented. It bears emphasis that the relevant question for deference purposes is whether the courts can reach reasonable decisions, not the best ones.

But neither of those requirements is readily met in free speech cases. The range of specialized knowledge necessary to resolve free speech questions is quite narrow. Many issues ultimately entail empirical judgments about speech's and speech restrictions' likely impact on human motivations and social interaction. Others involve more complicated judgments concerning, for example, pedagogical processes, artistic merit, and prison conditions. Though making good judgments is often difficult, and, of course, can benefit from informed opinions, litigants can usually explain, with relative ease, the relevant factors or considerations in a clear and understandable way. Courts generally need not master inaccessible or remote bodies of knowledge to reach reasonable judgments on free speech matters. Unlike some patent or environmental law questions, for example, free speech questions do not presuppose a fluency in mathematic principles or biological processes.

The recurring expertise-based arguments for judicial deference in military cases are illustrative here. Courts and scholars regularly maintain that, because the military occupies a "separate society," and demands unparalleled degrees of authority and

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<sup>72</sup> See, e.g., sources cited in n. \_\_\_, *supra*.

<sup>73</sup> See *Edwards* and other cases.

<sup>74</sup> cite to article (Devins?), arguing that legislatures often do not make use of those resources.

obedience to function, courts lack the “specialized knowledge” necessary to review military judgments on the need to regulate expressive (or other) activities.<sup>75</sup> But that contention is unpersuasive. Though military officials undoubtedly have more expertise about how best to manage or operate military establishments, that ought not to be determinative. The pertinent issue is whether alleged First Amendment violations raise such complex issues that it would be difficult for court to reach reasonable decisions on the First Amendment claims. Even if, for example, courts might not at first appreciate why the military might deny a serviceman’s request to wear a yarmulke in observance of his religious beliefs,<sup>76</sup> or might exclude outsiders from speaking on a base,<sup>77</sup> military officials could easily explain their concerns so that courts could have a relatively clear understanding of what was at stake. Determining whether those forms of expression would interfere excessively with the military’s functioning would ultimately turn on judgments about human motivations and social interaction, not some impenetrable military knowledge. Courts might reach what most experts would agree to be the wrong decisions, but they are unlikely to render regularly judgments that are arbitrary or capricious.

### 3. Democratic arguments

While judicial review’s primary purpose illustrates the limits of epistemic arguments for deference in free speech cases, its practice clarifies the shortcomings of democratic arguments. In the United States, courts generally have not only the authority to declare when government decision makers have violated constitutional remedies, but also the power to remedy those violations.<sup>78</sup> Courts can, among other things, invalidate duly enacted legislation, enjoin administrative and executive practices, and order specific relief. We accept the democracy-infringing consequences of this form of judicial review in free speech cases generally, and thus it is no argument that courts ought to defer in some cases simply to avoid displacing the decisions of politically accountable decision makers. On that view, courts would have to defer in the vast majority of free speech cases.

In order for democratic arguments to be persuasive, they must establish why some free speech cases demand greater respect for political accountability than do others. As with the epistemic arguments, in other words, the relevant comparison is not between the comparative roles or characteristics of courts and other decision makers, but between the courts’ roles in some free speech cases as opposed to in others. Some cases suggest that the Constitution’s explicit textual commitment of some powers to the executive or

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<sup>75</sup> See sources cited in n. \_\_\_, *supra*.

<sup>76</sup> case cite.

<sup>77</sup> case cite.

<sup>78</sup> For thoughtful discussions of varying forms of judicial review, see, for example, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 A. J. OF COMP. L. 707 (2001); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

legislative branch distinguish the judicial role in the subset of cases questioning those powers' exercise. On this view, for example, courts ought to defer to the President's exercise of his Commander-in-Chief power because of its specification in the Constitution.<sup>79</sup> Yet that argument again proves too much. The Constitution explicitly gives Congress the power to regulate interstate commerce and to lay and collect taxes, and it would effectively eviscerate free speech protections if the court were to defer to congressional decisions restricting speech enacted pursuant to those powers.

#### 4. Pragmatic arguments

The two types of pragmatic arguments for judicial deference have very different implications for free speech analysis. The first type, which focuses on the heightened need for, or inevitability of, speech restrictions to accomplish governmental missions, is a type of anti-censorial confidence reason. That is, the argument maintains that, because government decision makers often have legitimate reasons in some contexts to regulate speech, courts should have greater confidence that the challenged restriction does not constitute impermissible censorship. Put more simply, courts ought to defer to the initial decision maker's judgment because they have less reason to assume that any given decision violates the First Amendment.

Heightened need arguments thus call for judicial deference in government-as-manager cases for reasons that are consistent with, or at least not opposed to, protecting free speech interests. But such arguments do not provide as powerful grounds for deferring as do the arguments based on restrictions' purposes and effects advanced in government-as-sovereign cases. The former argument is more generalized, suggesting that deference is appropriate because more decisions overall are legitimate. The latter claim is more specific, maintaining that courts should defer because a particular decision appears valid. As I discuss more fully below,<sup>80</sup> though the former arguments counsel in favor of judicial deference, they are not strong enough to justify the practice on their own.

By contrast, the second type of pragmatic argument, concerning the costs of judicial review, calls for deference in spite of, or at least with little regard for, free speech interests. These arguments essentially posit that, whereas we might be willing to tolerate the impediments to government action caused by judicial review in other contexts, we ought not to accept them here. The adverse consequences of judicial review are so great that courts should substantially diminish their role in protecting free speech interests.<sup>81</sup>

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<sup>79</sup> Cite.

<sup>80</sup> See *infra*, Part III.

<sup>81</sup> It is not at all clear that the harms occasioned by judicial review in government-as-manager contexts are necessarily much worse than harms occasioned by judicial review in government-as-sovereign contexts, or in other constitutional contexts where the courts apply heightened review. For instance, when courts review the scope of police authority to disperse protesters because of angry crowds, the courts' erroneous judgments could result in substantial violence or conflagration.

Combining the two types of pragmatic arguments might seem to present a strong justification for judicial deference. On the one hand, strong judicial review offers fewer benefits because government decision makers often have legitimate reasons to control or restrict speech, and, on the other hand, strong (and sometimes any) review imposes greater costs by risking terrible harms or undermining government functioning. But such views rest on overly narrow and circumscribed visions of what judicial review necessarily entails. As I elaborate below,<sup>82</sup> the fact that current practices of judicial review risks undermining institutional authority or otherwise compromises government interests suggests rethinking or altering the nature of judicial review in free speech cases, not simply weakening it as currently applied or abandoning it.

## B. Method of deference

The second principle that should inform judicial deference in free speech cases is what I call the *action-based principle*. According to this principle, in deciding whether to defer, courts should focus principally on the action under review and the circumstances that gave rise to it, rather than the agent or institution that made the decision. That is, the courts' determination should ultimately turn on whether the purpose or effect of the challenged action is likely to be censorial, not whether an agent or institution is inclined to be.

### 1. A matter of emphasis

The action-based principle represents primarily a modification of emphasis, rather than a fundamental restructuring of courts' approaches to deference in free speech cases. In deciding whether to defer, courts would still take into account the anti-censorial norms and process of governmental decision makers and institutions of which they are a part. But courts would be mindful that the ultimate question is whether those norms or processes ordinarily apply to the challenged action, rather than generally characterize the decision maker.

A recent proposal by Frederick Schauer is instructive here. In a thoughtful and provocative essay, Schauer suggested that institutional identities might appropriately serve as a First Amendment doctrinal category.<sup>83</sup> Noting that "a certain number of existing social institutions in general, even if not in every particular, serve functions that the First Amendment deems especially important, or may carry risks that the First Amendment recognizes as especially dangerous," he has argued that "a recast First Amendment could more consciously treat these institutions in rulelike fashion, with the institutions serving as under- and overinclusive, but not spurious markers of deeper

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<sup>82</sup> See *infra* pages \_\_-\_\_.

<sup>83</sup> Frederick Schauer, *Toward an Institutional First Amendment*, 89 MINN. L. REV. 1274-76 (2005). Other First Amendment and constitutional scholars have also recently argued that free speech doctrine might benefit if there were greater attention paid to the institutional identities of the government decision makers. See, e.g., Horwitz, UCLA 1504, Mark Rosen, Winkler, Halberstam, Hills.

background First Amendment values.”<sup>84</sup> Under his view, once an institution is identified as serving some important First Amendment value (*e.g.*, colleges and universities furthering the purposes of inquiry and knowledge acquisition), then a court could apply a second-order test, focusing on whether a specific decision maker falls within the institution, rather than whether the challenged decision furthers First Amendment values. Insofar as the envisioned method would treat government institutions, or government decision makers, as a determinative category justifying judicial deference, the proposal would violate the action-based principle.<sup>85</sup>

There are two inter-related problems with an agent-based deference approach. First, it conflicts with one of the foundational principles of the First Amendment: its deep distrust of government and, by extension, government decision makers. “Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and of somewhat deeper distrust of governmental power in a more general sense.”<sup>86</sup> This distrust stems from not only doubts about government decision makers’ capacities, but also their motives. The First Amendment reflects concerns that government decision makers will misuse (or force other government decision makers to misuse) their authority to suppress dissenting or unpopular views. An approach that counsels courts to defer to government decision makers based on their identities privileges the positive attributes of their authority and pays insufficient attention to its risks.

Vincent Blasi’s well-known admonition that First Amendment doctrine ought to reflect a “pathological perspective” lends support to this view.<sup>87</sup> In light of the First Amendment’s central role in constituting the American polity and governmental structure, he argues, the doctrine should be “targeted for the worst of times.”<sup>88</sup> In other words, the courts’ “overriding objective at all times should be to equip the First Amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.”<sup>89</sup> Applied in the judicial deference context, this perspective means that courts’ approaches should incorporate a sensitivity to the continuing possibility that government decision makers and their institutions—*e.g.*,

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<sup>85</sup> Schauer does not explicitly address whether his proposal ought to apply to questions of judicial deference. *See id.* By contrast, he does suggest institutions (*e.g.*, elections) as meaningful markers for heightening First Amendment scrutiny. *See id.* It bears emphasis that his proposal contemplates institutions more generally, and not government institutions in particular. *See id.*

<sup>86</sup> Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989); *see also* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982). *add cites.*

<sup>87</sup> Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

<sup>88</sup> *See id.* at 450.

<sup>89</sup> *See id.* at 449, 455-56. For thoughtful criticism of Blasi’s position, see Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618 (1988); George C. Christie, *Why the First Amendment Should Not Be Interpreted From the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L. J. 683.

legislatures, universities, libraries, schools, or workplaces—could be transformed into sites of intolerance and repression. While a pathological perspective might justify recognizing First Amendment protections for these institutions, including government ones, from certain types of regulation,<sup>90</sup> it would counsel against shielding governmental institutions *qua* institutions from heightened judicial scrutiny in cases alleging free speech violations.

Second, and relatedly, an agent-based approach pays insufficient attention to institutional variation. Institutions differ significantly across both space and time. Hence, for example, schools differ from other ones, and a school today can change significantly in the future. Though courts could reasonably identify certain institutions as generally furthering some important First Amendment values today, making judgments that remain accurate over time becomes more complicated. More significant, adopting a pathological perspective, the courts ought to worry that the very institutions that uniquely further First Amendment values (such as enabling individual autonomy, promoting inquiry and knowledge acquisition, enhancing public deliberation, and checking governmental power) are the ones most attractive for purposes of governmental cooptation and control during periods of hysteria and intolerance. And reduced judicial skepticism of those institutions' decisions will make them even more attractive. Of course, judicial doctrine could identify the qualities or processes of the institutions that would make them worthy of judicial deference, and in determining whether any government decision maker qualifies as an institution, courts could take those factors into account. But, particularly in pathological times, it will be difficult for courts to resist accepting government classifications of its own institutions. Also, there is little need to rely on the intermediary step of identifying whether a government decision maker falls into an institutional category. The point here, and again it is one of emphasis, is that courts should analyze the qualities or processes as evidence of a First Amendment-preferred form of decision making, not as elements that signify the decision maker.

To be clear, objecting to an agent-based approach does not necessarily entail rejecting more rule-like deference analyses. For instance, courts could identify a set of

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<sup>90</sup> It is unclear whether, and to what extent, First Amendment protections extend to governmental actors and entities. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 & n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”); *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) (First Amendment does not constrain government expression of political views). The First Amendment might protect state government communications from federal restriction. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (recognizing a First Amendment claim of a state university to design its educational program). The First Amendment might also protect speech by government employees on behalf of the government from restriction by that same government. See, e.g., *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir. 2001) (holding that public elementary school teacher’s curricular choice constituted speech protected by the First Amendment); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995) (en banc), vacating as moot, 520 U.S. 43 (1997) (holding that an English-only language restriction on a state employee’s speech used in handling medical malpractice claims violated the First Amendment). For a sustained examination of this issue, see generally David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637 (2006).

background conditions, such as the availability of due process hearings to challenge allegedly censorial actions, that would function as a meaningful, although not absolute, marker of governmental decisions that are less likely to violate the First Amendment. The courts' inquiry would focus on not whether the set of background conditions had actually prevented or hampered a decision maker's ability to censor in any given case, but instead whether the set of conditions existed. Though it might seem more attractive or easier to identify extant institutions that satisfy a set of conditions, the risks of focusing on institutional identities discussed above counsel against doing so.

## 2. A matter of kind

Another shortcoming of the agent-based approach is its narrowness. In premising judicial deference on the characteristics and qualities of the decision maker, it detracts attention from the myriad ways in which factors extrinsic to the agent also limit or channel the decision making process. That is, an agent-based approach excludes from consideration factors that militate in favor of judicial deference. [[This is especially, though not exclusively, the case for executive branch and administrative decisions.]]

The recent Supreme Court case, *Garcetti v. Ceballos*,<sup>91</sup> is illustrative here. In *Garcetti*, a deputy district attorney sued his employer on First Amendment grounds, alleging retaliation for statements that he had made in a disposition memorandum recommending dismissal of a case because of suspected governmental misconduct.<sup>92</sup> In a 5-4 decision, the Court held that he could not file suit because the First Amendment does not protect speech made by public employees pursuant to their official duties.<sup>93</sup> Writing for the Court, Justice Kennedy noted that, despite the inapplicability of the First Amendment, public employees would still be able to speak on matters concerning governmental inefficiency and misconduct because of “the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.”<sup>94</sup> Though Justice Kennedy did not clarify whether those laws had any constitutional significance, Justice Souter, in dissent, contended that they did not.<sup>95</sup> He stressed, among other things, “the tenet that “[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.”<sup>96</sup>

Yet there are good reasons to conclude that courts should consider remedies afforded by state or federal laws, or even administrative regulations, when deciding

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<sup>91</sup> 126 S. Ct. 1951 (2006).

<sup>92</sup> *See id.* at 1955-56.

<sup>93</sup> *See id.* at 1955.

<sup>94</sup> *See id.* at 1962.

<sup>95</sup> *See id.* at 1970 (Souter, J., dissenting).

<sup>96</sup> *Id.* Justice Souter acknowledged, in a footnote, that previous cases had held that a § 1983 remedy for alleged violations of federal law might be unavailable “when the underlying statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under § 1983.”

whether to defer to the initial decision makers' judgment.<sup>97</sup> Because judicial review serves primarily to deter free speech violations, the availability of other protections that hinder or discourage governmental decision makers from censoring speech is highly relevant. When courts can be relatively confident that errant government decision makers are subject to other controls, then there is less need for judges to apply heightened First Amendment scrutiny.<sup>98</sup> Though Justice Kennedy erred in suggesting that the general availability of whistle-blower and labor laws in many jurisdictions, as opposed to the existence of such laws in a particular jurisdiction, supported withholding judicial review, his basic insight—that such laws should affect the judicial review calculus—was correct.

Ample precedent supports this view. In deciding whether to recognize non-statutory constitutional damages actions, or *Bivens* actions, for example, courts regularly consider, among other things, whether the alleged violation “would otherwise go unaddressed.”<sup>99</sup> Insofar as other significant, even if not necessarily equally effective, remedies are available, courts are less likely to authorize *Bivens* review.<sup>100</sup> In *Bush v. Lucas*, for example, the Supreme Court declined to recognize a *Bivens* action for federal employees alleging First Amendment violations by their superiors because of the comprehensive regulatory scheme giving federal employees “meaningful remedies” against their employer.<sup>101</sup> Though the *Lucas* decision turned ultimately on the Court’s deference to Congress’ institutional competence to craft appropriate relief for aggrieved federal employees, that deference was nevertheless premised on the existence of alternative meaningful remedies.<sup>102</sup> The Court’s subsequent decisions, moreover, make clear that the availability of other avenues of redress, and not necessarily congressionally created ones in particular, militate against authorizing *Bivens* remedies.<sup>103</sup>

The Supreme Court has pointed to alternative means of furthering free speech values when rejecting First Amendment challenges in other contexts. In *Houchins v. KQED, Inc.*, for example, while holding that the news media had no first or fourteenth amendment right of access to a California county jail to report on inmate conditions, the Court noted that the news media and the public could learn about those conditions in a variety of other ways.<sup>104</sup> The news media had a First Amendment right to receive letters from inmates, and could interview others, for instance, lawyers, former inmates, visitors,

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<sup>97</sup> As I discuss more fully below, I do not mean to suggest here Justice Kennedy’s ultimate approach was correct. *See infra*, pages \_\_\_-\_\_\_. [should have looked to see whether there were whistleblower laws applicable here; should have made clear that the relinquishment of judicial review turned on the availability of those laws]

<sup>98</sup> (courts as collaborators point – move into text as justification for going beyond agent-based approach?)

<sup>99</sup> *See Bush v. Lucas*, 462 U.S. 367, 388 (1983); *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). [check *United States v. Stanley*, 483 U.S. 669, 683 (1987)]

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<sup>101</sup> 462 U.S. 367.

<sup>102</sup> *See id.*

<sup>103</sup> *See Malesko*, 534 U.S. at 520; *Schweiker*, 487 U.S. at 421-22.

<sup>104</sup> 438 U.S. 1, 14-15 (1978).

public officials, or institutional personnel, who had had access to the jail.<sup>105</sup> The news media and public could also learn about the county jail conditions in reports, mandated by California law, from the prison Board of Corrections and health inspectors.<sup>106</sup>

The availability of other avenues of redress has also been a recurring justification for withdrawing judicial review in federalism cases.<sup>107</sup> As the Court explained in *Garcia v. San Antonio Metropolitan Transit Authority*, because “[t]he political process insures that laws that unduly burden the States will not be promulgated,” the states’ “sovereign interests [are] more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>108</sup> Judicial constraints are appropriate, the Court added, only “to compensate for possible failings in the national political process.”<sup>109</sup> Although later cases have rejected the *Garcia* approach and recognized a more aggressive judicial role in policing national power, they did so not because of any disagreement with the basic proposition that alternative means of redress weaken the case for judicial intervention.<sup>110</sup> Rather, in emphasizing that federal officials often have substantial political incentives to act against state interests and the citizenry’s interests more generally, the latter cases primarily differed in their assessments of the alternatives’ adequacy in vindicating federalism principles.<sup>111</sup>

To be clear, the foregoing precedent concern reasons for declining judicial enforcement of constitutional rights or principles. They do not directly concern altering the standard of review for cases once courts have concluded that judicial enforcement is appropriate. One might argue that, though the availability of alternative means ought to affect the foregoing analysis, it ought not to influence the latter. On this view, when courts hold that there is no judicially enforceable right, they do not necessarily expound on the precise contours or dimensions of the constitutional rights or principles in questions. By contrast, when they purportedly enforce rights, their pronouncements are more conclusive and far-reaching in defining constitutional rights and responsibilities; particularly when they reject challenges, they legitimate the government officials’ actions. Accordingly, once courts conclude that it is appropriate for them to enforce rights, they ought not to tailor their analysis because of the alternative means of redress.<sup>112</sup>

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<sup>105</sup> See *id.* at 15.

<sup>106</sup> See *id.*

<sup>107</sup> I thank Eugene Volokh for suggesting this point to me.

<sup>108</sup> 469 U.S. 528 (1985). See also *South Carolina v. Baker*, 485 U.S. 505 (1988); *Printz v. United States*, 521 U.S. 898 (1997) (Stevens, J., dissenting); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Brennan, J., dissenting). Prominent academics have also supported this view. See Herbert Wechsler, *The Political Safeguards of Federalism—The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

<sup>109</sup> See *Garcia*, 469 U.S. at \_\_\_.

<sup>110</sup> See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>111</sup> See *New York*, 505 U.S. at 168-69; *Printz*, 521 U.S. at 928-30.

<sup>112</sup> This is similar to an argument made with respect to justiciability questions. [Add cites].

But that argument is unpersuasive. It is true that, when courts decline to hear cases, or state that a right is unenforceable, they play less of a legitimating function with respect to the challenged actions. But, when courts enforce rights, they can clarify the scope and limits of their enforcement authority, and thereby modify their holdings' legitimating effect. That is, once courts explain that they are declining to protect a constitutional right or principle fully in light of the alternative means of redress, their decisions upholding government actions will have less of a validating force. By contrast, after having acknowledged their reluctance to enforce constitutional principles to their full limits, their decisions striking down challenged actions might be even more forceful.

As I have argued above, judicial deference is not absolute, and there are varying degrees of deference that courts can give to the judgment of other governmental actors. Declining to enforce rights and reducing levels of scrutiny represent various points along the deference spectrum, and thus the reasons for doing one or the other are often (though not always) similar. Because the availability of other avenues of redress ought to influence decisions to do either, an agent-based approach offers too narrow a focus for making judicial deference determinations.

To recap, this section has evaluated the arguments and methods that inform courts' approaches to judicial deference in free speech cases. First, from a free speech perspective, the most attractive reasons for deferring are anti-censorial ones—those alleging that deference is appropriate because courts have a reasonable degree of confidence that censorship is not afoot. Though pragmatic concerns can also provide good reasons for deferring, courts ought to be reluctant to do so if there are ways to make judicial review less costly or intrusive. Epistemic and democratic arguments for deference are largely unpersuasive in free speech cases. Second, under the action-based principle, courts ought to ground their deference decisions by focusing on the challenged decision or “action,” and the circumstances that gave rise to them. They ought not to rely exclusively on the decision maker's inclinations, but consider more broadly the larger regulatory context that channels or limits the ultimate decisions. The next section turns to the principles' application.

### III. Rethinking the Government-as-Manager Cases: Prudential Deference

Section I mapped out how courts approach deference questions in free speech cases. As the foregoing suggests, courts generally rely on anti-censorial reasons and follow the action-based principle when deciding whether to defer in cases in which the government regulates speech in its sovereign capacity. That is, courts review challenged actions with a lesser degree of scrutiny when they have reason to believe that government decision makers are neither targeting dangerous ideas nor regulating in a manner to suppress an enormous amount of speech or a specific sets of ideas disproportionately. In making those decisions, courts focus on the decision under review, and not the decision maker's identity.

By contrast, courts do not rely primarily on anti-censorial reasons or follow the action-based principle when analyzing deference questions for cases in which the government regulates speech in its managerial capacity. Courts defer to the initial judgments even if they have little reason to believe that the challenged government decision is consistent with the First Amendment. Current approaches reflect a highly trusting attitude towards the good-faith, first-amendment sensitive intentions of government decision makers. This section offers a revised approach to judicial deference in government-as-manager cases consistent with anti-censorial concerns and the action-based principle.

A. The altered deference landscape

The factors considered by courts when deciding whether to defer in government-as-sovereign cases are not equally appropriate for government-as-manager cases. The most obvious difference is the significance attributed to content-based regulations. When the government regulates speech based on its content, courts in the former cases view such actions with skepticism. Unless they conclude that the content-based regulations serve a content-neutral purpose, they assume that the government has likely violated the First Amendment and apply strict scrutiny. Yet such an approach does not make sense in the government-as-manager cases. There, courts do not, and ought not to, assume that content-based decisions, or decisions having content-differential effects, likely violate the First Amendment.

As discussed above, in deciding First Amendment challenges, courts must give government decision makers leeway to control speech within governmental institutions such as schools, workplaces, and prisons, in ways that would be impermissible when government regulates speech in the public sphere more generally. In those contexts, decisions makers—legislative, executive, or administrative officials—must be able both to control the content of a significant amount of speech and to make other decisions that will substantially limit speaker freedoms. Such authority is critical to the government’s ability to achieve its institutional missions or objectives. So, for example, government officials must be able to prescribe school curricula, which define topics appropriate for discussion by teachers and students, and government supervisors must be able to specify issues that ought or ought not to be addressed in employee memoranda or speeches. Likewise, government officials must be able more readily to limit prisoners’ and military members’ prerogatives to speak or act in ways that would compromise official authority.

The distinct need for government officials to regulate speech in its managerial capacities has at least three implications for how courts approach deference decisions in those sorts of cases. First, and obviously, courts cannot accord much significance to regulations that have content-differential effects. As content-based regulations often are appropriate in government-as-manager cases, it necessarily follows that content-differential effects are as well. Because heightened scrutiny is reserved for those types of

governmental decisions presumed to be largely impermissible, courts ought not to apply such review to decisions with content-differential effects.

Second, courts will face greater challenges in evaluating government purposes. For one thing, courts can no longer reasonably rely on content-based decisions or decisions with content-differential effects as proxies for improper purposes. There are simply too many instances in government-as-manager cases when it would be appropriate for the initial decision-maker to require or limit speech of a particular content. Also, especially in settings like schools or universities, where the government's mission is to imbue values or promote knowledge, distinguishing between proper and improper purposes often will be elusive. Even absent the freedom of religion dimensions, for instance, it is unclear whether a legislature ought to have authority to ban the teaching of creationism as an alternative account to evolution, when the official curriculum prescribes only evolution. Along similar lines, it is debatable whether a public law school dean, convinced that his faculty and the views they expressed were overwhelmingly liberal, could legitimately hire only professors with more conservative public policy perspectives.

Third, and relatedly, courts have greater reason to fear misuse of authority. A recurring theme in First Amendment doctrine is heightened concern that official discretion facilitates the censorship of speakers and ideas simply because of their unpopularity or hostility to the existing regime. This worry underlies the distinct procedural mechanisms that allow litigants raising First Amendment claims to challenge laws on their face, rather than as applied, on vagueness grounds,<sup>113</sup> and to overcome traditional barriers against third-party standing when attacking laws as impermissibly overbroad.<sup>114</sup> It also accounts for the First Amendment limits on official discretion in speech licensing regimes.<sup>115</sup> In those contexts, the doctrine recognizes and responds to the problem that, when government decision makers have substantial discretion to regulate speech, and when the boundaries between permissible and impermissible decisions are unclear, there is an increased risk of official abuse of authority. This is precisely the problem that arises when government regulates speech in its managerial capacities.

#### B. Shortcomings of current approaches

Current free speech doctrine and scholarship and their conceptions of judicial deference have failed adequately to address this problem of increased risk of censorship in government-as-manager cases. As discussed above, the doctrine concerning judicial deference focuses on epistemic, pragmatic, or democratic reasons why courts ought to refrain from reviewing initial decision makers' judgments too aggressively. In most of

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<sup>113</sup> See CITE. Courts generally invalidate laws only as applied on due process vagueness grounds.

<sup>114</sup> See XX. For an argument that overbreadth challenges involve first-party, not third-party standing, see Henry Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Henry Monaghan, *Third-Party Standing*, 84 COLUM. L. REV. 277 (1984).

<sup>115</sup> See *Freedman*, etc.

those instances, the reasons have little to do with whether courts have a basis to conclude that the decision maker has used her authority properly. Instead, they involve claims about the courts' shortcomings: judges lack sufficient knowledge about the contexts under review; aggressive judicial review will undermine the government institutions' (and the courts' own) abilities to function; or courts are not the constitutionally assigned actor to decide the matter. In maintaining that the initial decision should thus be preferred, all of these arguments assume that the decision maker has acted in good faith, consistent with her best understanding of what the First Amendment requires.

Though some scholars have acknowledged this assumption of good faith, they have failed to offer a satisfactory account of how courts would incorporate these considerations in their deference analyses. In discussing judicial deference in government-as-manager cases, for example, Robert Post states that "it is a necessary precondition of deference that a court believe that institutional authorities are aware of the constitutional principles that should guide their judgment and are in good faith attempting to enact those principles."<sup>116</sup> In explicating the factors that would inform courts' assessment of whether the precondition were met, Post states only that courts will "perceive danger signals when they confront institutional decisions that on the merits seem . . . 'arbitrary, capricious, or invidious,' or . . . 'unreasonable.'"<sup>117</sup> In other words, he suggests no factors beyond a minimum rationality requirement. Yet because government decision makers can often easily provide reasons, or pretexts, to conceal their misuse of authority, such minimal scrutiny provides an insufficient basis for courts to assume good-faith, First Amendment-sensitive decisions.

In considering judicial deference in constitutional cases more generally, Paul Horwitz states that parties invoking deference might have an obligation to "reason *in good faith*," "to reason *thoughtfully*," and "to meet a minimum level of appropriate *process* in its deliberations."<sup>118</sup> Before deferring, courts ought to determine whether the institution "deliberate[d] fully and transparently on the question as to which it seeks deference."<sup>119</sup> So, for example, when a public law school seeks deference for its decision to exclude military recruiters from its campus on the ground that the recruiters' sexual orientation-discriminatory policies conflict with its educational mission, Horwitz argues, courts should determine, *inter alia*, whether the school reached that decision "after meaningful academic deliberation," which "might well require that faculty become meaningfully involved in the on-campus recruitment process rather than leaving that task to administrators."<sup>120</sup>

Courts could reasonably rely on a finding of meaningful deliberations to assume the good-faith, First Amendment-sensitive intentions of the initial decision makers. But the absence of such deliberations should not be taken to convey a lack of good faith or

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<sup>116</sup> Post, *Public Forum*, *supra* note \_\_, at 1810.

<sup>117</sup> *Id.* at 1810-11.

<sup>118</sup> See Horwitz, *Three Faces*, *supra* note \_\_, at 48-49.

<sup>119</sup> See *id.* at 53.

<sup>120</sup> See *id.* at 90-91.

sensitivity. Government decision-makers, for instance, teachers, will regularly restrict student speech, and it would be unrealistic to require them to deliberate with others before doing so. Also, Horwitz's approach ignores the argument that judicial review itself risks undermining institutions' functioning. As discussed above, in some institutions like the military and prisons, the ability to challenge decision maker's authority to regulate speech undermines the intense obedience and discipline thought necessary to achieve their objectives.<sup>121</sup> In other institutions like the schools and workplaces, where decision makers must regularly limit and structure speech, liberally allowing some types of suits that can be dismissed only after discovery, risks overwhelming institutions by forcing them to concentrate substantial resources on legal defense efforts.<sup>122</sup> Because Horwitz's proposal would have courts engage in context-specific, case-by-case inquiries on the decision making process to determine the appropriate degree of deference, it offers institutions little ability to protect themselves against judicial review's potential harms.

### C. Anti-censorial indicators

Courts reviewing free speech challenges in government-as-manager cases generally avoid applying strict scrutiny. In some cases, they ease the standard of review but nonetheless evaluate the balance of competing government and speaker (or public) interests. In others, they effectively forego any meaningful review. In this latter set of cases, courts either accept governmental decisions so long as they are reasonable, or hold that the First Amendment does not cover the speech at issue. Two recent Supreme Court cases illustrate the latter two variations. In *Frederick v. Morse*, the Court upheld a principal's suspension of a student who displayed a "Bong Hits for Jesus" banner at a race attended by his class during a school trip because "it was reasonable for the principle to conclude that the banner promoted illegal drug use." Such a message, the Court noted, conflicted with a school policy that served an "important, and perhaps compelling" government interest.<sup>123</sup> In *Garcetti v. Ceballos*, the Court held that a deputy district attorney alleging that his employer retaliated against him for statements about purported governmental misconduct that he had made in a work memorandum, could not bring suit on freedom of speech grounds because the First Amendment does not protect speech made by public employee pursuant to their official duties.<sup>124</sup>

Whenever the court defers to the initial decision maker's judgment, it should be reasonably confident that the decision maker acted in good faith, without an intent to suppress speech merely because of its unpopularity or hostility to the government. Except when judicial review is incompatible with an institution's functioning – *i.e.*, when the institution requires extreme obedience or authority to function, or when controlling the type of speech at issue is integral to an institution's objectives – then courts ought to consider three sets of factors to assess the likelihood of misuse of authority.

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<sup>121</sup> See *supra*, pages \_\_\_-\_\_.

<sup>122</sup> See *supra*, pages \_\_\_-\_\_.

<sup>123</sup> See 127 S.Ct. 2618, 2628-29 (2007).

<sup>124</sup> CITE.

First, courts should minimally examine the decision's substance. As Post suggested, courts ought to assure themselves that the challenged decision are reasonable, or not arbitrary and capricious.<sup>125</sup> Court should also consider the extent to which the decision leaves alternative channels for the speaker or others to express the restricted ideas. Though the absence of meaningful alternatives ought not to be determinative, their relative abundance should alleviate some concerns about improper censorship.

Second, courts should consider the process that led to the decision. As Horwitz suggested, courts have greater reason to accept decisions that result from open and meaningful deliberations, or a structured and transparent process. Those decisions are more likely to reflect due consideration for First Amendment interests and less likely to rest on mere hostility or fear toward the ideas expressed. Courts also have a stronger basis to conclude that decision makers are more likely to be respectful, or at least cognizant, of free speech principles when institutions have adopted formal speech policies. It is relevant, moreover, whether the institutions have published, distributed, or publicized the policies or taken other steps to make them part of the institutional culture.<sup>126</sup>

Third, courts should assess the accountability that can follow from the decision absent judicial review. Courts should consider whether, and to what extent, the aggrieved party could pursue other lawsuit-like means to challenge the decision. Such means might include internal procedures, such as forms of administrative review that meet basic due process requirements, or external options, such as the availability of suit on grounds other than the First Amendment (*e.g.*, whistleblower laws). Courts should also gauge whether the decision is likely to receive political review. Here again the existence and public availability of speech policies are relevant. Insofar as the decision clearly follows or diverges from a well-publicized speech policy, then courts have greater reason to expect that political pressures would be brought to bear against at least some questionable free speech policies or some errant or improperly motivated decisions, respectively.

To be clear, my point here is not that courts must conclude that each of the foregoing factors indicate that the government has reached a good faith, First Amendment-sensitive decision. Except for the minimal rationality test, which would have to be satisfied, all of the factors serve only as potential anti-censorial indicators. Indeed, it would be unreasonable to conclude that simply because a decision did not follow certain processes or was not subsequently subject to some form of administrative review that the decision maker likely acted in bad faith or without regard for First Amendment principles (or, in other words, that the decision does not merit deference). That a teacher might summarily exclude a student article advocating social welfare policies from a school literary magazine does not, for example, suggest bad faith. Nor would an unreviewable public spokesperson's dismissal for distorting or criticizing her

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<sup>125</sup> See *supra* note \_\_\_ and text accompanying notes.

<sup>126</sup> Cf. *City of Boca Raton v. Farragher*; *Burlington v. Ellerth*

superior's views during a formal news conference, indicate improper censorship. My point here is that, before deferring, court must have a reasonable basis to conclude that the decision in dispute reflects a good faith sensitivity to First Amendment values, and that the foregoing factors could provide support for such a conclusion.

D. Withdrawing judicial review

Finally, I turn to the more difficult issue of how courts can guard against improper censorship when judicial review itself threatens to undermine the institution's ability to function. In those contexts, judicial review ought to be conditional, dependent on the institution's compliance with clear, unambiguous rules. Put another way, legislative and executive officials ought to be able to act *ex ante* to ensure that government institutions can avoid the potentially debilitating effects of judicial review. The "cost" of such insulation involves measures that limit the likelihood of bad faith, First Amendment-insensitive decisions.

The availability of meaningful administrative procedures to challenge allegedly free speech-infringing decisions would limit the likelihood of such improper decisions.<sup>127</sup> Though such procedures need not provide the full range of procedural protections and substantive remedies afforded through judicial review, the process would have to satisfy minimal due process requirements and offer a form of relief sufficient to encourage administrative challenges and to deter would-be violators. Though the precise contours of what due process and effective enforcement would require in any given context are unclear, some measures would clearly pass muster. For example, if an administrative procedure provided impartial decision makers, liberal opportunities to develop and present evidence, a written decision, and all the relief that would be available in court, and cost complainants no more than the amount required for judicial process,<sup>128</sup> then that mechanism would provide a sufficient alternative to judicial review. If the legislature or executive sought to insulate an institution's free speech decisions from First Amendment judicial review, they could choose to make such an administrative framework available.

But if that were the only means of shielding institutional authority from judicial oversight, it would not be especially meaningful. It is both unrealistic and undesirable to expect institutions to allow complainants to second-guess all potentially speech-infringing decisions. To return to my examples above, schools could not and should not provide a notice and hearing for every student who wished to challenge penalties for flouting their teachers' curricular choices. Similarly, the government ought not to have to offer administrative hearings for disgruntled political spokespersons demoted for disagreeing with their superiors' positions during a news conference. Also, to the extent

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<sup>127</sup> See Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463 (2007) (arguing for administrative procedures to challenge first amendment violations in public employment).

<sup>128</sup> See *Amendariz v. Found. Health Psychcare*, 6 P.3d 669 (Cal. 2000) (discussing minimal requirements to render arbitral decisions fair alternatives to judicial ones).

that the military mission requires “instinctive obedience” to military orders, ready administrative challenges may be almost as debilitating as judicial ones.<sup>129</sup>

In light of the inadequacy of the administrative procedure option, courts must allow institutions other means to secure insulation from judicial review. A far less comprehensive, but nonetheless meaningful measure would be whether the institution has a publicly available, easily accessible speech policy. At a minimum, the policy would have to specify (1) the kind of speech that is restricted; (2) alternative channels of speech that the institution has left open; (3) means of enforcing the policy; and (4) protections against improper enforcement. To be clear, there should be no required content for those topics. To justify deference, the policy would simply have to be reasonable, or not arbitrary or capricious.

The existence of such a policy would clearly not provide protections against bad faith, First Amendment-insensitive decisions as effective as those secured by judicial or administrative review. But it would be meaningful in at least three ways. First, it would increase consciousness about First Amendment concerns. When designing policies, institutional decision makers, or the governmental bodies that regulate them, would have to contemplate whether, and to what extent, they plan to accommodate or further First Amendment values within their institutions. Also, having speech policies in place, regardless of the extent of the protections, would remind decision makers of the special solicitude that the freedom of speech generally demands. The policies would also alert institutional participants and the citizenry more generally of their free speech rights and the ways in which the institution in question approaches those rights.

Second, publicly available, easily accessible speech policies can induce pressure on institutions to become more (or less) speech-protective. They provide a focal point for public discussion, enabling political organizers to point to an institution’s avowed free speech commitments and mobilize support for a response to them. Also, insofar as institutional participants have choices about membership (*e.g.*, whether to attend, or have one’s children attend, a school; whether to work for a government employer; or whether to join the military), the availability and accessibility of such policies will mean that individuals who prioritize certain free speech rights can more easily study or compare them, and make more informed choices. When a sufficient number of individuals object to or shun an institution based on its speech policies, moreover, that institution may feel compelled to reform its approach.

Third, even without formal enforcement methods, policies that specify speech protections will constrain government decision makers. Speech policies represent an institutions’ formal statement of their commitment to (or disregard for) free speech principles. Publicly articulating that commitment puts institutions on record as to what they value or seek to achieve. With that record, institutional decision makers will be more reluctant to deviate from those commitments than they would have been absent any

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<sup>129</sup> Of course, review by other military officials is probably less disruptive than judicial review.

public speech policies. Organizational management studies reporting the effectiveness of corporate statement of values,<sup>130</sup> and social psychology studies detailing the binding effect of individuals' stated commitments,<sup>131</sup> support this argument.

Of course, requiring public institutions to have speech policies as a precondition for insulation from judicial review is no panacea for the problem of censorship and other improper decisions or regulations. Indeed, in some cases, it may lead government institutions to adopt highly speech-restrictive policies. Yet it cabins the otherwise unlimited discretion of government officials, and, though some institutional decision makers might exercise that discretion consistent with first amendment values, it seems unlikely that most would necessarily do so. More important, as discussed above, speech policies provides a focal point for community and democratic review. Conditioning the withdrawal of judicial review on speech policies represents a necessary compromise of the competing interests in protecting free speech values and preserving institutions' abilities to function. A speech policy pre-condition provides some meaningful First Amendment protections, yet is relatively easy to satisfy so that any institution could meet it *ex ante* with complete confidence and thereby avoid judicial review.

Some might question the courts' authority to require speech policies as a precondition for judicial deference. They might argue that such an approach does not involve interpretation and application of a constitutional provision, but instead improper judicial legislation of good government practices. They might contend, for instance, that a speech policy rule would involve an impermissible exercise of the courts' constitutional authority much like the constitutional rule crafted in *Miranda v. Arizona*.<sup>132</sup> As that case famously instructed, because of the inherently coercive nature of custodial police interrogations and the difficulty courts face in evaluating the voluntariness of confessions resulting from them, police officers should inform individuals of their rights to remain silent and to retain counsel before initiating any questioning.<sup>133</sup> If officers fail to do so, the *Miranda* Court held, courts shall treat any statements resulting from the interrogation

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<sup>130</sup> See, e.g., Margaret Ann Cleek & Sherry Lynn Leonard, *Can Corporate Codes of Ethics Influence Behavior*, 17 J. OF BUS. ETH. 619 (1998); Ronald R. Sims, *The Challenge of Ethical Behavior in Organizations*, 11 J. OF BUS. ETH. 505, 510-12 (1992); Myrna Wulfson, *Rules of the Game: Do Corporate Codes of Ethics Work?* 20 REV. OF BUS. 12 (1998).

<sup>131</sup> See, e.g., Jerry Burger & Tara Cornelius, *Raising the Price of Agreement: Public Commitment and the Lowball Compliance Procedure*, 33 J. OF APPLIED SOC. PSYCH. 923 (2003); Barry R. Schlenker, David W. Dlugoleck & Kevin Doherty, 20 PERS. & SOC. PSYCH. BULL. 20 (1994).

<sup>132</sup> 384 U.S. 436 (1966). Numerous commentators argue that the Court overstepped its constitutional authority in crafting the *Miranda* rule. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 445-46 (2000) (Scalia, J., dissenting); *Miranda*, 384 U.S. at 504-14 (Harlan, J., dissenting); Grano, Graham, Erwin, Spring.

<sup>133</sup> See *Miranda*, 384 U.S. at 479 (requiring officers to inform an individual that "he has the right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of a lawyer, either retained or appointed," and that "the defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently").

as *per se* involuntary and bar their use as evidence in a criminal case against the individual.<sup>134</sup>

But the speech policy requirement would differ significantly from the *Miranda* rule. Unlike the failure to provide the *Miranda* warning, the failure to adopt a speech policy would not automatically result in penalizing or invalidating government decisions. If an institution does not have a speech policy, a court will not necessarily rule against the government, but simply agree to review the challenged decision. The government could still prevail in any given case. Moreover, courts regularly impose various procedural requirements as a pre-condition for judicial deference. Clear statements and congressional requirement findings provide some ready examples.<sup>135</sup> Much like courts have authority to consider prudential factors in determining judicial standing, they should have similar license to take into account speech policies in deciding on deference.

#### IV. CONCLUSION

This Article has begun to construct a theory of judicial deference in free speech cases. Focusing on cases in which governmental decision-makers seek deference, it has advanced two guiding principles. First, it has maintained that anti-censorial confidence grounds provide the most attractive grounds for judicial deference in free speech cases. Second, it has contended that courts should defer based on the nature of the challenged decision or action, and the circumstances that gave rise to them, rather than the characteristics of challenged decision maker alone. Based on those two insights, the Article has proposed an alternative to courts' current approaches to deference in government-as-manager free speech cases. It has argued that courts ought to exercise a form of prudential deference, deferring only after it has reasonable confidence that the challenged restriction represents a good-faith, first amendment-sensitive decision. The Article has then clarified that courts can have such confidence when reviewing decisions from institutions with publicly available, easily accessible speech policies.

There is more work to be done to construct a theory of judicial deference for free speech cases. For example, nongovernmental actors regularly seek deference from the courts for their legal and factual judgments, and the concerns there are in important ways distinct from the issues raised when governmental actors seek deference.<sup>136</sup> Also, governmental and nongovernmental actors routinely solicit deference in non-free speech cases, and it would enhance our understanding of what is at stake in free speech cases if we had greater clarity about whether, and to what extent, deference considerations differ in free speech and non-free speech cases. Judicial deference is a fundamental feature of

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<sup>134</sup> See *id.* The Court has limited the scope of the exclusionary effect in subsequent opinions. See, e.g., *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971); *New York v. Quarles*, 467 U.S. 649, 655 (1984).

<sup>135</sup> Cites.

<sup>136</sup> See Horwitz, *supra* note \_\_\_. But see Roderick M. Hills, Jr., *The Constitutional Rights of Privates Governments*, 78 N.Y.U. L. REV. 144 (2003).

our First Amendment jurisprudence, and has an immense impact on the extent to which free speech values receive protection. By developing a normative theory of “free speech deference,” we further the project of preserving free speech commitments while accommodating other legitimate societal interests.