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Universities’ Speech and the First Amendment

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Kristine L. Bowman*

Universities' Speech and the First Amendment

ABSTRACT

Increasingly, scholars and students alike suggest that university leaders should engage in speech to oppose racism and other systemic discrimination. In May and June of 2020, countless university leaders across the country did exactly that, expressing solidarity with the Black Lives Matter movement. That speech also contained implied answers to two questions: normatively, should a public university speak in this way, and legally, can it do so? Developing a robust answer to the second question is the focus of this Article, which brings together political scientist Corey Brettschneider's conceptualization of government speech as persuasive or coercive; federal constitutional law (forum analysis doctrine and government speech doctrine); and recent changes in state law regarding free speech at public colleges and universities.

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I. INTRODUCTION

We often think of universities as physical places where speech happens, rather than institutions who are speakers in their own right. However, universities are both of these things, and the intersection can be messy. Campus speech controversies between 2016 and 2020 brought one aspect of this intersection into focus as universities reacted to visiting campus speakers like Richard Spencer and Milo Yiannopoulos, whose speech perpetuates systemic discrimination. In 2020, another aspect came into focus when the Black Lives Matter movement gained momentum after the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, and countless university leaders across the country issued statements expressing solidarity with the movement. Throughout this time, an increasing number of scholars and advocates have been calling for universities, as powerful, elite institutions, to speak up for the minoritized and marginalized.[1] These statements, especially when followed by action, could be considered acts of "moral leadership."[2]

The responses of university leaders in both of these situations—responses to events that occur on their campus and in the world—are important and are gaining increasing attention in literature. For example, recently, Katharine Gelber and I analyzed how and why a university's silence in the face of systemically discriminatory speech on its campus by outside speakers (such as Spencer and Yiannopoulos) accommodates discrimination, thereby enabling the harm it constitutes and seeks to cause.[3] We contended that universities have a normative obligation to refute systemic discrimination because if they do not, their silence allows the harm to occur and perpetuates injustice.[4] We further demonstrated why universities' "silence" includes both failure to acknowledge and respond to the harm—the colloquial un-

1. *See, e.g.*, Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1802 (2017).
2. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 94 (2019).
3. Katharine Gelber & Kristine L. Bowman, *Responding to Hate Speech: Counter Speech and the University* (forthcoming).
4. *Id*.

derstanding of the term—as well as an equivocal, or limited, acknowledgement or response to the harm.[5] We concluded that universities can engage in effective counter-speech and partially mitigate the harms of systemically discriminatory speech by challenging the implied authority of the speaker and countering the harmful speech's inegalitarian norms. Doing so, we argue, prevents the speech from disempowering its targets, and therefore, such counter-speech by university leaders is ultimately speech-enhancing.[6]

Our work dovetails both with the work of critical theorists who note that "the burdens of hateful speech are not evenly distributed"[7] and with research about the significance of bystander intervention—the idea that when those who are not direct targets of speech or action speak up, they can powerfully support the target and interrupt the harm the speech or action constitutes and seeks to cause. It also is consistent with the views of other leading First Amendment scholars such as Catherine Ross, who writes that "the harm assaultive speech [on campus] causes affects the whole community, not just the intended targets. The victims should not be expected to shoulder the additional burden of responding to speech that denigrates them."[8] Although the Dean of Berkeley Law, Erwin Chemerinsky, and University of California-Irvine Chancellor, Howard Gillman, think universities' role as speakers should be limited, lest leaders "[create] a campus orthodoxy of opinion," they also write: "Still, there are times when views so assault the campus's basic values that leaders need to speak up."[9] For both Chemerinsky[10] and Gillman,[11] the killing of George Floyd and others along with the protests in mid-2020 marked one of those times.

Given the practical importance of universities refuting systemically discriminatory speech occurring on their campuses and in the world, it is important to examine how the law aligns with the claim that universities and their leaders should speak in this way. Yet, the literature lacks a thorough analysis of the legal contours of such action. This Article fills that gap, focusing on the colleges and universities that are state actors: public institutions. In this Article, I first explore the nuanced nature of government speech, relying on political

5. *Id*.
6. Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1993 (2017).
7. *Id*. at 2037.
8. Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 768 (2017).
9. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 149–50 (2017).
10. *See* Letter from Erwin Chemerinsky, Dean, UC Berkeley Sch. of Law, to Berkeley Law Sch. Cmty. (Oct. 8, 2020) (on file with author).
11. *See* Letter from Howard Gillman, Chancellor, Univ. of Cal. Irvine, to Univ. of Cal. Irvine Cmty. (May 31, 2020) (on file with author).

scientist Corey Brettschneider's theory of value democracy and his important insight that speech by the government can be persuasive or coercive. Then, I analyze and synthesize Supreme Court doctrine relevant to public space as a venue (public forum doctrine) and the government's restriction of individual speech that contradicts its own (government speech doctrine); I also consider the problem of a "chilling effect." I discuss occasions—in our lived experiences and in the black-letter law—in which government is simultaneously the neutral arbiter of a venue and a persuasive speaker in that same venue, advancing its own viewpoint. Although this is consistent with the current doctrine, jurisprudence and literature take the approach of noting that persuasive government speech is not excluded from public fora—and stop there. Rather than adopting the common refrain of "it's not prohibited," I conceptualize affirmatively how and why such speech belongs in the public forum. I thus add nuance to our understanding of First Amendment doctrine by viewing the relationship between the public forum and government speech doctrines from another angle, illuminating what was previously hidden from view.

Because it is both important and timely to understand how the law does (or does not) constrain what public universities may say in response to systemically discriminatory speech occurring on their campuses or in the world, I apply this concept to public universities, with particular attention to a wave of state legislation enacted from 2016 through mid-2020 which has sought to shape the landscape of free speech on campuses. Specifically, at least a dozen states, reacting to a purported free speech "crisis" on college and university campuses,[12] have enacted legislation that declares all public spaces on campuses to be public fora. Additionally, four state legislatures have regulated what a public university may say as a speaker, directly contradicting the core idea of government speech. By considering these two emerging themes in state law, including their intersection with federal constitutional principles and the theory of value democracy, I add significant analytical depth to the assertion that universities can use counter-speech, such as anti-racist solidarity statements, to respond to harmful speech.

Before proceeding, I note that the topic of free speech on campus is so vast that it is important to clarify what this Article addresses and what it does not. First, my focus is on speech by "the university," as exemplified through speech by senior leaders of public universities such as presidents, provosts, vice presidents, vice provosts, and deans. This speech would almost certainly be considered government speech

12. Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 221–32 (2019) (providing an extensive discussion of the actual events and the media campaign that sought to create the perception of a free speech "crisis" on campuses).

under any of its various permutations if individuals were to claim they had the ability to share a contrary message in the same space.[13] Second, this Article examines government speech that seeks to advance equality, not speech that seeks to advance *inequality*. The latter question is too complex to address here; however, for more thinking on this topic, I refer curious readers to the excellent work of leading government speech scholar Helen Norton.[14] Finally, this Article is not about whether, or in what situations, universities can or should punish students or faculty for their speech.[15]

II. GOVERNMENT SPEECH: PERSUASIVE, COERCIVE, OR BOTH?

When considering free speech, we think perhaps most often of government as the regulator, not as the speaker. Yet, government is both of these things. Often, we do not take time to analyze, and thus disentangle, which role government is occupying in a given moment or to think about when government should occupy one role rather than the other. However, doing so can add nuance and depth to our understanding of government as speaker. In this Part, I engage Brettschneider's contention that when government speaks, it can speak in a coercive manner or a persuasive one,[16] summarizing his work and the literature that builds upon it.

In 2012, Brettschneider published *When the State Speaks, What Should It Say?*, in which he articulated a new liberal political theory: value democracy. In his words, this theory aims to "defend robust rights of free speech, religion, and association" and "articulate the rea-

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13. I do not consider the situations in which students arguably become government actors with government speech rights, as I think those claims stretch the government speech doctrine beyond recognition. For a discussion of the changing tests over time, including in the Court's 2015 *Walker* decision, see Mary-Rose Papandrea, *The Government Brand*, 110 Nw. U. L. Rev. 1195 (2016) (analyzing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015)).
14. Norton, *supra* note 2, at 93–126.
15. The speech rights of students and faculty on campuses of public universities are broad (presumably under *Garcetti*, the rights of staff are less so), and various excellent articles explore these issues. *See, e.g.*, Papandrea, *supra* note 1, at 1805–11 (exploring the legal possibility of punishing students for their speech and discussing examples).
16. Corey Brettschneider, When the State Speaks, What Should It Say? (2012). In this Article, I focus on Brettschneider's book, as it is the location where his argument is spelled out in greatest detail. Readers may also be interested in an article that appears to be an earlier version of parts of this argument as well as an essay published in a law review that draws on the book and the earlier essay. *See* Corey Brettschneider, *When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion*, 8 Persp. on Pol. 1005 (2010); Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forum Doctrines*, 107 Nw. U. L. Rev. 603 (2013).

sons that justify why rights should be respected in the first place, [including attempting] to convince citizens to adopt the democratic values of freedom and equality as their own."[17] A key premise in Brettschneider's argument involves distinguishing "between a state's coercive power, or its ability to place legal limits on hate speech, and its expressive power, or its ability to influence beliefs and behavior by 'speaking' to hate groups and the larger society."[18] Specifically, Brettschneider contends that "the state should simultaneously protect hateful viewpoints in its coercive capacity and criticize them in its expressive capacity."[19]

Brettschneider frames his approach as an alternative to the "two positions [that] have defined the debate over state responses to hate speech": "neutralism" and "prohibitionism."[20] The prevailing view in the United States is the assumption that government should be neutral among all viewpoints, including hateful ones that arguably undermine and threaten freedom and equality; this is neutralism, also known as agnosticism.[21] Many, if not most, other liberal democracies around the world are more amenable to prohibiting hateful speech and discriminatory viewpoints. Australia, Canada, and Germany are among the most prominent countries to adopt this approach, known as prohibitionism.[22] Neutralism is anathema to prohibitionists, and vice versa.[23] The debate is a deep one in law, politics, and philosophy.[24] Perhaps unsurprisingly, responses to value democracy tend to pull either in the direction of neutralism or towards prohibitionism, such as four of the six contributions in a 2014 *Brooklyn Law Review* symposium focused on Brettschneider's work.[25]

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17. BRETTSCHNEIDER, *supra* note 16, at 4.
18. *Id.* at 3.
19. *Id.*
20. *Id.* at 72.
21. *Id.* at 1–3; Dale Carpenter, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407, 1409 (2005).
22. BRETTSCHNEIDER, *supra* note 16, at 1–3.
23. *Id.* at 8–9.
24. For example, in the chapter focused most squarely on free expression and democratic persuasion, Brettschneider discusses work by John Rawls, Ronald Dworkin, Alexander Meiklejohn, and Jeremy Waldron. *Id.* at 75–82.
25. Brettschneider characterizes the contributions by Steven Calabresi and Andrew Koppelman as pulling towards neutralism, those by Robin West and Sarah Song as pushing towards prohibitionism, and those by Josiah Ober and Frank Michelman as extending his argument. *See* Corey Brettschneider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059 (2014). The core of Calabresi's contention is that he would extend Brettschneider's argument so that government would also speak against religious discrimination in addition to discrimination based on race, ethnicity, and gender. Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV. 1005, 1013 (2014). Koppelman's piece is by far the most overtly critical of Brettschneider's, alleging, in a nutshell, that Brettschneider proposes a

By distinguishing between the government's role as coercive rule-maker and its role as persuasive influencer, Brettschneider seeks to create a third way, in which government simultaneously allows the expression of all viewpoints and also wields its influence in an equitable manner to support freedom and equality. In the words of legal scholar Robin West:

> Brettschneider shows us how to think of the state as a fully moral actor in this ongoing liberal project, leaving behind the two roles our traditional debates on this issue have articulated for it: roles as the generator of unconstitutional laws that inhibit speech, or the sometimes overly zealous protector of individual rights to engage in it. The state is more complex than this simplistic dichotomy and can multi-task with the best of us.[26]

The concepts of coercion and persuasion are both key to Brettschneider's argument. His narrow, law-based view of coercion allows him to draw a bright line between state speech that is "coercive"—requires a certain behavior—and speech that is "persuasive"—intended to encourage individuals and groups to behave in a particular way. More specifically, Brettschneider relies on philosopher Robert Nozick's definition of coercion, which Brettschneider describes as "the state threatening to impose a sanction or punishment on an individual

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one-size-fits-all approach that lacks nuance, presents "silly" responses to counter-arguments, and does not provide evidence to support that the problems he identifies are actually problems. Andrew Koppelman, *You're All Individuals: Brettschneider on Free Speech*, 79 BROOK. L. REV. 1023, 1026 (2014). West's piece builds on a book review she wrote the year earlier, Robin West, *Liberal Responsibilities*, 49 TULSA L. REV. 393 (2013) [hereinafter West, *Liberal Responsibilities*]. Robin West, *Liberty, Equality, and State Responsibilities: Review of Corey Brettschneider's* When the State Speaks, What Should It Say?, 79 BROOK. L. REV. 1031 (2014) [hereinafter West, *Liberty, Equality, and State Responsibilities*]. Both pieces express sympathy with Brettschneider's project yet criticize Brettschneider's book as limited because it is out of step with current constitutional theory. Still, her works commend Brettschneider's book to readers given its substantial contribution to debates about hate speech: focusing on the government's role in responding, not merely individuals' rights to engage. West, *Liberal Responsibilities*, *supra*, at 402–03. Song identifies and elaborates on the primary objections of neutralists—that "'[p]ersuasion' [i]s [c]oercion"—and prohibitionists—that "[p]ersuasion [d]oesn't [g]o [f]ar [e]nough" because it restricts itself to issues of public concern and not so-called private matters. Sarah Song, *The Liberal Tightrope: Brettschneider on Free Speech*, 79 BROOK. L. REV. 1047, 1049, 1053 (2014). Ober focuses on rhetoric as formally understood and contends that if the state is to persuade, it must attend to the effect of its speech, and thus the rhetorical form, and not rely merely on an intent to convince. Josiah Ober, *Democratic Rhetoric: How Should the State Speak?*, 79 BROOK. L. REV. 1015, 1015–16 (2014). Michelman contends that Brettschneider does not adequately develop the notion of the legitimacy of the state and attempts to fill this gap. Frank I. Michelman, *Legitimacy and Autonomy: Values of the Speaking State*, 79 BROOK. L. REV. 985, 985 (2014). Brettschneider's work, of course, has also received attention in political science. *See, e.g.*, Katharine Gelber, When the State Speaks, What Should It Say? *How Democracies Can Protect Expression and Promote Equality*, 124 ETHICS 177 (2013) (book review).

26. West, *Liberty, Equality, and State Responsibilities*, *supra* note 25, at 1033.

or group of individuals with the aim of prohibiting a particular action, expression, or holding of a belief."[27] Political theorists Paul Billingham and Sarah Song, as well as legal scholar Robin West—scholars from a range of perspectives and disciplines—independently challenge this characterization, contending instead that Nozick understands coercion more broadly as focusing on an actor's intent to persuade others to adopt a certain course of action, which can occur at times through a symbolic sanction.[28] However, whether or not Brettschneider accurately captures Nozick's understanding, Brettschneider advances a clear definition of coercion himself, and it is one with a bright line that helps to establish clarity and predictability.

That said, Brettschneider focuses more of his argument on persuasive state speech, which may be because neutralism is so often an unstated assumption in the American context. In laying the groundwork for his normative argument, he first highlights ways in which the government already speaks persuasively in support of freedom and equality, namely by "celebrating official holidays that honor democratic ideals, . . . funding efforts to advance freedom and equality for all citizens," and "building public monuments to civil rights leaders like Martin Luther King, [Jr.]."[29] Norton[30] and West separately have echoed this assessment that persuasive state speech is ubiquitous, with West observing:

> The state does, after all, already "speak" and attempt to persuade *constantly*; it is *never* quiet. The state speaks when it passes laws; when it justifies them in judicial decisions; when it promulgates administrative regulations and adjudicates those regulations; when it imposes sanctions in civil cases; when it educates children in public schools; and when it imprisons, fines, and executes people. Almost all of that speech, furthermore, is "persuasive." Persuasive state speech is as present as air.[31]

Neutralism so dominates American conceptions about the role of the state, and the correlative First Amendment culture, that this statement may cause some American readers to cringe. However, while West's assessment of the current presence of persuasive government speech may be hard for some readers to swallow, it is on point.

Through persuasive speech, Brettschneider contends, government already resists the "paradox of rights," in which "liberalism justifies rights protections based on an ideal of equality, but the liberal state cannot respond to critics of equality who are protected by rights."[32]

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27. BRETTSCHNEIDER, *supra* note 16, at 88.
28. Paul Billingham, *State Speech as a Response to Hate Speech: Assessing "Transformative Liberalism,"* 22 ETHICAL THEORY & MORAL PRAC. 639, 643–45 (2019); Song, *supra* note 25, at 1053–55; West, *Liberty, Equality, and State Responsibilities*, *supra* note 25, at 1039–43.
29. BRETTSCHNEIDER, *supra* note 16, at 7.
30. *See generally* NORTON, *supra* note 2.
31. West, *Liberty, Equality, and State Responsibilities*, *supra* note 25, at 1034.
32. BRETTSCHNEIDER, *supra* note 16, at 7.

Furthermore, he argues that under value democracy, it is proper for the state to advocate for equality; unless the state speaks in opposition to hateful speech, (1) it will actually be complicit in the speech or be perceived as complicit, and (2) free and equal citizenship will be undermined.[33] Billingham questions both of these justifications in the most thorough response to Brettschneider's work in social science literature to date.[34] To be sure, these are empirical claims, and Brettschneider's argument would be stronger with more evidence—as would Billingham's rejection of Brettschneider's claims.

Ultimately, Brettschneider argues that through democratic persuasion, the state should "express the reasons and values that underlie rights" and "attempt to change the minds of both the members of hate groups and citizens more generally."[35] Such persuasion can involve the state articulating a viewpoint, and, more controversially, it can also involve the state refusing to subsidize views it characterizes as undermining free and equal citizenship.[36] As suggested above, some reject the idea that Brettschneider has proposed a third way, and instead, see his approach as another variation on the heavy-handed "invasive state." Billingham contends that the concept of "free and equal citizenship" is vague and that Brettschneider applies it inconsistently.[37] Legal scholars Steven Calabresi, Bryan Fair, Richard Garnett, Michael McConnell, and Kevin Vallier all contest the application of Brettschneider's argument to religious organizations and individuals.[38] At the same time, others, such as Song and West, contend that Brettschneider does not go far enough, asking why he is focused exclusively on race and sex equality (and perhaps more on race than sex).[39]

It is fitting that Brettschneider tests the application of his ideas in educational settings given the substantial presence of persuasive state speech, particularly in the K-12 context. He notes that K-12 school curriculum—especially civil rights curriculum—is not neutral, which

33. *Id.* at 16–17, 44–45, 85; Billingham, *supra* note 28, at 641–43.
34. Billingham, *supra* note 28, at 641–43.
35. BRETTSCHNEIDER, *supra* note 16, at 91.
36. *Id.* at 109–41.
37. Billingham, *supra* note 28, at 646–47.
38. Calabresi, *supra* note 25, at 1013–14; Bryan K. Fair, *Freedom of Speech, Equal Citizenship, and the Anticaste Principle: A Commentary on Regulating Hate Speech*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 115, 119 (Austin Sarat ed., 2012); Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES, *supra*, at 194, 220–21; Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466–75 (2000); Kevin Vallier, *Religious Freedom and the Reasons for Rights*, 6 PHIL. & PUB. ISSUES 9, 14–15 (2016); *see* Billingham, *supra* note 28, at 646–48; Song, *supra* note 25, at 1051–53.
39. Song, *supra* note 25, at 1051; West, *Liberty, Equality, and State Responsibilities*, *supra* note 25, at 1043–44.

he contends is appropriate.[40] To education law scholars, the idea that the state advances a viewpoint through curriculum is hardly shocking. Though again, because neutralism is such a foundational feature of American constitutional law, Brettschneider's accurate description may come as a bit of a surprise to those who have not had reason to think deeply about the role of the state in public elementary and secondary education.

Brettschneider's discussion of higher education is more detailed than his discussion of K-12 schools, and it focuses on an issue various Supreme Court cases have brought to the forefront: whether recognized student organizations should be funded by public universities in a viewpoint-neutral way.[41] Brettschneider distinguishes between college students' free speech and association rights, which he would leave unchanged, and what he describes as a right to receive a public subsidy, where he would part ways with the viewpoint neutrality required by the Supreme Court and let universities distribute funds to recognized student organizations in a way that would support free and equal citizenship.[42] Specifically, Brettschneider views these as instances of a university "exercising state speech through the use of [their] funds and . . . recognition of official student groups."[43] This analysis lays the groundwork for a broader, controversial claim that the state should use the power of the purse—whether by funding recognized student organizations or granting tax exemptions or other subsidies to businesses—to support only organizations that support free and equal citizenship.[44]

While on one hand it makes perfect sense that the principles Brettschneider applies to the government at large are the same as those he applies to a public university, there is also something to be said for considering the role of a public university as a distinctive government institution, although Brettschneider's work does not go that far. Calabresi speculates on this topic, noting: "I would add that public colleges, universities, and secondary schools could not even function if they did not choose to praise some viewpoints and criticize others. The praising of some things and the disapproving of others is basically at the core of what education itself is all about."[45] Calabresi does not elaborate, but at a general level his statement dovetails with West's earlier comment and with the idea articulated above that curriculum—government speech by and in public institutions—is never neu-

40. BRETTSCHNEIDER, *supra* note 16, at 95–96.
41. *Id.* at 115–20.
42. *Id.* at 114–22.
43. *Id.* at 119.
44. *Id.* at 128–67.
45. Calabresi, *supra* note 25, at 1010. Though he does not say it, I suspect Calabresi would agree that academic freedom is also relevant and important.

tral. This is consistent with Brettschneider's rejection of the idea that the state can and should be neutral, which is a pervasive assumption in First Amendment jurisprudence and much of the related scholarship.[46]

In sum, Brettschneider's work attempts to chart a course for the state that responds to both the concerns of neutralism and prohibitionism. Necessary to his argument is a nuanced understanding of the role the state occupies when it speaks and, specifically, whether the state is acting in its coercive capacity or its persuasive capacity. The next Part will overlay Brettschneider's conceptualization of government speech onto First Amendment jurisprudence in which the state is, or could be, a speaker.

III. THE FIRST AMENDMENT'S DOCTRINAL PUZZLE

Now we turn to the doctrinal terrain, beginning by sketching out the different pieces—forum analysis, government speech, and chilling effect—and discussing the assumptions each contains about the state as speaker. Then, I fit the pieces of the doctrine together, while also incorporating Brettschneider's understanding of government speech into a discussion of the doctrine. In doing so, I theorize a conceptual space in the doctrine, specifically in public forum doctrine, where government's persuasive speech is already present in a practical way. As others have noted, government's persuasive speech may presently exist there—it is not disallowed. In contrast to an approach that relies on the fact that such speech has not been ruled out, I offer a reason for affirmatively ruling it in. This Part makes that argument and thus lays the groundwork for the following Part, which will explore the application of the doctrine to the speech of public universities.

A. The Doctrine's Dominant Narratives

Forum analysis and government speech are the two core areas of doctrine relevant to the speech of the state. In addition to understanding each of these areas, it is important to consider how these areas fit with one another and also with the prohibition on a chilling effect. This section will address these issues in turn.

1. Government as Neutral Arbiter

Forum analysis doctrine gradually emerged beginning in the mid-twentieth century and has been a mainstay of First Amendment jurisprudence since the 1980s.[47] It is grounded in the idea that the open-

46. BRETTSCHNEIDER, *supra* note 16, at 71–82.
47. Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 224–31 (2013); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV.

ness of a public forum is inversely proportional to the government's ability to regulate individuals' speech in that venue.[48] In other words, the more open a forum (a public space) is, the more robust individuals' speech rights are in that venue.

In forum analysis doctrine, the state is traditionally assumed to be the regulator of the space, and, as we will see, viewpoint neutrality is a key requirement when government is acting in this role, although, importantly, neutralism is not.[49] Brettschneider defines viewpoint neutrality as "the legal doctrine that rights should protect the expression of all opinions" and neutralism as "a political theory that the state should not promote or express any particular set of values."[50] As Ross explains, the focus on viewpoint neutrality, and in particular the protection of "so-called low-worth expression" like "racist, misogynist and other vile speech," is largely driven by the assumption that "no public authority can be trusted to distinguish valuable from worthless expression."[51] Furthermore, a forum "is not a location-based criterion," so virtual spaces also constitute various types of fora.[52]

In a 2012 article, legal scholars Robert Jerry II and Lyrissa Lidsky summarized the range of judicially-recognized fora in a clear and succinct manner that is particularly impressive given the complexity of the jurisprudence.[53] Lawyer Derek Langhauser's step-by-step explanation of how to apply forum analysis doctrine reveals that, as with many things, the doctrine is clear in theory but messy in fact.[54] Drawing on their summary, Figure 1 visualizes the relationship among various fora as well as government speech. Government speech is included at the far end of this continuum for purposes of completeness; the following subsection will discuss it in depth.

1713, 1724–45 (1987); Jeffrey C. Sun, Neal H. Hutchens & James D. Breslin, *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49, 61–65 (2013).

48. Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 110–14 (2018).

49. *Id.*

50. BRETTSCHNEIDER, *supra* note 16, at 73.

51. Ross, *supra* note 8, at 749–50.

52. Sun et al., *supra* note 47, at 71.

53. Robert H. Jerry II & Lyrissa Lidsky, *Public Forum 2.1: Public Higher Education Institutions and Social Media*, 14 FLA. COASTAL L. REV. 55, 67–72 (2012). This portion of the article relies on Lidsky's prior work. *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011).

54. Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005).

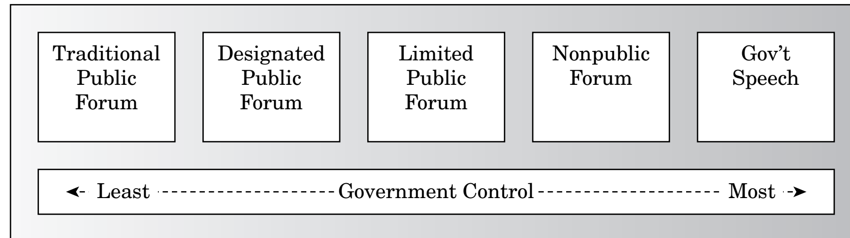

Figure 1 - Jerry and Lidsky's Understanding of the Relationship Among Areas of Doctrine

Building on this understanding and again drawing from Jerry and Lidsky's narrative description, Table 1 layers doctrine onto this continuum, thus summarizing the doctrinal landscape.

Table 1 - Summary of Public Forum and Government Speech Doctrine

Category	**Example**	**General rule**	**Content discrimination allowed?**	**Viewpoint discrimination allowed?**
Traditional Public Forum	Spaces historically used for such expression[55] i.e., campus quad if traditional place for public speech and protest	Content-neutral speech restrictions must be "narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication"[56] *Same as designated public forum below*	Only if "necessary to serve a compelling state interest" and "narrowly drawn" to achieve that goal[57] *Same as designated public forum below*	No
Designated Public Forum ("designated open")	Government intentionally opens space for expressive activity by the public[58] i.e., campus meeting rooms available for use by anyone	Content-neutral speech restrictions must be "narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication"[59] *Same as traditional public forum above*	Only if "necessary to serve a compelling state interest" and "narrowly drawn" to achieve that goal[60] *Same as traditional public forum above*	No

55. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 45–46.
60. *Id.*

Category	**Example**	**General rule**	**Content discrimination allowed?**	**Viewpoint discrimination allowed?**
Limited Public Forum (“designated limited”)	Government intentionally opens space for expressive activity but limits access to specific types of groups or for specific purposes[61] i.e., student activity fund or campus meeting rooms available only to student groups	Content discrimination permitted if reasonable & viewpoint-neutral[62] *Same as nonpublic forum below*	Some, to define & preserve limits (i.e., topics or class of speakers) *Same as nonpublic forum below*	No[63]
Nonpublic Forum	Default category, government grants speakers access on case-by-case basis, if at all[64] i.e., university professor decides whether to allow an outside speaker in class	Content discrimination permitted if reasonable & viewpoint-neutral[65] *Same as limited public forum above PLUS:* Time, place, and manner restrictions permitted so that the property can fulfill its intended use[66]	Some, to define & preserve limits (i.e., topics or class of speakers)[67] *Same as limited public forum above*	No

61. *Id.* at 46.
62. *Id.*; *see also* Christian Legal Soc’y v. Martinez, 561 U.S. 661, 679 (2010) (reiterating rule for restrictions in limited public fora).
63. Rosenberger v. Rector & Visitors, 515 U.S. 819, 829–30 (1995).
64. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); *Perry Educ. Ass’n*, 460 U.S. at 55; U.S. v. Grace, 461 U.S. 171 (1983); Widmar v. Vincent, 454 U.S. 263 (1981); Greer v. Spock, 424 U.S. 828 (1976).
65. *Perry Educ. Ass’n*, 460 U.S. at 49.
66. *Id.* at 45.
67. *Grace*, 461 U.S. 171; *Widmar*, 454 U.S. 263.

Category	**Example**	**General rule**	**Content discrimination allowed?**	**Viewpoint discrimination allowed?**
Government Speech	Non-interactive messages communicated by the government[68] i.e., university issues a message to all students, faculty, and staff about an upcoming event	Government sometimes must speak to govern and need not share its platform when it is doing so	Yes	Yes[69]

As this summary makes clear, the more open a forum, the less a government can restrict what happens there—more specifically, the less it can restrict or punish what individuals say there. The more closed the forum (with government speech being understood for the moment as a closed forum one step beyond nonpublic forum), the more control the government has over individuals' speech.[70] However, even when the government must maintain viewpoint neutrality, which is, according to the jurisprudence, anytime except when it is engaging in government speech, some categories of individual speech remain *un*-protected in accordance with First Amendment doctrine, including speech that constitutes a true threat,[71] fighting words,[72] speech likely to cause imminent harm,[73] defamation,[74] and speech constituting illegal discrimination.[75]

2. *Government as Coercive Speaker*

As the discussion up to this point has suggested, forum analysis and government speech, at first glance, seem to be mutually exclusive areas of doctrine based on very different ideas about the role of gov-

68. Joseph Blocher, *Viewpiont Neutrality and Government Speech*, 52 B.C. L. Rev. 695 (2011).
69. Bd. of Regents v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rectors & Visitors, 515 U.S. 819 (1995).
70. Although it can be difficult at times to tell whether speech is that of an individual or an institution, those murky situations are not the focus of this Article. *See* Langhauser, *supra* note 54, at 488.
71. Virginia v. Black, 538 U.S. 343 (2003).
72. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
73. Brandenburg v. Ohio, 395 U.S. 444 (1969).
74. Papandrea, *supra* note 1, at 1822–23.
75. Martha Chamallas, Principles of Employment Discrimination Law (2018).

ernment in different contexts. While I will add contours to this paradigm later, this subsection first develops a detailed understanding of the government speech doctrine, a creature of United States common law in which the government is assumed to be a coercive speaker with the ability to monopolize the marketplace of ideas and exclude other viewpoints. The doctrine arises in defense to an individual's claim that he or she has been denied an opportunity to speak because his or her viewpoint contradicts the government's own.[76] This may sound alarming; however, as noted earlier, the government speaks—and excludes others from doing so—all the time.

The government speech doctrine emerged from a series of Supreme Court decisions in which the government, via a public hospital, a public park, or publicly-funded art, expresses a viewpoint and denies individuals an opportunity to do the same. As a constitutional matter, scholars regularly look to the Court's 1991 decision in *Rust v. Sullivan*[77] as the beginning of the government speech doctrine. In *Rust*, the Court held that government could prohibit federally-funded family planning programs from using federal funds to subsidize abortion, including counseling patients regarding abortion and providing referrals to abortion providers.[78] This approach constituted a viewpoint, and the government was, according to the Court, allowed to mandate that a prescribed viewpoint be expressed by health care providers in participating programs.[79]

In the decades since *Rust*, the Court has made clear that the government may freely express viewpoints and that it does not have (or need) First Amendment protections when doing so. In 2009, the Court wrote in *Pleasant Grove v. Summum*:

> If [the state was] engaging in [its] own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to "speak for itself." "[I]t is entitled to say what it wishes," and to select the views that it wants to express.[80]

Most recently in *Walker v. Texas*, the Court maintained, if not strengthened, this holding. In *Walker*, the Court wrote:

> When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. . . . Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials,

76. Blocher, *supra* note 68, at 698–99.
77. Rust v. Sullivan, 500 U.S. 173 (1991).
78. *Id.*
79. *Id.* at 178.
80. Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (citations omitted).

> when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? . . . "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey.
>
> . . . .
>
> That is not to say that a government's ability to express itself is without restriction. . . . But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.[81]

In other words, the process of governing—making and enforcing laws—is one continual process of expressing viewpoints and thwarting individuals' and groups' efforts to contradict those viewpoints.

As the Court has explained, "It is inevitable that government will adopt and pursue programs and policies within its constitutional powers . . . which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."[82] Indeed, policymaking means adopting one approach to the exclusion of others—*not* being viewpoint neutral. As the Court has stated, "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. . . . [I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies."[83]

The check on policymaking, of course, is political. Again, in the Court's words: "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[84] When described this way, government speech appears impossible to separate from our system of government. However, accountability is only possible if the government is clearly the source of the speech. *Walker* presented the question of whether messages on specialty license plates are government speech.[85] To answer this question, the Court employed a somewhat different test than it had in the past and asked whether a "reasonable observer" would view the speech as the government's; ultimately, it held that the license plates were government speech.[86] In many government speech cases, identifying the speaker is complicated, indeed.

81. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207–08 (2015) (citations omitted) (quoting *Summum*, 555 U.S. at 468).

82. Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000).

83. *Id.*

84. *Id.* at 235.

85. *Walker*, 576 U.S. 200.

86. *Id.* at 219–20.

Current scholarship about the government speech doctrine builds on earlier works by legal scholars Robert Kamenshine,[87] Steven Shiffrin,[88] Lawrence Tribe,[89] and Mark Yudof,[90] which theorized the idea of government speech. Most significantly over the past decade, legal scholar Helen Norton's work has brought particular attention to the doctrine and done much to explore its potential implications.[91] Few scholars have engaged the doctrine as it pertains specifically to educational environments, although Joseph Blocher,[92] Mark Yudof,[93] and Kristine Bowman[94] have done so independently in the context of primary and secondary schools. The Supreme Court has never directly engaged the question of whether and how the government speech doctrine applies in the context of higher education,[95] and the literature similarly lacks a deep engagement of the government speech doctrine in the context of higher education.

87. Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).
88. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).
89. Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237 (1978).
90. Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 873–97 (1979).
91. *See* NORTON, *supra* note 2; Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543 (2017); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016); Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73 (2015); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159 (2012); Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265 (2011); Helen Norton & Danielle Keats Citron, *Government Speech 2.0.*, 87 DENV. U. L. REV. 899 (2010); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008).
92. Blocher, *supra* note 68, at 698–99; Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 4 (2007). However, a major open question in government speech doctrine is how we know if the government is speaking or if the speech is that of a private individual; in the education context, scholars have parsed whether student speech or faculty speech is government speech.
93. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 211 (1983).
94. Bowman, *supra* note 47.
95. In *Rust v. Sullivan*, considered to be the foundational government speech case, the Court stated:

> Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

500 U.S. 173, 200 (1991) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603, 605–06 (1967)). This is not exactly deep engagement of core government speech issues.

As this brief discussion has made clear, not all government viewpoints are expressed in the same way. Government can speak in a coercive, exclusive way, as it does when it enacts policy through laws and regulations that require or incentivize particular actions by individuals or organizations. However, government can also seek to persuade, leaving decisions about actions up to individuals or organizations while making its view and rationale clear. Since *Rust*, many decisions by the Court have further defined the contours of the government speech doctrine,[96] but the doctrine is still a long way from having clean edges.[97]

3. *Government as Punitive Agent*

The final piece of the doctrinal puzzle is the constraint that the government cannot take action which creates a "chilling effect" on individuals' free speech. This principle emerged in Supreme Court decisions beginning in the 1950s; it took shape particularly during the 1960s.[98] For our purposes, it is important to understand that "chilling effect"—the unconstitutional deterrence of speech otherwise protected by the First Amendment—is a legal term of art. It is not enough for speech to be chilled because it is understood in a colloquial sense to be out of favor when compared with the government viewpoint. Rather, as legal scholar Frederick Schauer explained in his seminal article on the topic, an individual must fear that his or her speech will result in "punishment—be it by fine, imprisonment, imposition of civil liability, or deprivation of governmental benefit."[99] In other words, for the chilling effect to come into play, a formal sanction must be on the table.[100] As such, chilling effect is largely beyond the scope of this Article.

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96. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009); Bowman, *supra* note 47, at 225–26.

97. *See* NORTON, *supra* note 2; Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1264, 1269 (2010); Norton & Citron, *supra* note 91, at 916–17; Richard Schragger, *Unconstitutional Government Speech, in* VIRGINIA PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES NO. 2019–56 (2019); Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 HASTINGS CONST. L.Q. 37 (2016).

98. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 685–87 (1978).

99. *Id.* at 689.

100. The hard questions regarding chilling effect involve queries such as how to make sense of legal concepts such as defamation, obscenity, and incitement. Schauer's article provides great detail regarding these situations. *Id.* at 687.

B. How the Doctrines Articulate

The Supreme Court has acknowledged that the government has expressive capacity and exercises it. It also has accepted that the government need not support individuals' viewpoints when advancing its own agenda. Furthermore, the Court expects that the government will be a neutral arbiter of various types of public spaces, and that, as a general matter, it will not enact laws that chill individuals' speech. However, it is not exactly clear how all these ideas fit together. Below, I depict and discuss ways in which the dominant narrative around these doctrines operates before offering a subtle yet critical additional piece.

The conventional understanding of the forum analysis and government speech doctrines, discussed and summarized above, is that (1) forum analysis applies when government is moderating a space; (2) government speech applies when government is speaking and excludes an individual with a contrary view from the dialogic space; and (3) governments do not need special permission to express their viewpoints.[101] The relationship between the doctrines as understood in this manner is expressed in Figure 2, with forum analysis and government speech as a binary and government viewpoint outside the dynamics of the First Amendment.[102]

101. The Court's assertions support this summary. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215 (2015) ("Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."); Bd. of Regents v. Southworth, 529 U.S. 217, 234–35 (2000) ("Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play." (citations omitted)); Gerlich v. Leath, 861 F.3d 697, 707 (8th Cir. 2017) ("The government speech doctrine does not apply if a government entity has created a limited public forum for speech." (citing *Pleasant Grove City*, 555 U.S. at 478–80 (2010))). As Papandrea has noted, government speech doctrine and public forum doctrine "often exist in tension with each other." Papandrea, *supra* note 13, at 1200.

102. Bowman, *supra* note 47, at 227–29 (describing this trend).

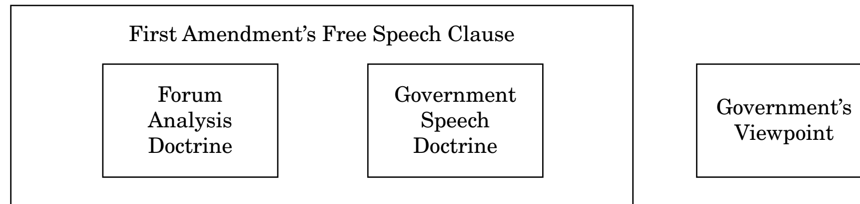

Figure 2 - Conventional Understanding of Relationship Among Areas of Doctrine

The understanding depicted in Figure 2 assumes that there are three things government can do in a speech context: (a) it can moderate; (b) it can speak; and (c) it can exclude others from the dialogic space. Excluding others can be coercive, such as prohibiting smoking in public buildings, or persuasive, such as a public health campaign that discourages smoking and does not publicly subsidize a point of view that encourages smoking.

If the government is (b) speaking, which it does all the time, then the default is that it is exercising government viewpoint outside the purview of the Free Speech Clause; the First Amendment is never triggered. This is so unless others claim they are (c) wrongly excluded from the dialogic space by such speech, in which case the government speech doctrine operates as a defense that protects the government's ability to privilege its viewpoint over others.

If the government is (a) moderating, it is acting as the neutral and also coercive arbiter of a forum, making and enforcing rules. As illustrated in Table 1, under forum analysis doctrine if the government is (a) moderating, it can only (c) exclude others from the dialogic space for very specific reasons, which change depending on the forum type. The government cannot simply choose to (c) exclude others from speaking because their viewpoint contradicts the government's own unless the government speech doctrine is the governing principle.

One more permutation is possible, and it is one the jurisprudence has allowed by noting *it is not impossible*, rather than explaining why it is both possible and consistent with the existing doctrine. If the government is (a) moderating, it is acting as the coercive, neutral arbiter of a forum, and it also presumably (b) can speak persuasively in that forum. This is conceptually challenging because the presence of government viewpoint in a forum that government moderates contradicts the implied government neutrality that forum analysis so prizes. However, it may be that the conceptual relationship between forum analysis and government speech is not one of mutual exclusion, but rather one in which overlap exists. This understanding is depicted below in Figure 3.

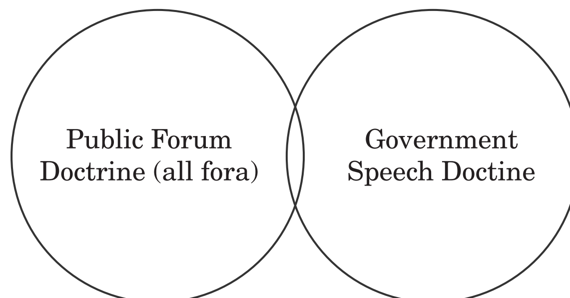

Figure 3 - Proposed Understanding of Relationship Among Areas of Doctrine

In this understanding, the part of the Venn diagram that is solely the public forum doctrine captures the government as a coercive, neutral regulator only. In the space that is solely the government speech doctrine, the government is a coercive or persuasive speaker that may exclude all others from speaking. In the space that is in the overlap, the government is both a coercive, neutral regulator, as moderator of the forum, and a persuasive, non-neutral speaker alongside other speakers and their speech rights.[103]

In sum, the dominant narratives suggest that forum analysis doctrine and government speech doctrine are either polar opposites or points on a continuum: regarding the former doctrine, the government must regulate individuals' speech in a viewpoint-neutral way, and under the protection of the latter doctrine, government may say what it wants and prohibit any contradictory viewpoint from the same forum. I contend that the explicit articulation should also acknowledge how and why government can be a persuasive speaker in a forum it also coercively regulates. I have also proposed a way to understand why this *is* and should be so, rather than merely noting it is permissible because it is not *not* so.

IV. UNIVERSITIES AS SPEAKERS

Forum analysis and government speech doctrine both play a prominent role in the speech that occurs on university campuses, including

103. To be clear, this is not what scholars describe as "mixed" speech, where the speech may belong to both the government and an individual. *See Walker*, 576 U.S. 200; NORTON, *supra* note 2, at 5–6; Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008). That is an important type of speech, but it is not what I address here. Rather, I contend that government's persuasive speech exists alongside individuals' speech in various public fora, and alongside government's coercive speech.

the speech of universities themselves. To understand these dynamics, it is important to understand both how federal constitutional law applies to speech in public universities and how recent state statutes have sought to influence these dynamics. When students and others call on public universities to oppose systemically discriminatory speech, universities must consider their legal ability to do so. In the words of noted First Amendment scholar Catherine Ross:

> No constitutional hurdle restrains administrators . . . from promoting chosen messages, including exhortations that encourage empathy, sensitivity, tolerance of difference, and civil norms. And nothing keeps them from finding ways to turn volatile moments that divide communities into teachable moments designed to nourish young people, as many college deans and presidents have done, even while recognizing the offender's constitutional right to provoke.[104]

To be sure, there is no constitutional prohibition that prevents universities from speaking this way, although, as discussed above, there is a strong implicit tension between doing so and upholding the value of neutralism that undergirds free speech jurisprudence and culture.

This presumption of neutralism also runs through recently enacted state statutes focused on conflicts over free speech on public university campuses. These statutes focus on various aspects of free speech on campus; one group of statutes seeks to dictate specific aspects of universities' codes of student conduct, such as requiring universities to impose discipline in response to particular actions by students.[105] Although those particular provisions are beyond the scope of this Article (they focus on students' speech, not the speech of the university itself), two other categories of provisions within this recent legislation wave are highly relevant to the issues explored in this Article: the designation of all outdoor public campus spaces as public fora, and the expectation or aspiration that universities themselves be neutral on public controversies.

In this Part, I summarize the origins of this recent spate of state legislative activity before addressing, in turn, public forum analysis in the university and relevant state statutory provisions, government speech doctrine in the university, and the presumption of neutralism in state statutory provisions. Ultimately, I close the loop by analyzing the ideas of persuasion, coercion, and university speech.

A. The Origins of Recent State Legislation

Between January 1, 2016 and July 1, 2020, more than one-third of all states enacted legislation about free speech on campus, and in many other states, similar bills died in committee or on the state

104. Ross, *supra* note 8, at 764.
105. Franks, *supra* note 12, at 232–36.

house floor.[106] Prior to this recent uptick in state legislative activity, only one state (California) had enacted legislation on this topic, and it did so in 1989. As legal scholar Ben Trachtenberg explains, the recent trend is part of a broader pattern in which state legislatures increasingly seek to intervene in "day-to-day [campus] operations."[107] Most of the recent free speech legislation appears to be based on model bills created by the Goldwater Institute,[108] a conservative and libertarian think tank, and the Foundation for Individual Rights in Education (FIRE), a libertarian group focused on colleges and universities.[109]

The Goldwater Institute model bill anchors itself in three reports about free speech on campus produced at some of the nation's most prominent research universities. First, Yale University's 1974 Report of the Committee on Freedom of Expression at Yale, chaired by noted historian C. Vann Woodward, emphasized the importance of both free expression and protest, while also considering how free speech can coexist with the educational and administrative functions of the university.[110] Second, the University of Chicago's 1967 Report on the University's Role in Political and Social Action emphasized the importance of university neutrality "on the dominant political issues of the day"[111] to facilitate "respect for free inquiry and diversity of viewpoints."[112] Third, the University of Chicago's 2015 Report of the Com-

106. Action has occurred at the federal level as well. Ben Trachtenberg, *The People v. Their Universities: How Popular Discontent Is Reshaping Higher Education Law*, 108 KY. L.J. 47, 78–80 (2019). In a 2017 U.S. Senate Committee hearing, Iowa Senator Charles Grassley suggested that *private* colleges and institutions that receive federal funds should be liable for violating free speech rights pursuant to the Spending Clause. *Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. Sess. (2017) (prepared statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary). In 2019, President Trump issued an executive order regarding free speech on campus that essentially required public universities to comply with the Constitution and private universities to comply with their own rules. Susan Svrluga, *Trump Signs Executive Order on Free Speech on College Campuses*, WASH. POST (March 21, 2019, 11:13 PM), https://www.washingtonpost.com //2019/03/21/trump-expected-sign-executive-order-free-speech/ [https://perm.unl.edu/ZR35-7335].

107. Ben Trachtenberg, *The 2015 University of Missouri Protests and Their Lessons for Higher Education Policy and Administration*, 107 KY. L.J. 61, 113 (2019).

108. STANLEY KURTZ, JAMES MANLEY & JONATHAN BUTCHER, CAMPUS FREE SPEECH: A LEGISLATIVE PROPOSAL 19–22 (2017); AM. ASS'N OF UNIV. PROFESSORS, CAMPUS FREE-SPEECH LEGISLATION: HISTORY, PROGRESS, AND PROBLEMS 1–2 (2018).

109. Trachtenberg, *supra* note 106, at 60–62; *Frequently Asked Questions: The Campus Free Expression Act (CAFE)*, FIRE (Dec. 17, 2015), https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/ [https://perma.unl.edu/HG9T-D3NG].

110. STEVEN A. BENNER ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1974); *see* AM. ASS'N. OF UNIV. PROFESSORS, *supra* note 108, at 4.

111. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 108, at 4.

112. HARRY KALVEN JR. ET AL., REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION 2 (1967).

mittee on Freedom of Expression, led by law professor and First Amendment scholar Geoffrey Stone, emphasized "unrestricted debate and institutional neutrality."[113] The 2015 University of Chicago report has become known as the "Chicago Statement" or "Chicago Principles." According to FIRE, the Chicago Principles were adopted by over eighty colleges, universities, or university systems as of July 2020.[114]

Building on this foundation, the Goldwater Institute model bill responds to what the Institute perceives to be a free speech "crisis" on American college and university campuses, consisting of speech codes, trigger warnings, safe spaces, student discipline or lack thereof, physically small free speech zones, and attempts to de-platform outside speakers (especially conservative speakers) by disinviting them or shouting them down.[115] The model bill responds to the possibility of these policies or practices in a variety of ways. Two provisions are relevant to this Article: First, all public areas of college and university campuses are designated as traditional public fora. Second, "universities, at the official institutional level, ought to remain neutral on issues of public controversy to encourage the widest possible range of opinion and dialogue within the university itself."[116] Similarly, FIRE's Campus Free Expression model legislation focuses on designating outdoor public university spaces as traditional public fora and preventing the disruption (and presumably de-platforming) of speakers on campus.[117]

Both of these model statutes are grounded in neutralism, the idea that the government should remain neutral among all views and thus presumably remain silent. More specifically, the neutralism of the aforementioned reports informs the public forum provisions of the statutes, which focus extensively (though not necessarily exclusively) on the role of the university as arbiter of a forum acting with both content and viewpoint neutrality. Additionally, neutralism explicitly anchors the public controversy provisions, which prohibit universities from expressing viewpoints lest university views influence the university community.

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113. Am. Ass'n of Univ. Professors, *supra* note 108, at 5; Geoffrey Stone et al., Report of the Committee on Freedom of Expression (2015).

114. *Chicago Statement: University and Faculty Body Support*, FIRE (Feb. 3, 2021), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/ [https://perma.unl.edu/MN9B-NXJN].

115. Various scholars dispute the existence of a "crisis." *See* Franks, *supra* note 12, at 221–32; Trachtenberg, *supra* note 106, at 54–60.

116. Kurtz et al., *supra* note 108, at 2.

117. *Campus Free Expression Act Multistate DRAFT*, FIRE (Sept. 18, 2019), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/09/18105224/Ca-Expression-Act.pdf [https://perma.unl.edu/BRM7-Z8YN].

B. Forum Analysis and Public Universities' Speech

Legal scholars Vikram Amar and Alan Brownstein as well as higher education scholars Neal Hutchens and Frank Fernandez caution us to remember that "[m]ultiple fora can exist on public college and university campuses. . . . Additionally, depending on its usage at a particular time, a campus space can take the form of more than one type of forum."[118] Forum analysis doctrine continues to be a complex and important piece of the legal regulation of free speech on campus.[119] This section discusses the Supreme Court's jurisprudence regarding forum analysis in universities and the fifteen state statutory provisions, based on the Goldwater Institute and FIRE model legislation, that create public fora out of outdoor university spaces.

1. Forum Analysis in Public Universities

Forum analysis doctrine has determined the outcome of many important free speech cases involving universities. As Amar and Brownstein have noted, "[t]he uses to which property is put on a university campus are extraordinarily diverse," and this variation results in multiple types of fora on university campuses.[120] Despite this diversity, all of the most prominent university forum analysis cases have involved the same type of forum—limited public forum. I summarize these three cases here to illustrate how forum analysis works in a university setting and to further explain the jurisprudence: *Rosenberger v. Rectors of the University of Virginia* (1995), *Board of Regents of the University of Wisconsin v. Southworth* (2000), and *Christian Legal Society v. Martinez* (2010).

First, in *Rosenberger*, the University of Virginia, in accordance with university policy, denied student activity fund support to a student organization that sought to pay an outside contractor to print a religious (Christian) newspaper.[121] The Court first identified that the student activity fund was a limited public forum, though it did not engage in a deep analysis to support that classification. It did, however, take care to analyze whether the speaker was the student organization, the university, or both. It determined:

> The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each [contractor] must sign. The University declares that the student groups eligible for SAF support

118. Hutchens & Fernandez, *supra* note 48, at 114; *see* Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943 (2017).
119. Hutchens & Fernandez, *supra* note 48, at 114–21.
120. Amar & Brownstein, *supra* note 118, at 1964.
121. Rosenberger v. Rectors & Visitors, 515 U.S. 819, 822–23, 825, 827 (1995).

> are not the University's agents, are not subject to its control, and are not its responsibility.[122]

Having identified the forum (the student activity fund), the speaker (the student organization), and the role of the university (neutral arbiter of the forum, in other words coercive regulator), the Court summarized its rules about government activity in a limited public forum: The government "may legally preserve the property under its control for the use to which it is dedicated,"[123] including content discrimination if content distinctions "reserv[e the forum] for certain groups or for the discussion of certain topics"[124]; however, others' speech may only be excluded if such action is "reasonable in light of the purpose served by the forum"[125] and the speech is not excluded "on the basis of its viewpoint."[126] The Court held that in this circumstance, "the University [did] not exclude religion as a subject matter [in the forum], but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[127] The Court thus struck down the university's distinction and allowed the student organization to access university funds to print the religious newspaper.

Five years later, in 2000, the Court decided *Southworth*, another student activity fund case. The question in this case was whether students could be required to pay a student activity fee that supported student organizations, and in so doing, be compelled to support viewpoints contrary to their own.[128] The Court engaged in dicta regarding the government speech doctrine and was clear that the speech of student organizations was not government speech. It underscored the assumption that government speech questions are distinct from forum analysis questions.[129] Then, the Court applied other forum analysis cases, noting they were instructive "by close analogy,"[130] and overturned the district court and Seventh Circuit's opinions, holding that the university could require students to pay an activity fee that would be used to support all student organizations.[131] Echoing *Rosenberger*, it was important in *Southworth* that the university's system for funding student organizations was viewpoint-neutral.[132]

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122. *Id.* at 834–35 (citation omitted).
123. *Id.* at 829 (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993)).
124. *Id.*
125. *Id.* (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 804–06 (1985)).
126. *Id.* at 830 (quoting *Lamb's Chapel*, 508 U.S. at 393).
127. *Id.* at 831.
128. Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).
129. *Id.* at 229–30.
130. *Id.*
131. *Id.* at 229–36.
132. *Id.*

Most recently, in 2010, the Court decided *Christian Legal Society v. Martinez* (CLS),[133] another case involving a student organization which turned on the forum analysis doctrine. In *CLS*, a public university's law school adopted a non-discrimination policy applicable to all registered student organizations which effectively required that registered student organizations accept any student who wanted to be a member, without restriction.[134] However, the local chapter of CLS, consistent with the national organization, required that its members sign a "statement of faith" which, among other things, prohibited extramarital sexual conduct or "unrepentant homosexual conduct."[135] CLS contended the non-discrimination policy violated its rights of free speech, expressive association, and free exercise of religion.[136] The Court analyzed the forum of registered student organizations as a limited public forum in which the law school's viewpoint-neutral "all-comers" policy was reasonable in light of the purposes of the forum.[137] It held that CLS did not have to pursue status as a recognized student organization, but if it wanted that status and the funding that came with that designation, it needed to jettison its "statement of faith" requirement for members.

These three cases provide a window into the Court's application of limited public forum doctrine to public universities. In these cases, the university is assumed to be a neutral regulator as well as a coercive regulator. Furthermore, the importance of the university acting in a viewpoint neutral manner is a dominant theme that ties these cases together. Although the university may not be explicitly excluded from persuasively participating in the forum, it is implicitly assumed to not be present as a speaker.

2. *Everything Outdoors Is a Public Forum*

Between January 1, 2016 and July 1, 2020, fifteen states enacted statutes about public universities and public fora based on Goldwater Institute or FIRE's model legislation. The public forum statutes typically seek to establish "the public areas of the university's campuses" as "public forums, open on the same terms to any speaker."[138] The statutes thus aim to enhance the opportunities for individuals' speech on college campuses. These provisions are framed as responding to universities restricting student speech by physically limiting student speech to what FIRE characterizes as "unconstitutionally restrictive

133. Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).
134. *Id.* at 661.
135. *Id.*
136. *Id.*
137. *Id.*
138. KURTZ ET AL., *supra* note 108, at 13.

'free speech zones,'"[139] which are typically smaller areas of a campus that universities have designated as traditional public fora in contrast to the remainder of campus, where speech presumably can be somewhat more regulated.

States have attempted to quash these free speech zones, in favor of much larger areas for free speech on campus, in a variety of ways. Alabama's statute addresses this explicitly, specifying: "[T]he institution shall not create free speech zones or other designated outdoor areas of campus in order to limit or prohibit protected expressive activities."[140] Most state statutes seeking to accomplish this goal, however, take a more subtle approach. Although most create traditional public fora, some create limited or designated fora.[141] Specifically, ten states invoke the legal term of art "traditional public forum" when describing outdoor campus areas (Arizona,[142] Arkansas,[143] Colorado,[144] Florida,[145] Kentucky,[146] Louisiana,[147] Missouri,[148] Tennessee,[149] Texas,[150] and Utah[151]). Three states effectively designate all outdoor campus spaces as traditional public fora by using aspects of legal definitions and restrictions, although they do not use the specific term of art (Iowa,[152] Oklahoma,[153] and Virginia[154]). Two states require that outdoor campus spaces be designated or limited public fora (Alabama[155] and South Dakota[156]).

Of these fifteen states, one enacted its statute in 2015; two enacted statutes between 2016 and 2018; and eight enacted statutes in 2019. Geographically, most of these states are southern, though a couple are southwestern, border, or midwestern. Politically, ten of these states have cast their electoral college votes consistently for Republican pres-

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139. *Frequently Asked Questions: The Campus Free Expression (CAFE Act)*, FIRE (Dec. 17, 2015), https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/ [https://perma.unl.edu/9JYW-GAUF].
140. H.B. 498, 2019 Reg. Sess. (Ala. 2019).
141. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1864(D) (2019) ("The public areas of university and community college campuses are public forums and are open on the same terms to any speaker.").
142. H.B. 2548, 52nd Leg., 2d Reg. Sess. (Ariz. 2016).
143. S.B. 156, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019).
144. COLO. REV. STAT. § 23-5-144 (2018).
145. FLA. STAT. ANN. § 1004.097 (West Supp. 2020).
146. KY. REV. STAT. ANN. § 164.348 (West Supp. 2019).
147. LA. STAT. ANN. § 17:3399.35(6) (2020).
148. MO. ANN. STAT. § 173.1550.2 (West Supp. 2020).
149. TENN. CODE. ANN. § 49-7-2045(11) (West Supp. 2020).
150. TEX. EDUC. CODE. ANN. § 51.9315(c)(1) (West Supp. 2020).
151. UTAH CODE § 53B-27-203(1) (2017).
152. IOWA CODE ANN. §§ 261H.2, 261H.4 (West Supp. 2020).
153. OKLA. STAT. tit. 70, § 2120 (2019).
154. VA. CODE. ANN. § 23-1-401 (2016).
155. H.B. 498, 2019 Reg. Sess. (Ala. 2019).
156. S.D. CODIFIED LAWS § 13-53-51 (2020).

idential candidates since 2000; the other five have supported Republican and Democratic candidates at various times since 2000.[157] None of the states have consistently supported Democratic presidential candidates since 2000.

These statutes seem to achieve their goal of eliminating free speech zones and opening more physical space for student speech on campus. Yet, students are not the only speakers at a university, and it is important to consider the impact that designating the entire campus to be a traditional public forum would have on persuasive government speech. This impact, of course, will vary depending on how one understands the public forum and government speech doctrines individually and as connected to one another. As described above, the government is most often assumed to moderate a forum, and it is important that it fill this role in a neutral way. The caselaw and model statutes are consistent in emphasizing this. Yet, as the Court also noted in *Rosenberger* in 1995: "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles."[158] Although the University's speech may not be excluded from this forum, it is also not excepted.

C. Government Speech Doctrine and University Speech

Since public universities are state actors, the government speech doctrine applies to them whether their speech is coercive or persuasive. Yet, the fit is an odd one, and incompatible with a handful of new state statutory provisions that require governments to maintain neutrality about public controversies. This section explores both issues in turn.

1. Government Speech Doctrine in Universities

The consequences of university speech being "government speech" are clear. The government speech doctrine gives the government both great leeway over its own speech and the ability to exclude other speakers from the forum in which it is speaking. More specifically, the university may engage in both content discrimination and viewpoint discrimination. In *Widmar v. Vincent*, the Court was clear to note the university's vast authority regarding its own speech.[159] Over a decade later in 1995, the Court summarized *Widmar* as:

157. *Electoral Map: Red or Blue States Since 2000*, 270 TO WIN, https://www.270towin.com/content/blue-and-red-states [https://perma.unl.edu/47WQ-QB9K] (last visited Oct. 25, 2020).

158. Rosenberger v. Rector & Visitors, 515 U.S. 819, 834 (1995) (citing Bd. of Ed v. Mergens, 496 U.S. 226, 250 (1990); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–72 (1988)).

159. Widmar v. Vincent, 454 U.S. 263, 276–77 (1981).

> [A] proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.[160]

Some public university speech falls squarely into the category of government speech. As Jerry and Lidsky note, "This doctrine most obviously applies when, for example, [university] administrators issue directives to carry out university operations; announce management decisions or information; or address students or faculty in meetings, retreats, convocations, or academic ceremonies."[161] They further speculate that "[c]ourts are likely to treat university social media sites that do *not* permit user comments as government speech."[162] These examples, of course, contain both coercive and persuasive speech, and a large part of what brings the government speech doctrine into play is that the university is not sharing the forum.

Just as sharing the forum can remove the protections of the government speech doctrine, so too can ambiguity about the identity of the speaker. In other words, if it is not clear that the government itself is speaking, then the government speech doctrine does not come into play. For example, in *Widmar*, the Court relied on identifying the speaker as the student organization, as opposed to the university, to overturn a university's ban on student organizations using public university facilities for worship and religious instruction.[163] The Court held that student organizations' use of university space did not transform individual or group speech into government speech.

Clarity about the source of the speech is part of what enables the check on government speech—public accountability through the political process—to work. The idea is that if the public disagrees with the government speech and no longer wants the government to convey that message, it can take action at the ballot box. The public must know the government is speaking in order for this to work. In the context with which this Article is concerned, the university is clearly the speaker. The university develops, endorses, and expresses a message.[164] Indeed, a university's speech has power to block or challenge systemically discriminatory speech of others in large part *because* the speech can unequivocally be identified as the speech of the university. The traditional model of accountability for government speech may

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160. *Rosenberger*, 515 U.S. at 833.

161. Jerry & Lidsky, *supra* note 53, at 74.

162. *Id.*

163. *Widmar*, 454 U.S. at 273, 280–81 (noting that such a prohibition was not required by the Establishment Clause).

164. *See* Papandrea, *supra* note 13, at 1201.

not work all that well in the university context, but this is not because of a lack of transparency about the speaker's identity.[165]

The accountability challenge arises because the political process check does not apply as readily to most public universities as it does to state legislatures or other bodies. As recent Black Lives Matter solidarity messages demonstrated, the university president is the voice of the university in a practical sense, not the university board of trustees. The board of trustees select the university president and is the only entity that can fire a university president.[166] If the university community does not like the university's message delivered by the president, even a vote of no confidence from a university's faculty cannot remove a president—it can merely signal a significant lack of support to the board of trustees.[167] Furthermore, although some public universities' trustees are elected, many with much longer terms than other elected officials, most are appointed by state governors.[168] Because the structure of the university is a hybrid corporate-government structure, the government speech doctrine is a somewhat unusual fit for the university context even though a public university and its employees, when acting in their official capacity, are undisputedly state actors in a legal sense.[169]

2. *Expecting Government Neutrality*

From January 1, 2016 to July 1, 2020, four states enacted statutes that limit the persuasive speech in which public universities can engage, even under the government speech doctrine. These statutes, which have direct consequences for university speech, were the jumping off point for this Article.

The four states' approaches can be divided into three categories. The first approach, adopted in two states, is aspirational and not accompanied by an enforcement mechanism: Alabama's statute says, "the institution should strive to remain neutral";[170] Arizona's says, "the institution is encouraged to attempt to remain neutral, as an in-

165. *Id.*
166. *See generally* Andrés Bernasconi, *Tenure of University Presidents*, INSIDE HIGHER ED (June 23, 2013), https://www.insidehighered.com/blogs/world-view/tenure-university-presidents [https://perma.unl.edu/T2ZX-RF5E].
167. *See, e.g.*, Kevin Kiley, *Voting with No Confidence,* INSIDE HIGHER ED (Apr. 23, 2013), https://www.insidehighered.com/news/2013/04/23/votes-no-confidence-proliferate-their-impact-seems-minimal [https://perma.unl.edu/G5KH-DAS6].
168. *See generally Gubenetorial Appointment "Cleanest Way" to Ensure Accountability in University Trustees*, MICH. RADIO (Feb. 6, 2018), https://www.michiganradio./post/gubernatorial-appointment-cleanest-way-ensure-accountability-university-https://perma.unl.edu/3ZB7-EMJH].
169. *State Action Requirement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/state_action_requirement [https://perma.unl.edu/S7DU-475Z] (last visited Feb. 4, 2021).
170. H.B. 498, 2019 Reg. Sess. (Ala. 2019).

stitution."[171] The second approach is slightly stronger, stating an expectation of institutional neutrality and also calling for an annual public report discussing instances in which public universities are living up to this standard and in which they fall short. This creates public accountability, if not enforcement. Georgia's statute asks its Board of Regents to publish a report each year addressing "[a]ctions taken by state institutions of higher learning, including difficulties, controversies, or successes, in maintaining a posture of administrative and institutional neutrality with regard to political or social issues."[172] The third approach is the strongest. North Carolina's statute mandates an annual public report and also requires the public university system to "develop and adopt a policy on free expression" that, in part, prohibits institutions from "tak[ing] action, as an institution, on the public policy controversies of the day in such a way as to require students, faculty, or administrators to publicly express a given view of social policy."[173]

The Goldwater Institute characterizes these neutrality provisions as "aspirational" and explains them as fostering diversity of viewpoint on campus: "When a university, as an institution, takes a strong stand on a major public debate, this inherently pressures faculty and students to toe the official university line, thereby inhibiting their freedom to speak and decide for themselves."[174] The Institute does not use the terms "coercion" or "chilling effect" but does adopt the colloquial understandings of those terms as discussed earlier.[175] Relatedly, these state statutory provisions also enact the Goldwater Institute's commitment to neutralism, the idea that government should be neutral among competing views. As an additional reason to support neutralism, the Goldwater Institute cautions that "when the university speaks, it does so with funds that have likely not been given to it for that purpose."[176] This makes assumptions about both the mission of the university and the role of the university as speaker. If the univer-

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171. ARIZ. REV. STAT. ANN. § 15-1864(G) (2019).
172. GA. CODE ANN. § 20-3-48.1(3) (West 2019).
173. N.C. GEN. STAT. § 116-300 (2019).
174. KURTZ ET AL., *supra* note 108, at 5.
175. Chilling effect doctrine is not part of questions regarding universities' persuasive expression of their own viewpoint in opposition to systemic discrimination. A university's speech in these circumstances may "chill" an individual's systemically discriminatory speech in a colloquial sense. That is, it may deter such speech because the speaker does not want to be out of favor with the university. This is unproblematic in a legal sense: When a university is declaring its own views and, in particular, when it is engaging in counter-speech to systemically discriminatory speech impacting the university community, it is speaking persuasively and seeking to convince rather than to compel. Accordingly, coercion and chilling effect are of limited relevance to this situation. *See, e.g.*, McGlone v. Cheek, 534 F. App'x 293, 298–99 (6th Cir. 2013).
176. KURTZ ET AL., *supra* note 108, at 9.

sity's mission is to create and disseminate knowledge—and scholars from various disciplines and across the political spectrum agree that it is[177]—then the question is whether the university is also committed to ensuring equal opportunity for marginalized and minoritized members of its community.[178] If so, the university may need to use its voice, specifically its persuasive speech, to help level the playing field.

Under *Garcetti v. Ceballos*,[179] it is unclear whether state legislatures can prevent universities from speaking in this way. Although *Garcetti* is focused on the official job duty speech of individual employees, it is, at its core, about the state controlling its own speech. Thus *Garcetti* is consistent with the broad contours of the government speech doctrine. Essentially, *Garcetti* holds that the government owns the speech of its employees and can control it.[180] This Article focuses on the speech of universities, but, in a very real sense, institutional speech is only possible through individuals. Consequently, if a state statute prohibits a university from taking a stand on controversial matters of the day, thereby curtailing what a state employee (i.e., a university president) can say and the policies he or she can enact, *Garcetti* would seem to support such a restriction. This is the case even though *Garcetti* assumes an exception for academic freedom,[181] since academic freedom is focused on deference to individual faculty members' professional judgment in first-person activities of teaching and research—not on the speech of the university itself.[182]

However, there is one significant caveat to the potentially broad authority *Garcetti* may give state legislatures in this regard. Some state constitutions or judicial decisions ensure public universities constitutional autonomy.[183] In other words, public universities are not agencies of the executive or legislative branch, but rather are independent entities.[184] If a public university has autonomy to manage its

177. *See generally* ULRICH BAER, WHAT SNOWFLAKES GET RIGHT: FREE SPEECH, TRUTH, AND EQUALITY ON CAMPUS (2019); SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (2017); CHEMERINSKY & GILLMAN, *supra* note 9; KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2019).

178. *See generally* BAER, *supra* note 177; BEN-PORATH, *supra* note 177.

179. Garcetti v. Ceballos, 547 U.S. 410 (2006).

180. *Id.* at 410–11.

181. *Id.* at 425.

182. *See* AM. ASS'N OF UNIV. PROFESSORS, STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), *available at* https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure [https://perma.unl.edu/XHR2-ZWJA]; *see also* Amar & Brownstein, *supra* note 118 (giving an excellent overview of academic freedom rights).

183. *See, e.g.*, DEBORAH K. MCKNIGHT, MINN. HOUSE RESEARCH DEPT., UNIVERSITY OF MINNESOTA CONSTITUTIONAL AUTONOMY: A LEGAL ANALYSIS (2004); Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271 (2009).

184. *See* Hutchens, *supra* note 183, at 282.

own affairs, then this also arguably includes deciding the messages it will convey to members of its community as well as the policies it will enact. If a university has constitutional autonomy, it is not obvious why another branch of government would be able to restrict its speech, and policies which gain traction through speech, to and on behalf of its own community.

Regardless of whether a public university has constitutional autonomy, consider what it would be like to apply the Goldwater Institute's neutrality provision to the issue of international students and immigration—certainly a "public policy controversy of the day."[185] First, what would it mean for an institution to be neutral regarding visa restrictions and undocumented students; would it mean that the university was obligated to be silent? However, especially in a case like this, does silence indicate agreement with the federal regulations and related actions, in which case silence is not neutral? What would it look like to not be silent? Could a university speak publicly about the benefit these students bring to the institution and the nation, and enact a policy that supports them by providing access to information and resources?[186] Could it sue the federal government on their behalf?[187] The actions—and speech—of university employees are necessary to implement these policies and do things such as make funds available, provide access to food and housing, and perhaps even provide legal advice. They also are not neutral. Even if a public university were to enact such policies or express such views, it also could, and presumably would, continue to allow individuals and groups on campus to express all views about these issues—moderating the forum in a

185. *See* Karin Fischer, *As MIT and Harvard Sue, Colleges Scramble to Respond to New Federal Policy on International Students*, CHRON. HIGHER EDUC. (July 8, 2020), https://www.chronicle.com/article/as-mit-and-harvard-sue-colleges-scramble-to-respond-to-new-federal-policy-on-international-students [https://perma.unl.edu/XPH7-KLB8]; Karin Fischer, *An "America First" Presidency Clashes with Higher Ed's Worldview*, CHRON. HIGHER EDUC. (Feb. 1, 2017), https://www.chronicle.com/article/an-america-first-presidency-clashes-with-higher-eds-worldview/ [https://perma.unl.edu/42PQ-RLEB]; Katherine Mangan, *Supreme Court Ruling Relieves DACA Students and Energizes Activism*, CHRON. HIGHER EDUC. (June 18, 2020), https://www.chronicle.com/article/supreme-court-ruling-relieves-daca-students-and-energizes-activism [https://perma.unl.edu/R7A8-KEH7]; Fernanda Zamudio-Suaréz, *Higher-Ed Groups Warn Against Visa Restrictions for Chinese Students*, CHRON. HIGHER EDUC. (May 30, 2018), https://www.chronicle.com/article/higher-ed-groups-warn-against-visa-restrictions-for-chinese-students/ [https://perma.unl.edu/Q6S4-Z2F2].

186. *See, e.g.*, *Undocumented Student Resources*, MICH. STATE UNIV., https://undocumented.msu.edu [https://perma.unl.edu/YW8N-983U] (last visited Oct. 25, 2020).

187. Karin Fischer, *As MIT and Harvard Sue, Colleges Scramble to Respond to New Federal Policy on International Students*, *supra* note 185.

technically coercive and neutral manner and participating alongside the other speakers in a persuasive manner.[188]

D. Persuasion, Coercion, and University Speech

Public universities have broad leeway under the government speech doctrine to advance their views while excluding others' viewpoints, but this Article is not intended to justify or encourage the use of that option. Rather, I contend that by understanding a public university's speech as coercive or persuasive, we can recognize that a public university can be a persuasive speaker in a public forum alongside the speech it regulates in a viewpoint-neutral way. This is different from the dominant understandings of the forum analysis and government speech doctrines, in which the government is either the silent moderator of the forum or the coercive rule-maker who can exclude others' viewpoints. When pushed to consider the role of government as a speaker in a public forum, the common response is that such speech is not prohibited. Those doctrines apply in the same way to public universities as they do to cities, states, and the federal government. Thus, the lack of nuance about government speech constrains analyses about public universities' speech as well.

Like general-purpose governments, universities engage in coercive speech in the form of rule-making: student codes of conduct[189] and rules regulating employee behavior and terms of employment are the university-equivalent of local law; administrative policies are the counterpart to administrative agency regulations. Like elected governmental bodies, universities make policy to govern their community. All of these rules and regulations constitute coercive speech and thus fit neatly into the legal category of "government speech."

Additionally, public universities engage in substantial persuasive speech. When university presidents speak at convocation and graduation, and when they communicate regularly with their campuses, they

188. This example demonstrates Hutchens and Fernandez's characterization of these statutes as essentially proposing "to muzzle institutional leaders on various speech issues to weaken the notion that institutions are able to espouse values related to, for instance, diversity and inclusion." Hutchens & Fernandez, *supra* note 48, at 126. They criticize this as both "misunderstanding the place of colleges as appropriately being able to advocate for certain positions" and presumably "prov[ing] exceptionally difficult to implement" because it hinges on the meaning of vague terms such as "controversial." *Id.* at 126–27. Ultimately, they express concern that the "neutrality provision [is] best viewed as using free speech as intellectual cover to undermine institutional autonomy." *Id.* at 127.

189. *See generally* WILLIAM FISCHER ET AL., TNG CONSULTING, A DEVELOPMENTAL FRAMEWORK FOR A CODE OF STUDENT CONDUCT: TNG MODEL CODE PROJECT (2013) (providing model codes of student conduct for public and private universities as well as community colleges, and noting that the consulting group has written codes of student conduct for over seventy-five institutions).

often are opining and seeking to persuade rather than demanding compliance. This is persuasive speech, and yet it is also government speech if the university is not sharing the microphone (the actual microphone in the case of a graduation or the metaphorical one in the case of a regular email message). However, when seeking to persuade, speakers often want to invite others into the conversation. Therefore, persuasive speech may better achieve its purpose in a forum where interaction takes place not just because the university permits it but because other speakers have a right to share their views there as well. Under a traditional understanding of forum analysis doctrine, though, the government moderates and is not assumed to participate in these fora, so a public university's persuasive speech is not part of the explicit legal framework of forum analysis. Perhaps because public universities engage in a great deal of persuasive speech, arguably even more than general purpose governments, the need for a fitting legal and conceptual framework—and examples of its application—seems critical.

Counter-speech by University of Florida President Kent Fuchs to white nationalist Richard Spencer provides a helpful illustration of persuasive government speech by a university across various fora. When Spencer came to the University of Florida in the fall of 2018, Fuchs was outspoken in his opposition to Spencer's message. Fuchs conveyed this through messages sent to the university community in email, video, the campus newspaper, via social media, and in public spaces.[190] In all circumstances, Fuchs spoke persuasively, seeking to convince those in the university community and beyond that Spencer's views were wrong. Fuchs did not speak coercively, punishing Spencer or threatening to punish those who supported him. Fuchs was clear that he was speaking in his official capacity, so there was no confusion that he was speaking as the university.

The legal rules applicable to Fuchs's speech vary, however. Consider some specific examples. First, when Fuchs's official statements were published on the university's website,[191] they were protected by the government speech doctrine. This is because the university has

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190. *See also* Ross, *supra* note 8, at 765 (noting that when Richard Spencer visited Texas A&M, university leaders engaged in counter-speech as well).

191. W. Kent Fuchs, *Potential Speaker on Campus*, UNIV. FLA.: STATEMENTS (Aug. 12, 2017), http://statements.ufl.edu/statements/2017/08/potential-speaker-on-camp.html [https://perma.unl.edu/2M95-72JU]; W. Kent Fuchs, *UF Denies Request for Speaking Event – Message from President Fuchs*, UNIV. FLA.: STATEMENTS (Aug. 16, 2017), http://statements.ufl.edu/statements/2017/08/uf-denies-request-for-speaking-event---message-from-president-fuchs.html [https://perma.unl.edu/-6HBF]; W. Kent Fuchs, *Update on Potential Speaker from President Fuchs*, UNIV. FLA.: STATEMENTS (Aug. 30, 2017), http://statements.ufl.edu/statements//08/update-on-potential-speaker-from-president-fuchs.html [https://perma.edu/WM87-KJLD]; W. Kent Fuchs, *Statement from President Fuchs About Richard Spencer Appearance*, UNIV. FLA.: STATEMENTS (Oct. 10, 2017), http://

used those spaces in a way that makes clear they are only available for its own speech, not the speech of anyone who may want to use them. Thus, even though these statements were persuasive speech (they did not create or enforce rules or regulations, so they were not coercive), they constituted the official and exclusive view expressed in that nonpublic forum.

Second, Fuchs wrote about Spencer's views and campus visit in his regular column in the school newspaper.[192] A public university newspaper easily can have multiple types of fora within it. For example, the letter-to-the-editor section could not restrict based on viewpoint, but may limit itself to letters written by students, faculty, or staff of the university; any such restrictions would need to be reasonable in light of the purpose of the forum as well as viewpoint-neutral. As a result, limited public forum is a good fit for the letter-to-the-editor section. However, the rest of the newspaper is closer to a nonpublic forum controlled by the journalists and newspaper itself. That the newspaper allowed Fuchs regular access (via his column) does not open the forum beyond nonpublic, so long as access is granted on a case-by-case basis. For no other reason than length and cost of the publication, a newspaper would need to determine who can make regular contributions and the length of those contributions.

Third, Fuchs made comments about Spencer's views in the outdoor, public areas of campus; we know this because a student journalist appears to have unexpectedly encountered Fuchs on campus, interviewed him, and shared the recorded interview online.[193] Unless the campus had designated free speech zones, these outdoor, public areas would be traditional public fora moderated by the university, or perhaps designated public fora also moderated by the university but open only to members of the university community and not to the general public. To view this space as a public forum that the university was required to facilitate but could not participate in would have denied Fuchs—the embodiment of the university—a voice in that arena, where he sought to engage in counter-speech. On the other hand, to view the controlling doctrine as government speech, since Fuchs was expressing a viewpoint on behalf of the university, would have allowed the university to shut down all speech that was contrary to Fuchs's in that forum, which seems normatively ill-advised and also not the pur-

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statements.ufl.edu/statements/2017/10/statement-from-president-fuchs-ab-spencer-appearance.html [https://perma.unl.edu/YX3M-9HWV].

192. Kent Fuchs, *Shutting Down Spencer's Movement*, INDEP. FLA. ALLIGATOR (Oct. 20, 2017), https://www.alligator.org/opinion/shutting-down-spencer-s-movement/article_68ad8856-b56c-11e7-86cc-f7d4852770be.html [https://perma.unl.edu/AQJ3-QYE3].

193. First Coast News, *UF President Dr. Kent Fuchs Speaks About Richard Spencer Event*, YOUTUBE (Oct. 19, 2017), https://www.youtube.com/watch?v=RJCdpabNQrM [https://perma.unl.edu/5A95-FFRK].

pose of the government speech doctrine.[194] The reality of the situation was that the university, through Fuchs, was both arbiter and participant. Most recently, during May and June 2020, similar speech from university leaders was everywhere as the Black Lives Matter movement gained momentum.

All of these events demonstrate the necessity of theorizing the way in which a university is speaking in a forum as well as the interaction of that speech with constitutional doctrine, rather than merely noting that such speech is not per se prohibited. Especially if free speech is to flourish on campuses where minoritized voices have been excluded, a powerful speaker or speakers, such as the university itself, must be able to answer systemically discriminatory speech with persuasive counter-speech, and this should be an explicit part of the way that we understand the doctrine.[195] The university is not the only speaker who can speak on behalf of the minoritized or marginalized, but it is among the best able to do so. To be clear, the university can speak persuasively in this way, seeking to convince[196]—it is not limited to speaking coercively by making rules and enforcing them through discipline.

V. CONCLUSION

If we expect university leaders to speak about institutional values and engage in speech opposing systemically discriminatory speech and actions, it is necessary to understand how the law shapes their ability to do so. This is especially important in the present moment because free speech controversies and political protests have gripped campuses and communities across the country in the past few years with an intensity we have not seen since the 1960s.[197] Indeed, the recent Black Lives Matter protests may be the largest in American history.[198] Only time will tell whether this is merely a period of social unrest, or one of punctuated equilibrium.

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194. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000); Rosenberger v. Rector & Visitors, 515 U.S. 819, 832–33 (1995) (noting "when the state is the speaker, it may make content-based choices" and may engage in viewpoint discrimination); Papandrea, *supra* note 13, at 1198 ("[T]he government must speak to be effective and that it need not embrace opposing viewpoints whenever it does.").

195. Gelber & Bowman, *supra* note 3.

196. *Id.*

197. *See* Ronald Brownstein, *The Rage Unifying Boomers and Gen Z*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/politics/archive/2020/06/todays-protest-movements-are-as-big-as-the-1960s/613207/ [https://perma.unl.edu/C3QP-UG3M].

198. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://wwwnytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.unl.edu/382L-EPPT].

Either way, university leaders are being asked to speak in support of minoritized groups and, seemingly more than ever before, are choosing to do so. This raises many questions. To analyze these questions in a scholarly manner and help move the conversation forward, this Article looks to Brettschneider's theory of value democracy, which posits that government should use its speech to support fundamental values of freedom and equality. Additionally, this Article draws a distinction between different roles government can hold when it speaks—advocate/persuader or regulator/coercer. Turning to federal constitutional doctrine, even though we often talk about the government as either neutral moderator of a forum in which others speak *or* as a speaker in its own right who can monopolize the forum, scholars and courts also acknowledge in passing that this is not the complete picture. Understanding government speech in a more nuanced way—specifically, as coercive or persuasive—provides a way to affirmatively explain why the government can speak persuasively alongside other speakers in forums it moderates (as opposed to noting simply that it is not prohibited from doing so). This interpretation theorizes government speech in a more robust manner and in one that also reflects our lived realities.

This is important and timely not only because of some university leaders' desire to speak in a way that supports minoritized members of their community but also because emerging trends in state law are complicating the landscape. In the past few years, numerous states have declared all or most outdoor areas of public university campuses to be traditional public fora. The nuanced understanding I develop in this Article explains how and why the university can, consistent with existing doctrine, engage in these spaces as a persuasive speaker alongside others. Second, state legislatures in four other states have constrained universities' ability to speak on matters of public controversy. While neutral on their face, these sorts of provisions will operate to the disadvantage of minoritized students, faculty, and staff. The reach of these provisions likely varies from state to state, in some contexts arguably silencing universities. Yet, universities are not merely places where speech happens; they are powerful speakers in their own right and have been for a long time, even if this has been hidden from our view.