The Rust That Corrodes: State Action, Free Speech, and Responsibility

Peter M. Shane
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In an age of overworked superlatives, the extraordinary life and character of Alvin Rubin defy adequate expression. Not a day has passed since my clerkship fourteen years ago that I have not reflected on his counsel and on his example. No one surpassed "ABR" as judge, teacher, writer, or friend.

Among Judge Rubin's most remarkable traits was the deep sense of personal responsibility that attended his every official act. He never cut corners. Beneath the glass of his desk was a note to himself: "Every case is important to its parties." It is no surprise that legal ethics and judicial administration were among his chief areas of scholarly concern. The meticulous and ethical fulfillment of judicial responsibility to the public was the very ideal he embodied.

It thus seems fitting to devote an essay in memory of Judge Rubin to two areas of constitutional law where the theme of responsibility has been much overlooked, although not by him. These areas are "state action" and freedom of speech. I wish to focus, indeed, on an aspect of "free speech" doctrine that raises the same conundrum that the state action doctrine poses: what is public; what is private?

I can illustrate my linkage of these two doctrinal areas with an example: Imagine a privately owned and operated family planning clinic financed almost entirely through federal funds. As I write this, that funding would subject the clinic to federal regulations barring most clinic

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1. Judge Rubin's judicial reluctance to condone irresponsible official behavior was evident in more contexts than are explored in this article. See, e.g., Stern v. Tarrant County Hosp. Dist., 778 F.2d 1052, 1061 (5th Cir. 1985) (Rubin, J., dissenting) (unequal treatment inflicted by state officials in violation of state law should be deemed irrational and therefore necessarily violative of equal protection); Hill v. Mississippi State Employment Serv., 918 F.2d 1233, 1241 (5th Cir. 1990) (Rubin, J., dissenting) (negligent failure of state employment agency employees to treat black job applicant fairly should not be a defense to a Title VII race discrimination claim).
employees from providing information to a client on the use of abortion for family planning. Suppose that, under the express, but independently adopted policy of my hypothetical clinic: "No physician or other employee performing his or her work adequately for one year shall thereafter be discharged except for cause." Imagine further that a nurse employed two years by this clinic is summarily dismissed for allegedly violating the abortion gag rule.

Under current Supreme Court decisions, the restriction on the nurse's speech—what would surely be protected private free speech outside the clinic context—is permissible because the government is helping to fund the clinic's counseling services. On the other hand, the dismissal without notice or hearing—clearly unlawful if the nurse were a government employee, rather than the employee of an independent contractor—would be beyond constitutional purview. This is so because the decision whether to accompany the nurse's dismissal with any procedural protections would not be an implementation of affirmative government policy. Government funding alone would not render the clinic a "state actor" subject to due process obligations. Thus, in my clinic, government has chosen to use its funding effectively to "de-privatize" individual speech where that transformation serves a permissible government end, but has foregone extending to clinic employees any of the job protection that the Constitution would itself confer if they were government employees. This is surely the worst of both private and public worlds.

I suggest that the Supreme Court has often written unpersuasively in both doctrinal areas highlighted by my example, because it has failed to elaborate a compelling normative vision underlying the public/private distinction that these cases necessarily delineate. The law, to be accurate, actually depicts three categories of action: action so private as to be beyond any government's regulatory power, action public enough in its implications to be regulable within the government's discretion, and action so public or "governmental" in nature as to be subject auto-

2. The U.S. Department of Health and Human Services (HHS) supposedly narrowed the scope of the relevant regulations, 42 C.F.R. 59.8-59.10 (1991), in a March 20, 1992 memorandum, reprinted 138 Cong. Rec. S4252 (daily ed. Mar. 26, 1992), from Deputy Assistant Secretary William Archer III to regional HHS administrators. Although the intended impact of this memorandum is uncertain, it appears that clinic employees other than physicians remain subject to the speech restriction described in text.


matically to the regulation of the federal Constitution. Instead of attending to the substantive purposes served by this doctrinal conceptualization of human behavior, the Court's discussions in cases dependent on some assessment of the private/public distinction have become aridly formal and obfuscatory.

My argument is that the boundaries of public and private action would be assigned more constructively by attending to substantive notions of responsibility. Indeed, what the public/private distinction most usefully implements is a conceptualization of the world in which the human capacity for responsible action is maximized. A broad conception of what is "public" creates opportunities for the community to affirm its responsibilities to individuals and to assure that individuals fulfill their responsibilities to one another and to the community. An expansive conception of what is "private" preserves a realm of unregulated activity and a conception of human autonomy that makes conventional liberal notions of individual responsibility comprehensible. In deciding what is public and what is private in state action or in free speech cases, courts should assess the impacts of either determination on society's discharge of its responsibilities to individuals, the fulfillment of each person's responsibilities to other individuals and to the community as a whole, and the autonomy individuals must enjoy if they are to have any capacity for responsible behavior.

I. STATE ACTION AND COMMUNAL RESPONSIBILITY TO THE PERSON

The state action doctrine, like the law of federalism, is generally understood as being protective of individual liberty. By limiting the direct regulatory reach of the Constitution to government action, the Court respects a presumptive realm of private autonomy that, if regulable at all, may be regulated only by political action more recent and less entrenched than the Constitution. So, too, the Tenth Amendment asserts the existence of a realm of state and local activity beyond the reach of national regulation.

Federalism, however, is also understood to have a constructive character vis-a-vis that particular actor—the federal government—that the doctrine also limits. Federalism theory embodies a commitment that the


7. Although Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005 (1985), repudiated the judicial enforceability of the Tenth Amendment as a protection for states against federal legislation of general applicability, the Supreme Court recently resuscitated that Amendment as a limit on Congress's power to direct the states' use of their regulatory power. New York v. United States, 112 S. Ct. 2408 (1992).
federal government shall not be denied the capacity to fulfill its constitutionally assigned functions effectively. The competence of national authority is thus an ideal coexistent, if always in tension with, the ideal of local autonomy in Tenth Amendment doctrine.  

The Supreme Court, however, has never set forth the constructive character of state action doctrine except in a near-tautological way. The positive value of the state action doctrine lies in avoiding the imposition of unjustified liability on government for private acts,9 which implicitly has the consequence of conserving state resources for better uses. This explanation comes close to saying no more, however, than that state action doctrine is justified because it avoids unjustified consequences. It offers no explanation at all of the good that is accomplished by accurately diagnosing purportedly private action as the action of government. Any compelling understanding of a constructive aspect of the state action doctrine would have to specify a positive vision of what the Constitution accomplishes when it does apply. The achievement of that vision, like the preservation of federal regulatory competence as a goal of federalism, would deserve our allegiance alongside the anti-regulatory aim of preserving negative liberty.

An important suggestion of such a vision lies in Edmonson v. Leesville Concrete Company,10 in which the Supreme Court held the use of racially discriminatory peremptory challenges in civil actions to be an unconstitutional denial of equal protection. I do not take as my text, however, the Supreme Court decision handed down just eight days before Judge Rubin died. Instead, I look to Judge Rubin's dissent from the en banc Fifth Circuit opinion that the Supreme Court reversed.11 This was not Judge Rubin's only experience of seeing his views turned into Supreme Court pronouncement, but his Edmonson dissent, I think, is especially revealing of its author's character.

The relevant facts of Edmonson are simple. The case involved a personal injury claim by an African-American employee against his construction company-employer. In federal court for a jury trial, the employer used its three peremptory challenges to exclude two blacks and one white from the jury venire. Edmonson, relying on the Supreme Court's decision invalidating racially discriminatory challenges in criminal trials,12 asked that the employer be required to give a racially neutral explanation for its exclusion of the black jurors. The trial court held,

11. 895 F.2d 218, 227 (5th Cir. 1990) (en banc) (Rubin, J., dissenting), vacated, 860 F.2d 1308 (5th Cir. 1989).
however, that no such requirement applied in civil proceedings. The jury eventually found in favor of Edmonson on the issue of employer negligence, but it also found him eighty percent contributorily negligent and reduced his recovery accordingly. He then sought a new trial, relying on the employer’s possible use of racially discriminatory peremptory challenges.

The basis for the employer’s argument was that the use of peremptory challenges in a civil proceeding was not governmental action controlled directly by the Constitution at all. Those judges accepting that argument emphasized that the privately retained counsel for the employer was not implementing any policy endorsed, encouraged, or required by the state. “Clearly,” the Fifth Circuit concluded, private counsel cannot be a state actor if “even a public defender, paid by the state, in a criminal proceeding against an indigent defendant is not.”

The one acknowledged state actor on the scene—namely, the trial judge—had been performing what the pro-employer appellate jurists considered “the merely ministerial function of excusing the veniremen cut by counsel from further attendance in the case.” Perceiving the judge’s action as “mere . . . acquiescence” in private choice, these jurists determined that any racism latent in the peremptory challenges could not be attributed to government or voided under the Constitution. As Justice O’Connor summed up: “Arbitrary discrimination based on race is particularly abhorrent when manifest in a courtroom, a forum established by the government for the resolution of disputes through ‘quiet rationality.’ But . . . [t]he Government is not responsible for a peremptory challenge by a private litigant.”

The Supreme Court majority reached a different conclusion, relying on a series of ostensibly technical doctrinal tests for discerning “state action.” Justice Kennedy’s opinion determined that the exclusion of civil jurors through peremptory challenges depends on the “significant participation” of government. It deemed the constitution of juries to be a “traditional function of the government.” It concluded that the injury inflicted by race-based peremptories was “aggravated in a unique way by . . . incidents of governmental authority,” namely, the courtroom setting. On these bases, the majority held that the use of peremptories

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13. These include Judge Gee in dissent on the original appellate panel, the Fifth Circuit en banc majority, and the Chief Justice together with Justices O’Connor and Scalia in dissent on the Supreme Court.
15. 860 F.2d at 1316; see also 895 F.2d at 221.
17. Id. at 2084.
18. Id. at 2085.
19. Id. at 2083 (citing Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948)).
does represent state action and may not be based solely on racial animus.

Judge Rubin's careful parsing of the state action precedents presaged each of these results, but there is one theme he evoked more emphatically and with a decidedly non-technocratic passion:

By presiding over jury selection in his official, governmental capacity, a judge is intimately involved in a process that Tocqueville termed America's "greatest advantage" in "rub[bing] off th[e] private selfishness which is the rust of society." By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval. . . . On its face, it is discriminatory state action for the government itself to establish and maintain a system of jury selection that authorizes blatant racial discrimination by litigants using the courts set up by, paid for, and operated by the government.21

Conspicuous in this passage is Judge Rubin's sense of a judge's fiduciary responsibility to the society the judge serves, a responsibility corrupted by any complicity in the facilitation of racial bigotry. We recognize such dereliction for what it is because, however resistant private racism remains to wholesale elimination, our constitutional processes—embodied not only in venerated documents, but also in the daily deliberations of legislative, executive, and judicial authorities—have established antiracism as a core value of public life. To maintain constitutional government is to propagate this value.

The ideal of government implicit in Judge Rubin's analysis can be further generalized. We can think of constitutional government as more generally representing both a society's capacity to identify fundamental value commitments and to keep faith with those commitments in its public transactions. Thus, "correct" determinations of the state action boundary enable a community not only to protect an important realm of unregulated personal autonomy, but also to assure appropriate space for the affirmation of those common values for which constitutionalism, at its best, can stand. This is the constructive side of state action doctrine.

The affirmation of common values is one of the most strengthening functions that society can perform for its members. Assuming the values are well chosen, society's steadfastness in sustaining those values rescues its members from a state of constant uncertainty in which each individual's sense of personal security, respect, tolerance, and fair play is

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21. Id. at 233 (footnote omitted) (citation omitted).
put at risk and must constantly be renegotiated in every transaction in which he or she participates. Strong community values make it unnecessary, for example, for each individual seeking a job, an education, or some similarly important good, to argue whether such goods may be appropriately withheld on grounds of race, religion, political belief, or even mere whim. Once a community elevates some value to constitutional status, the public pursuit of that value can be seen to discharge the government’s most basic obligations to the people.

Reconstructing state action doctrine to attend to the affirmation of public values would not reverse every Supreme Court decision in which state action was found absent. It would argue, however, for a different form of analysis. Such cases routinely involve purportedly private decision making (a) that stands in some close proximity to government, and (b) that, if ascribed to government, would be unconstitutional. When such decision making is facilitated in any nontrivial way by government licensing, funding, or ancillary activity, courts should be at least as concerned that constitutional adjudication not forego an appropriate opportunity for promoting fundamental constitutional values as we are about abridging the scope of unregulated private conduct.

My analysis would render *Edmonson* an easy case. Judge Rubin correctly discerned that judges presiding without resistance over the use of race-based peremptories to exclude African-Americans from an official decision making role in the community cannot help but legitimate racism. Unlike Justice O’Connor, he did not regard a judge’s personal abhorrence of racism, even if voiced, as providing adequate sustenance to the Constitution’s commitment to racial equality. Judges permitting arbitrary peremptory challenges would fail in their own responsibilities to the community, as well as preventing African-Americans from fulfilling their roles as responsible citizens. Seen in this light, declaring race-based peremptories to be state action is to affirm the constitutional value of antiracism in the courtroom, to discharge society’s obligations to racial minorities, and to assure individual African-Americans a fair opportunity to assume responsible roles in their communities.

Mine is not an argument, however, for finding state action whenever state licensing, funding, or other supportive activity occurs in proximity to some challenged private initiative. In any complex human interaction, there exist multiple lines of actual or potential responsibility. Treating private action as state action will always have the effect of affirming constitutionalism and, to that extent, the community’s responsibilities to its members. In some instances, however, such treatment may undermine the exercise of responsibility in other ways. Indeed, for courts to treat all private action as essentially public and constitutionally controlled might reasonably be thought to subvert our capacity to understand our actions as expressions of our individualism, a capacity that is central to our commonest notions of what it means to be morally accountable.
Thus, if a core aim of the state action doctrine is to maximize opportunities for each person, and for the community, to fulfill important responsibilities, then the courts' focus on the general theme of responsibility must look at interactions among the state and individual persons quite broadly.

For example, *Edmonson* would appear to be a closer case if eliminating race-based peremptories would undermine the capacity of private lawyers to fulfill their duties to their clients. That seems highly speculative. The only limit *Edmonson* places on a conscientious lawyer's pursuit of a fair-minded jury is that the lawyer must be able to state some reason, even if idiosyncratic, other than the juror's race, to explain the exclusion.\(^2\)\(^2\) It would also appear a closer case if, as Justice Scalia argues in dissent,\(^2\)\(^3\) implementation of the restriction on peremptories would undermine the capacity of civil courts to function efficaciously—perhaps because the time and energy exhausted in demanding and reviewing reasons for apparent racial exclusions are too vast. This, too, the majority disbelieved.

Finally, it would be a closer case if treating race-based peremptories as state action would so deprive private lawyers of discretionary decision making as to undermine their capacity to express themselves as autonomous, and therefore, as responsible individuals in a society largely committed to individualism. That possibility seems frivolous. So little of any lawyer's life is consumed in the process of exercising peremptory challenges in civil trials that this activity cannot possibly be critical to any sane person's sense of self or to the sense of a person that is reasonably held by others. In short, under what an administrative lawyer might call a "responsibility impact analysis," recognition of race-based peremptories as state action fulfills the constructive ideal of state action—maintaining the constitutional value of antiracism—without undermining any freedom from government constraint that individuals need to be effectively responsible to themselves or others.

A court faced with a constitutional challenge to action that is putatively private, but government funded, licensed, or otherwise directly

\(^2\)\(^2\) To measure the disadvantage *Edmonson* imposes on civil litigants, we would have to know: (1) the possible racial generalizations on which lawyers would prefer to rely in selecting a jury (e.g., "white jurors undervalue injuries to black victims"), (2) their accuracy, (3) the likelihood that a juror substituted from a favored group will not exhibit the same bias as the juror excluded on account of race, and (4) the likelihood that those members of the disfavored racial group who exhibit the feared bias could not be excluded through a reason that a court would accept as legitimate. It is unclear, to say the least, whether these unknown data, if discovered, would strongly support the use of race-based challenges as a rational litigation strategy. For this reason, I also regard the Supreme Court's state action analysis barring a criminal defendant's use of race-based peremptories as correct. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

\(^2\)\(^3\) 111 S. Ct. at 2095-96 (Scalia, J., dissenting).
facilitated should ask: Might the extension of the state action rubric to this case result in an appropriate extension of important constitutional values? Would it in any other way constitute or undermine the fulfillment of the community's responsibilities to its citizens? Would extending constitutional regulation to the challenged activity undermine the defendant's capacity to fulfill responsibilities owed to others? Would it so constrain defendants' permissible range of activity as to constitute a threat to their ability to express their autonomous and responsible nature generally?

This analysis wholly and persuasively explains the Court's holding in *Polk County v. Dodson*, on which the *Edmonson* dissent relied, that a public defender's motion to withdraw from the appellate representation of an indigent client on the ground that his claims were frivolous was not "state action," and thus, could not be treated as a potential denial of the right to counsel under the Sixth Amendment. First, there is no fundamental constitutional value attached to the zealous pursuit of appellate claims that counsel and a reviewing court determine are frivolous. Treating the public defender's behavior as private action thus does not thwart the fulfillment of society's obligations to the defendant. Moreover, disabling the client from filing such claims could not plausibly be regarded as denying his or her capacity for autonomous moral action. And, of paramount importance, subjecting public defender decisions of this sort to constitutional scrutiny could substantially threaten their capacity to fulfill their responsibilities as counsel to all of their clients. It would force them to take time irresponsibly from more deserving causes and to burden the judicial system with the adjudication of arguments that counsel believes are without plausible merit.

Responsibility-based analysis of state action claims would appropriately extend Judge Rubin's insight into official responsibility by focusing on the entire array of responsibilities at stake in a disputed transaction. The premise of the analysis that may seem vaguest is my concern that we not treat private action as state action where to do so

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24. To the extent this analysis entails important value judgments, it might be urged that the current state action doctrine also serves the cause of democracy by leaving such judgments to elected bodies that have the capacity, through legislation, to extend the Constitution's protections of liberty and property. It might, therefore, be an objection to my analysis that the approach goes too far in empowering unelected courts to regulate activity that has some claim to being left alone. A detailed argument on this score goes beyond the scope of the essay, but I do not intend to suggest I have any faith that the value judgments of judges are any more or less likely to be sound than those of legislators. On the other hand, if I succeed in adumbrating a view of the Constitution that is normatively more appealing than that embodied in current doctrine, I do not think it a strong argument that judges would play a key role in its implementation. See generally Peter M. Shane, Rights, Remedies, and Restraint, 64 Chi.-Kent L. Rev. 531 (1989).

would undermine people's capacity to exhibit or experience themselves as autonomous and, therefore, as morally responsible individuals. A great deal is built into this, including a certain resignation to this society's philosophically contestable allegiance to robust individualism, but the basic idea is familiar. A commonplace transaction deeply shaped and facilitated by the state is marriage. Yet, it would be dangerous to treat as state action an individual's refusal to marry an otherwise worthy partner solely on grounds of race, religion, sex, or nationality. To submit such decision making to constitutional review would be flagrantly at odds with the conception of choice that lies at the heart of the prevailing social idea of why people marry.26 Your selection as my partner means one thing in a world where my choice is unconstrained. It means something wholly different to me, to you, and to the community, in a world in which I am foreclosed by state power from excluding you as a marriage partner on grounds of bigotry. Of course, assessing the constitutionality of marital choices sounds so preposterous that I assume the category of such autonomy-threatening cases is fairly small.

Hard cases, however, will present themselves. Consider, because they have so recently been the subject of such controversy, the general category of parades. Many public parades entail special police protection and typically involve some sort of government licensing. They are not only visible to the public generally, but also occur on public property. Should the decisions of parade organizers to exclude would-be marchers on grounds forbidden to government decision makers be considered unconstitutional state action?

I would answer affirmatively—for some parades. The New Orleans City Council made history in 1991 by prohibiting Mardi Gras parades by organizations that exclude members on the basis of race, religion, sex, or sexual orientation.27 Though it seems a radical suggestion under prevailing precedent, perhaps a good case should already have been available that such exclusions, at least where impermissible for the City Council's own parades, were already unconstitutional. Mardi Gras parades are among the most significant cultural events that define the New Orleans community as a whole. They are touted both by government bodies (and by near-governmental bodies, such as the Chamber of Commerce) not as the specific expressions of discrete and ideologically defined groups, but as generally and fundamentally representative of what New Orleans is. One might have thought these parades "governmental" even if policed wholly by private security guards and mounted without express government licensing of any sort. In any event, I would easily regard

the parades now as "state action" because their deeply public character is conjoined with significant efforts by public authorities to facilitate the parades.

On the other hand, a parade conducted by an ideologically distinct group and constituting a form of advocacy for that group's beliefs might well be regarded as private action, even if licensed, policed, and otherwise facilitated by government decision makers who do not purport to endorse anything about the group but its right to self-expression. To take the most obvious example, it should at least be debatable whether a constitutional right exists on behalf of black and Jewish would-be marchers to join an ad hoc KKK parade, so long as they desire to express the message the parade is intended to advocate.28

The reason is not that contacts between a KKK parade and the government would necessarily be insufficient to sustain a finding of state action, but rather that society's responsibility to oppose bigotry steadfastly must compete in this context with another plausible claim about responsibility. The claim is that there is an important relationship between understanding persons as autonomous moral actors and their enjoying some right to associate on an expressly exclusionary basis in public to demonstrate a group belief in exclusion. This relationship may not be strong enough to withstand a properly enacted legislative determination that no racially or religiously exclusionary parades be permitted on public property. Just as private clubs that do not represent intimate associations may be subjected to antidiscrimination laws regarding membership, a case could be made that even advocacy parades must be open to all persons avowing the shared belief.29 The relationship between personal autonomy and the opportunity for public expression of shared beliefs, however, is strong enough to overcome the argument for direct constitutional control of the conduct of ideologically expressive parades.

II. The Rust Doctrine and Individual Responsibility

The theme of responsibility can also be used to inform another set of cases where the formalistic treatment of the private/public distinction

28. This may, of course, be a null set. If a KKK chapter desires to parade in support of the proposition that white Christians ought not cooperate in any project with Jews or African-Americans, members of the latter groups could not logically assert both that they share the KKK's belief and that they want to be part of the KKK parade.
29. See Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940 (1987); New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S. Ct. 2225 (1988). On the other hand, the private club cases might be distinguishable on the ground that the Court regarded membership in the clubs involved as conferring important benefits, but not as significantly expressing the members' beliefs. Participating in an advocacy parade is unlikely to be a source of substantial benefits and does significantly express the marchers' beliefs.
can produce horrible results. These involve the permissibility of government regulation of speech and expressive activity connected with government employment and other publicly funded programs. If state action decisions too often underweigh values of community responsibility in contention with personal autonomy, decisions concerning what I would call "speech discipline" often pay but lip service to values of personal expression once public funding signals a relationship between government efficiency and the regulation of speech.

One area in which the Supreme Court has recently been sensitive to the responsibility values I am discussing involves political patronage. During the last two decades, the Court has substantially limited patronage as an acceptable form of discipline for civil servants. Except when a government official is performing a function for which party loyalty might reasonably be thought a factor relevant to effective job performance, it is unlawful to discharge, to refuse to hire or promote, or otherwise to adversely treat that civil servant solely on the ground of partisan affiliation. Put simply, when a public employee's political affiliation cannot reasonably be thought to compromise the government's ability to discharge its responsibilities, the government is not entitled to disable aspects of an employee's political commitment that lie at the core of responsible citizenship.

Lower courts, however, have not always carried this rationale to its logical conclusion. In *McBee v. Jim Hogg County, Texas,* the Fifth Circuit confronted the case of a newly elected sheriff who refused to reappoint several deputies and dispatchers in his office who had supported his predecessor in the Democratic primary campaign. Neither the deputies nor the dispatchers played a policy role that would have permitted a dismissal on grounds of partisan affiliation, and the district court ordered these employees reinstated. An en banc majority, however, remanded for a determination of whether the dismissals should have been upheld. The court suggested that the employees' lack of personal support for the winning candidate in an intra-party context might have exhibited sufficient hostility in light of the close working relationships involved to outweigh the employees' interest in unfettered electoral choice.

Judge Rubin vigorously dissented. The trial court had not found any evidence that "the political beliefs or voting history of any of the Plaintiffs in any way impaired their fairness or efficiency on the job." Judge Rubin thought it determinative of the employees' rights that the

32. 730 F.2d 1009 (5th Cir. 1984) (en banc).
33. Id. at 1023 (Rubin, J., dissenting) (quoting the district court's findings).
34. Id.
record disclosed no actual connection between the employees' political expression and the government's capacity to discharge its responsibilities. Contrary to the majority, he would have given controlling weight to the danger that a rule of personal patronage would pose to the capacity of government employees to function as responsible voters and citizens. If government officials could arbitrarily redefine the personal loyalty of subordinates as dedication to the government's mission, a figure like the sheriff of Jim Hogg County could unjustly deprive dissenting employees of their jobs and the community of these employees' services. Although Judge Rubin did not say so explicitly, this is a risk much to be feared given how easily employers tend to conflate personal loyalty with professional effectiveness.

Despite the care with which the Supreme Court has weighed the competing interests in patronage cases, other "speech discipline" decisions display no such sensitivity. To note a much debated example, Rust v. Sullivan upheld the authority of the Department of Health and Human Resources to prohibit federally funded family planning clinics from engaging in counseling or advocacy regarding abortion, or from referring pregnant women for abortion. The Supreme Court did not regard the relevant HHS regulations under Title X of the Public Health Service Act as attempting to censor a particular viewpoint, but rather as a neutral government attempt to focus its funded programs on a permissibly defined mission of family planning. The rational relationship between the restriction on speech and the preservation of the government program's "integrity" in terms of its devotion to an assigned purpose was held sufficient to render the restriction constitutional. I believe Rust to have been clearly wrong in its constitutional holding but think the point clearer if I preface discussion of that case with a more general analysis of the values at stake.

The foundational premise of a case such as Rust is unassailable. Government must have some power of speech discipline as an incident of its authority to implement otherwise lawful programs. For example, instructors in public institutions—even public law schools—may presumably be told to confine their in-class speech to the subjects they have been hired to teach. Geography teachers may be disciplined for identifying national capitals incorrectly. Government employees may pre-

37. 111 S. Ct. at 1769-71.
38. I am not dealing here with speech restrictions imposed for their own sake in order to avoid a serious danger of some imminent and serious harm that the government has the power to prevent. Prohibitions, for example, against fraudulent consumer claims are presumably "government programs" in themselves, and do not seek justification as implementing some other set of activities.
sumably be forbidden to make personal phone calls during office hours, and government employers need not tolerate insubordinate or disruptive speech that addresses no issue of public concern. In sum, the effective discharge of government functions depends on some level of discipline, and some of what must be disciplined in order to achieve the functions of government will inevitably be speech.

If the speech discipline power is thoughtlessly expanded, however, dangerous consequences could result. Some such constraint may be rationally related to the implementation of certain government functions, but it is still suppression. At the very least, it exists in tension with the government’s responsibility to protect First Amendment values. Speech restrictions may impose specific and concrete harms by preventing the communication of important information, and because there is virtually no large-scale public activity in this country that is free of government funding, the sheer amount of speech that may be curtailed by virtue of its proximity to government funding is vast.

It is easy enough to posit some stark cases where speech discipline is obviously permissible and others where it clearly should not be. Requiring teachers to teach their subjects seems obviously permissible, while forbidding math teachers to mention prime numbers ought to be unconstitutional. Is it possible, however, to move from stark cases to some principled theory as to the limits on government’s power? In this respect, the responsibility-based analysis invoked above to analyze state action is again useful. As a matter of simple logic, enabling the government to implement permissible programs effectively is the only justification for speech discipline based solely on a “program integrity” rationale. Thus, when an instance of speech discipline is challenged, it is appropriate to examine the challenge in terms of what the government’s rule accomplishes in terms of the fulfillment of legitimate government purposes and what adverse effects, if any, it imposes upon the exercise of responsibility in other forms.

This calculus helps to identify the easy cases for assessing the imposition of speech discipline as a means of achieving government program integrity. Although a rule requiring teachers to focus on their subjects

40. “[F]ew large-scale endeavors are today not supported, directly or indirectly, by government funds—from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious. . . . [A]n invitation to government censorship wherever public funds flow . . . would . . . present an enormous threat to the First Amendment rights of American citizens and to a free society.” Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 478 (D.D.C. 1991).
exists in some tension with government’s commitment to free speech in theory, it clearly promotes the government’s ability to assure students and parents an effective performance of the teachers’ role. It betrays no social responsibility to government employees or to the public. It does not seriously diminish the capacity of employees to function as responsible individuals or to maintain their identity as autonomous moral actors. By contrast, a math teacher prohibited from mentioning prime numbers cannot fulfill his or her responsibility actually to teach math. Such a speech rule could not be regarded as furthering any reasonable governmental enterprise.

Responsibility-based analysis, however, points also to more difficult cases. For example, imagine that a school board hires a special AIDS counselor for its high school and insists that any teacher, confronted with a student request for AIDS information, limit his or her response to referring the student to the designated counselor. The counselor, the board feels, is not only the most likely person to have accurate and timely information, but is the one it knows to be trained in presenting this information in a manner accessible to teenagers and appropriate to its sensitivity.

In the government’s favor, it is easy enough to understand the reasoning that restricting teachers’ speech about AIDS is rationally related to the effective transmission of accurate AIDS information. However, unlike rules requiring geography teachers to identify state capitals correctly or requiring history teachers not to misidentify important dates, this rule can diminish a teacher’s capacity to serve a particular student and, to some extent, may undermine the government’s overall goals. One can easily imagine anxious students willing to seek counseling from familiar and trusted teachers, who would simply not be willing to consult the AIDS counselor, who may be a relative stranger. Restraining teacher speech in this circumstance may create a serious health risk to students. It is plausible that courts would uphold such a rule as constitutional, given the deference usually accorded educational authorities in making pedagogical judgments. Still, the rule should not be treated as obviously valid, precisely because of the complex network of responsibilities at work.

But there is another category of difficult cases—difficult not because of uncertainty as to proper result, but rather as to simple characterization. Consider again the prime number example. I asserted above that a speech rule prohibiting publicly funded math instructors from mentioning prime numbers would blatantly undermine the capacity of math teachers to fulfill their responsibilities to teach the subject of mathematics. But what if the government responded: “The speech restriction is rationally related to instruction in ‘mathematics’ as the government defines it, namely, calculation and theorizing using only numbers divisible by numbers other than themselves and one.” The government’s defense,
in other words, is that it is entitled to define "mathematics" in a wholly novel way. Having chosen its description of the field of math to exclude prime numbers, government may then impose speech discipline rationally designed to insure "program integrity."

This example seems absurd because the government's definition of math fails the "we-all-know" test, namely, we all know that the study of math includes the study of prime numbers. There may be a desire to devote some study to non-prime numbers as a field, and the government might be entitled to organize a program in "Non-Prime Number Study." What the government is not entitled to do is to treat the study of non-prime numbers as the equivalent of "mathematics." "We all know" that math embraces prime numbers. Thus, even if non-prime numbers are to be the main focus of study, it is irrational to prohibit all mention of prime numbers if the program purports to be "mathematics."

But what about subtler definitional denials of reality? A school district might proffer a course in World War II history that prohibits the mention of any evidence that the Holocaust occurred. One hopes "we all know" that Holocaust revisionism is fiction, in a way that precludes government from labeling a program of revisionism instruction as "history," but there is a degree of controversy here that does not attend prime number study.

To take another familiar example, one could imagine a publicly funded course on biology that prohibits the presentation of creationism as "science." Is such speech discipline permissible because "we all know" that the government's demarcation of biology as a field that excludes creationism is rational? Why "we all know" these things poses difficult questions, despite what seems the near certainty that school districts could not insist that Holocaust revisionism be presented as fact, but could insist that creationism be presented exclusively as religious philosophy.41

It is not stating a rationale for my posited holdings that is difficult. It seems obvious that government should not be able to defend the suppression of speech on the ground that such suppression rationally implements an irrational program. The effective implementation of an arbitrary construction of reality is not a proper exercise of governmental responsibility. If government had such discretion, plus the consequent capacity to prevent any publicly funded speech beyond the arbitrary boundaries of an Orwellian program description, the implications—given how much social programs depend on government funding—would be ominous.

What is difficult about my examples is knowing when the government's program description amounts to an arbitrary attempt to reconstruct reality. We can defend the assertion that courses excluding prime numbers from recognition, treating Holocaust revisionism as fact, and purveying creationism as science may not rationally be purveyed as Math, History, and Biology. Each of these fields has a wide degree of conventional recognition outside government. There exist conventionally recognized experts in these fields, the majority of whom would not assent to the accuracy of the government's construction of reality. There are conventionally accepted methods for identifying and assessing evidence, which have led most mathematicians, historians, and biologists to accept prime numbers, the Holocaust, and some version of evolution as reality.

But we cannot do better than this. However imaginary may be my mathematical example, there are "serious-sounding" people who deny the Holocaust and serious-sounding people who subscribe to "creation science." If all that is needed to authorize the government's implementation of an alternative reality is the existence of enough political support among serious-sounding people, opposing my hypothesized speech restrictions in principle would be far more difficult.

The Title X regulations reviewed in Rust are susceptible to similar analysis. The rules purport to implement a program of public funding for "family planning." A government that favors family planning, but not abortion, has a number of constitutional options under prevailing doctrine. Instead of funding "family planning clinics," it can fund clinics for "fetal health and preservation." It can fund family planning clinics generally, but provide actual services within those clinics that do not include abortion. It can fund informational advertising on adoption procedures, even if it does not fund informational advertising on abortion.

The Rust regulations, however, amounted to a significantly different tactic. Congress provided the possibility of federal funding for programs of "family planning," including counseling in that field. HHS purported to understand "family planning" in a wholly conventional sense, as a "process of establishing objectives for the number and spacing of one's children and selecting the means by which these objectives may be attained."
The speech discipline imposed by HHS, however, sought to recreate "family planning" as an activity that, even for informational purposes, excludes the phenomenon of abortion, at least in all but the most dire emergency circumstances. It prohibited not only the encouragement, promotion, or advocacy of abortion, but any "counseling concerning the use of abortion as a method of family planning." This should have been viewed as equivalent to an attempt to treat the study of non-prime numbers as the totality of "mathematics."

The very fact that a decision to choose abortion was constitutionally protected at the time of Rust should have been enough to certify that "family planning," as a realm of discussion and counseling, must include abortion. In terms of conventional understanding of abortion's status as a method of family planning, however, there is, of course, wholly non-doctrinal evidence. Despite decreases in public funding, the number of U.S. women obtaining abortions each year is about 1.5 million, which represents a termination of roughly one third of all pregnancies. The overwhelming majority of adult Americans accepts the medical and moral appropriateness of abortion in at least some circumstances. The prevailing medical view likewise supports abortion as an appropriate medical procedure. For all these reasons, the government should be denied the power to define, for purposes of discussion, the "process of establishing objectives for the number and spacing of one's children and selecting the means by which these objectives may be achieved" as a process that excludes abortion.

This approach differs somewhat from the dissent in Rust, which offered persuasive grounds for overturning the Title X gag rule as an

48. As I write this, as when Rust was decided, Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), is still "good law." Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). The tension between Rust and Roe was analyzed in dissent by Justice Blackmun. 111 S. Ct. at 1784-86. Under the analysis offered above, however, the field of discourse called "family planning" could not be constitutionally narrowed to exclude discussion of abortion regardless of the constitutional status of the abortion right.

Should Roe be overturned, it is possible, of course, that abortion might become unlawful in certain jurisdictions. The government then, as now, would presumably be entitled to constrain its grantees not to provide counseling on unlawful family planning methods generally, which would have the effect of eliminating abortion counseling in those jurisdictions where abortion is outlawed. The rationale for such a speech rule, however, would not be family planning "program integrity," but avoiding government involvement in counseling state criminal offenses.

impermissible attempt to censor a point of view. The key difference is that a rule against arbitrary limits on a field of discourse would work irrespective of the motive or intent behind speech suppression. It would not excuse a gag rule, for example, on the ground that some pro-choice government administrators may have favored the rule for fear that the phenomenon of publicly funded counselors discussing abortion would prove so effective an anti-choice organizing target that the net political result would put rights of choice even more seriously at risk. It would not excuse a gag rule, such as my hypothetical suppression of primary numbers, on the ground that, even though suppression of the topic seemed arbitrary, that suppression did not seem to favor or disfavor a particular viewpoint. It would likewise not excuse a speech suppression rule adopted in ignorance, for example, because a curriculum planner sincerely thought creationism really represented scientific consensus.

There are a number of things this analysis would not accomplish. It would not bar government from disallowing publicly funded counselors from engaging in on-the-job advocacy for or against any position related to any aspect of family planning. It would not require government to fund all family planning activities equally. It would go no further than disallowing the option of purporting to fund a field of discourse and then redefining it arbitrarily.

Critics of Rust might complain, however, that this approach is too formalistic, and thus, too easy to evade. To repeat an earlier example, it would seemingly not prohibit Congress from offering funding to “fetal protection clinics,” whose employees might then be forbidden to counsel clients on any matter not related directly to fetal protection. If abortion cannot be excluded from discourse on “family planning,” then the government could simply redefine the field of discourse to “fetal survival.”

This concern may be less weighty in practice than in theory because formalistic moves available in hypotheticals are often unavailable in real politics. The very wording of Title X underscores Congress’s interest in funding family planning as a broad range of activities. The more narrowly a proposed statute defines the purposes of public funding, the harder it should become to secure a majority coalition to support the funding. Opposition to the Title X regulations in Congress has been so

51. 111 S. Ct. at 1780-82 (Blackmun, J., dissenting).
52. The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). . . .
great that it is difficult to imagine there would have been a majority coalition to support a bill that expressly excluded abortion from what could be discussed as a matter of family planning.53

Nonetheless, so long as formalistic dodges are available to circumvent any limit on government authority, the temptation may exist to employ them. We should be concerned about a constitutional interpretation that would prohibit the suppression of Holocaust-related discussion in a course called “World War II History,” but that would permit its suppression in a course entitled, “History of Every Aspect of World War II Other Than the Holocaust.” One would want judges to have the ability to examine such retitled programs to see whether they are, in fact, bona fide attempts to focus government energies on a permissible, limited enterprise, or rather subtle, but unjustifiable barriers to speech appropriately connected with a funded activity.

Judges would, I think, have such an ability if they employed the sort of responsibility analysis advanced above in connection with state action. Government will invariably seek to portray its speech discipline rules as rationally related to the effective fulfillment of government responsibilities. Such claims are quite likely to appear most dubious when their effect is largely to impinge on what would conventionally be understood in the larger community as the personal or communal responsibilities of the individuals subject to regulation. For example, the gag rule in Rust operates to constrain communications between health care workers and clients. Such constraints obviously impinge on a form of interaction in which unconstrained communication is typically thought essential both to the professional’s responsible discharge of his or her role and the client’s responsible decision making. Arbitrary gag rules on teachers are similarly likely to appear as conspicuously interfering with what a community would conventionally regard as the teacher’s responsible discharge of his or her functions, and with the capacity of students to form responsible opinions in light of relevant knowledge and argument. The more seriously a speech discipline rule seems to frustrate conventional understanding of the scope of free communication essential to the responsible implementation of a particular function, the more suspicious a court should be that a rule, however phrased, is reconstructing a field of discourse in an arbitrary way.54 Such rules should be deemed to violate the First Amendment.

53. The political uncertainty in the current Congress is not whether a majority opposes the Title X gag rules, but whether a bill overturning those rules could be enacted over a presidential veto. Julie Rovner, Counseling Memo Nothing New, But Rules No Longer in Limbo, Cong. Q. Weekly Rep., Mar. 28, 1992, at 807.
54. This analysis is consistent with Judge Harold Greene’s decision invalidating on First Amendment grounds a National Institutes of Health (NIH) bar to the publication,
CONCLUSION

In linking the state action and speech discipline cases, I have really argued three propositions. First, the devaluing of the public sphere in state action cases underemphasizes an ideal of community responsibility for which constitutional government should stand. Second, the mere fact of government funding in the speech discipline cases has blinded the Supreme Court to the ominous potential consequences for private autonomy and responsible human interaction, which are critical values linked to free speech doctrine. Third, a form of analysis to avoid both sets of pitfalls would focus on the capacity of the community and of individuals to function responsibly and for persons to develop as responsible moral actors. Applying these propositions to the family planning clinic hypothesized at the beginning of this essay would perhaps invalidate even Title X regulations as currently interpreted and, in any event, assure the discharged nurse a pre-termination hearing.

I realize that so much talk about vindicating what is properly deemed public or private may seem hopelessly naive. Others have persuasively shown how the public/private distinction is infinitely deconstructable, deployable for repressive ends, or both. With policy makers advocating the “privatization” of virtually every government function, including schooling, adjudication, and incarceration, and “America’s Funniest Home Videos” a major form of national entertainment, any line between the worlds of private and public looks thin indeed. What my arguments seek to revive, however, is not a distinction for the sake of distinction, but renewed attention to the values for which “public-ness” and “private-ness” can stand—the benefits that we, both as individual citizens and as a constitutional community, derive from what I have called robust conceptions of public and private.

without NIH approval, of the preliminary results of any NIH-funded research. Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 476-77 (D.D.C. 1991) (“The plaintiff is of course a university. The subject of this lawsuit is the very free expression that the Rust Court held to be so important for the functioning of American society.... ”).


The argument is quite similar to Justice O'Connor's dissenting plea in *Garcia v. San Antonio Metropolitan Transit Authority*, for a re-invigorated understanding of federalism. The "Framers," she argues, were intent both on a national government competent to solve national problems and "a republic whose vitality was assured by the diffusion of power . . . between the Federal Government and the states." During the eighteenth century, "those intentions did not conflict because technology had not yet converted every local problem into a national one." Because of the emergence "of an integrated and national economy," however, these intentions now do conflict, and the principle of state autonomy requires the Supreme Court, in O'Connor's view, "to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power." 

The U.S. Constitution is intent on a nation of communal responsibility and private autonomy, ideals in tension, I suppose, even in 1789, but now invariably and conspicuously so under the technological and cultural conditions of postmodernism. This tension does not render the ideals obsolete, but does require us to police carefully what ought be considered private or public in an effective pursuit of both responsive community and individual liberty.

Judge Alvin Rubin embodied as deep a faith in the capacity of human reason and responsibility as is possible for someone who was also quite notably a realist. Any fair appreciation of just how much Judge Rubin accomplished as a single human being, uniting his capacity for reason and his passion for responsibility, suggests that our constitutionalism would do well to follow his example more broadly.

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61. Id. at 581, 105 S. Ct. at 1033.
62. Id.
63. Id. at 587, 105 S. Ct. at 1036.