

# **Government Speech and Public Opinion: Democracy by the Bootstraps\***

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The use of government resources to communicate with the public is a common source of controversy. In the 2016 referendum campaign on EU membership, the UK government was criticised by exit campaigners for the use of public resources to send a leaflet to every household promoting the benefits of remaining within the EU.<sup>1</sup>

While the government was content to promote its favoured view on that occasion, the UK government has also sought to clamp down on the inclusion of political content in newspaper-like publications by local authorities, nicknamed by critics as “Town Hall Pravdas.” More broadly, when newspapers report on the amount of money spent on government communications, the activity is frequently dismissed as spin, propaganda or just waste. Communications are nonetheless an essential part of what government does. The public needs all kinds of information that is collected by public bodies or related to government activities. The question then arises why government publicity often attracts such controversy. This paper will set out a framework to provide an objection to certain government communications that is rooted in an understanding of the democratic procedures.

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\* Thanks are due to the participants of the Comparative Free Speech Panel at the American Political Science Association Annual Meeting 2014 and to the anonymous reviewers for comments on an earlier version of this article.

<sup>1</sup> “Taxpayer to fund anti-Brexit leaflets”, *The Daily Telegraph*, 7 April 2016.

The argument advanced here is distinct from several common objections to government speech. Critics are quick to dismiss such communications as “propaganda.” That term is charged and the meaning is subject to debate.<sup>2</sup> In the most straightforward cases, the term propaganda is used to condemn falsities. A clear ethical objection can be made against deliberately false and inaccurate statements. However, this does not tell us why there is anything objectionable about government speech, as distinct from falsities stated by private actors. Furthermore, criticisms of government “propaganda” often extend beyond the knowingly false and are advanced in relation to biased, strategic and manipulative communications. However, focusing on those qualities is overbroad, as some biased and strategic communications from government are legitimate. To give a simple example, government does not present a neutral message when it advertises to discourage people from smoking or drink driving. Government provides the data that has greatest impact and does not contextualise the information with estimates of those occasions when people drive under the influence of alcohol without incident. In this example, government presents the strongest message with the aim of changing behavior. The communication may be strategic and is not impartial, but the technique is uncontroversial.

Even manipulative government communications are arguably acceptable on some occasions. For example, the government has used storylines on television dramas to promote government policies. Several years ago, soap operas, such as *Coronation Street*, were used to promote the National Year of Reading as part of government

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<sup>2</sup> See Garth S. Jowett and Victoria O'Donnell, *Propaganda and Persuasion, Sixth Edition* (London: Sage, 2015).

policy relating to literacy.<sup>3</sup> Such use of storylines may be regarded as manipulative in so far as the government's hand in the message is not visible in the communication itself. Along these lines, Franklin expresses "concern about the opacity of these arrangements and the extent of public awareness of the involvement of governments and their advertising specialists in developing the plots and storylines which unravel in viewers' sitting rooms."<sup>4</sup> However, the fact that a manipulative practice has been democratically approved and is subject to political accountability can, in some cases at least, make it less rather than more objectionable.

The objections to government speech based on falsity, bias and manipulation focus on the means used by government to advance its goal. A separate line of argument focuses on the purpose or justification for the communication. For example, most people would object to government using state resources for the purpose of promoting the re-election of the incumbent political party. Other examples, by contrast, provoke debate. Many people are content for government to advertise to promote public health, while others see such communications as unnecessarily paternalistic. This type of objection to government speech requires the identification of the purposes or justifications that the government can legitimately pursue, a matter on which there is considerable disagreement.

The discussion here will identify a distinct argument, based on an understanding of the democratic process, to evaluate and critique both the means and purposes of government speech. The argument will run that the appropriate purposes and means

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<sup>3</sup> Bob Franklin, *Packaging Politics, Second Edition* (London: Bloomsbury, 2004) at p.90.

<sup>4</sup> Ibid, at p.93.

of communication vary according to the role being undertaken by government. The argument rests on the view that in a democracy the government should be responsive to public opinion, and that opinion should be formed and transmitted in a process free from government direction. Some types of government communication, it will be argued, can reverse the relationship of responsiveness by allowing government to actively shape public opinion. The discussion will first consider these issues in relation to discursive democracy, which provides a central role for public opinion as a legitimating force. However, the insights are applicable across a broader range of democratic theories, including those that assign little role to responsiveness. An analogy will then be drawn with freedom of expression, to show that democracy-based arguments against censorship reflect similar concerns about government power being used to interfere in the process of opinion formation and transmission. The article will then show how a permissive approach to government speech may be taken when communications seek to implement government policy. The following sections will then look at how the argument fits with a role for political leadership, whether any measures can be taken to reduce the risks posed by certain types of government speech and whether government counter-speech policies pose problems for democratic legitimacy. Before looking at these issues, the following section will set out the basic argument that rests on responsiveness to public opinion in a democracy.

## **I. SPEAKING AND RESPONDING TO THE PEOPLE**

The basic argument runs that in a democracy government is to be responsive to public opinion. If that is the case, then it is not for government to use its communicative

resources to steer the very opinion that is supposed to steer government.<sup>5</sup> For government to shape the process that provides a source of its own authority would be to hold its democratic legitimacy by the bootstraps. The term “bootstrapping” will be used in this article to describe this phenomenon, in which government communications have the potential to short-circuit the workings of the democratic process through the “falsification of consent” or “manufacture of consent”.<sup>6</sup>

The bootstrapping argument relies on a distinction between the inputs and outputs of the democratic process. The use of government communications as a policy tool to advance democratically approved goals represents an output, while communications that contribute to a debate about what those policy goals should be represents an input. A government advertising campaign seeking to deter people from drink driving would fall into the former category. By contrast, an advertisement advocating a policy change for tougher penalties for drink driving would fall in the latter category. The bootstrapping argument applies only to the attempts to influence public opinion as an input. Under this approach, the formation and communication of public opinion is an input into decisions about what government should do.

Before elaborating the argument, the terminology used should be clarified.

Responsiveness is a key element in various theories of democracy, and is defined by May as the “necessary correspondence between acts of governance and the wishes

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<sup>5</sup> For a similar formulation of the issue, see Robert C. Post, “Compelled Commercial Speech” (2015) 117 *West Virginia Law Review* 867 at p.916.

<sup>6</sup> Mark G. Yudof, *When Government Speaks* (Berkeley: University of California Press, 1983); Walter Lippmann, *Public Opinion* (New York: Macmillan, 1922).

with respect to those acts of the persons who are affected.”<sup>7</sup> The degree to which government should be responsive is subject to debate, which will be considered later. The term “public opinion” is a source of greater controversy. While public opinion was prominent in earlier democratic theories, the term fell out of fashion among political scientists by the mid-20<sup>th</sup> century, who queried the possibility of there being a coherent opinion of the public and the ability of any mechanism to identify such opinion.<sup>8</sup> For present purposes, the term “public opinion” is used simply to refer to the matter that democratic government is expected to be responsive to - whether described as wishes, opinion or preferences.

The term government speech can also have a range of meanings. Everything government does has a communicative element. The discussion here focuses on government speech in a narrow sense to mean formal government communications, such as government publications, purchased advertisements and grants to private actors to promote government-selected messages. These types of communication rely on the resources and apparatus of the state, and can be considered a form of state action that is subject to constitutional constraints. The discussion will focus primarily on the communications of the central government institutions for which elected officials are constitutionally responsible and also on some communications from members of the legislature. Whether the arguments here apply to other public bodies and agencies will depend on whether those bodies are expected to be responsive to

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<sup>7</sup> John D. May “Defining Democracy: A Bid for Coherence and Consensus” (1978) 26 *Political Studies* 1.

<sup>8</sup> For a short history of the term, see John G. Gunnell, “Democracy and the Concept of Public Opinion” in George C. Edwards III, Lawrence R. Jacobs and Robert Y. Shapiro (eds) *The Oxford Handbook of American Public Opinion and the Media* (Oxford: Oxford University Press, 2011).

public opinion. Different considerations apply for agencies established to advise the public and set up to be independent from government and public direction.

The potential for government communications to undermine the linkage between the people and official decisions can be illustrated with reference to the discourse theory of democracy, which gives public opinion a central role in legitimating public decisions. Under this theory, Habermas writes that public opinion is not “statistical” or the “aggregate of individually gathered, privately expressed opinion held by isolated persons.”<sup>9</sup> Instead, public opinion is the product of discursive practices, taking place within the informal public sphere, which is itself a “communication structure”.<sup>10</sup> Public opinion does not exercise direct power over political decisions, but can influence “the voting behavior of citizens or the will-formation in parliamentary bodies, administrative agencies, and courts.”<sup>11</sup> Accordingly, the influence of public opinion can become “communicative power only after it passes through the filters of the institutionalised procedures of democratic opinion-and-will-formation and enters through parliamentary debates into legitimate lawmaking.”<sup>12</sup> The theory envisages a democratic process in which opinion begins among citizens in the “periphery” of civil society and gradually travels to the core political institutions through channels such as elections, and is eventually realised through the “administrative action” of the state.<sup>13</sup>

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<sup>9</sup> Jurgen Habermas, *Between Facts and Norms* (Cambridge: Polity, 1996), at p.362.

<sup>10</sup> Ibid, at p.307 and 360.

<sup>11</sup> Ibid, at p.363.

<sup>12</sup> Ibid, at p.371.

<sup>13</sup> Ibid, at p.356 and 382.

What is key for the present purposes is the importance placed on the independent formation of public opinion as a condition for democratic legitimacy. According to Habermas, the channeling of public opinion towards formal political institutions helps to constitute a legal system in which citizens can “understand themselves also as authors of the law to which they are subject as addressees.”<sup>14</sup> To attain independence, the discourse must be free not only from state censorship,<sup>15</sup> but also from government direction. In an early work, Habermas wrote that “state authority is so to speak the executor of the political public sphere” but “it is not a part of it.”<sup>16</sup> The logic of this approach suggests that government participation in discursive practices can undermine the autonomy of public opinion that is supposed to legitimate state action.

Within this framework, a distinction can be drawn between opinion formation and the transmission of that opinion to government institutions. The process of opinion formation is one where citizens talk among themselves, become aware of other views and the level of support for such views, and ideally reflect on what has been said. Bernard Manin notes the “horizontal dimension” of public discussion and explains how this process has the effect of “connecting the governed among themselves”, as “[p]eople who express the same opinion become aware of the similarity of their views, and this gives them capacities for action that would have not been available had they kept that opinion to themselves.”<sup>17</sup> As a result of this process, the “public

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<sup>14</sup> Ibid, at p.449.

<sup>15</sup> Ibid, at p.368.

<sup>16</sup> Jurgen Habermas “The Public Sphere: An Encyclopedia Article (1964)” (1974) 3 *New German Critique* 49.

<sup>17</sup> Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), at p.170-171.



expression of an opinion generates momentum” that gives it greater force in influencing government.<sup>18</sup> Political debate is therefore not just a matter of people informing one another, but is itself a participatory process in which certain causes and viewpoints gain strength. The problem in using government communications to shape opinion is that it represents a vertical intervention into what should be a discussion at the horizontal level. Government should not be a primary participant in horizontal level conversations about what the public wants.

Government communications can not only impact on the process of opinion formation, but also affect the transmission of that opinion to government. The most obvious mechanism for transmission is through election, in which votes legitimate the choice of leaders and government programmes.<sup>19</sup> The need for controls on government speech relating to elections are widely accepted. For example, the Ministerial Code, a non-legal self-regulatory code of practice for government ministers in the UK, provides that government resources and facilities “may not be used for the dissemination of material which is essentially party political.”<sup>20</sup> Similarly, local government in the UK is prohibited by statute from publishing or paying others to publish material that “appears to be designed to affect public support for a political party”..<sup>21</sup> As elections are a mechanism for selecting leaders, those in government have a clear vested interest in the outcome of the process. Government

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<sup>18</sup> Ibid, p.171.

<sup>19</sup> See Habermas, *Between Facts and Norms*. See also C. Edwin Baker, “Implications of Rival Visions of Electoral Campaigns” in W. Lance Bennett and Robert. M. Entman (eds) *Mediated Politics* (Cambridge: Cambridge University Press, 2001).

<sup>20</sup> Cabinet Office, *Ministerial Code* (2010) at [8.1].

<sup>21</sup> Local Government Act 1986, s.2.

communications that advocate a particular election result have the potential to entrench those in power.<sup>22</sup> Such a distortion of the electoral signal could help shield incumbent governments from public censure and prevent the removal of errant leaders. A constraint on government communication at elections thereby reinforces the process of representation and accountability by preventing the self-interested misuse of power to maintain a position in office.<sup>23</sup>

While constraints on government speech are widely accepted in relation to elections, the bootstrapping argument is not limited to electoral or partisan communications. To focus on such speech would be too narrow, especially as people seek to participate in politics outside of the traditional democratic institutions. Public opinion can be transmitted to government through a variety of channels including protest movements, interest groups, letter writing campaigns and discussions on social media. Sometimes the non-electoral channels can be more formally organised, such as government consultations, opinion polls, or online petitions. As these activities are a form of transmission of public opinion, some limits on the use of government communications are still expected. The problem of bootstrapping arises if public finances are awarded to external groups for the purpose of mobilizing citizens to lobby government to promote a government-selected view.<sup>24</sup> Similarly, the objection arises if government organises a petition for a particular policy or uses its resources to encourage people to sign it.

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<sup>22</sup> Abner Greene, "Government of the Good" (2000) 53 Vand. L. Rev. 1 at p.38.

<sup>23</sup> See John Hart Ely, *Democracy and Distrust* (Cambridge, Mass: Harvard University Press, 1980).

<sup>24</sup> The emphasis on the support for a government-selected view as a purpose of such funds distinguishes the example from more general restrictions on lobbying on bodies receiving public funds.

The independence of public opinion does not mean that government has no role in relation to the formation and transmission of public opinion. Government often provides important information that aids opinion formation. In this capacity, government is not like any other speaker, but acts as a servant aiming to help people make a decision without seeking to steer them to a particular conclusion. Government can perform this function directly, for example by releasing data and research reports. The government can act indirectly by providing support to institutions such as universities or research organizations, as long as the government does not direct the results of their work.<sup>25</sup> Another role for government resources is to support the activities of non-state actors that engage in political advocacy, such as subsidies to political parties or media organizations. However, to avoid any bootstrapping issues those resources must be distributed on a fair basis and not for the purpose of promoting the government's favoured viewpoint. This does not exhaust the role of government communications, which will be discussed later. The proposition to be explored and defended in this article is that, subject to the qualifications set out later, government resources should not be used to intervene in the formation and transmission of public opinion in order to condition and lead the public to accept the government's favoured outcome.

## **II. GOVERNMENT COMMUNICATIONS AND DEMOCRATIC LEGITIMACY**

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<sup>25</sup> See Robert C. Post, *Democracy, Expertise and Academic Freedom* (New Haven: Yale University Press, 2012), at p.33 on the need for academic freedom.

The strength of the bootstrapping argument rests on the extent to which government is supposed to be responsive to public opinion. So far, the point has been illustrated with reference to a complex and demanding discursive theory of democracy. One need not be a Habermasian or subscribe to discourse theories to value the independence of public opinion. While far removed from theories of discursive democracy, Hayek made a similar point in his discussion of democracy:

The conception that government should be guided by majority opinion makes sense only if that opinion is independent of government. The ideal of democracy rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed.<sup>26</sup>

The potential for government communications to subvert the independence of that sphere is illustrated by Hayek's discussion of the "absurdity" of government using its own resources to move public opinion to accept the case for bigger government projects.<sup>27</sup> The problem, he argues, lies in the result where "both voters and legislators receive their information almost exclusively from those whose activities they ought to direct."<sup>28</sup> For Hayek, the use of government speech can invert the relationship of responsiveness.

The discussion so far has emphasised the procedural element of democratic legitimacy. If a procedural justification of democracy is rejected in favour of a

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<sup>26</sup> Friedrich A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960) at p.109.

<sup>27</sup> Ibid, at p.293.

<sup>28</sup> Ibid, at p.293.

substantive account, government communications can still pose a threat to democratic legitimacy. While a substantive account does not see legitimacy solely flowing from fair procedures, those procedures are nonetheless a key element in the system. Ronald Dworkin justifies democracy in so far as it produces outcomes that treat individuals with “equal concern and respect”.<sup>29</sup> In order to show equal concern and respect, Dworkin argues that the political system must ensure that each person has “an opportunity to make a difference in the collective decisions”.<sup>30</sup> That chance to make a difference implies a role for the public in making decisions that is realised through the mechanisms that make government responsive to public opinion. Consequently, one of the substantive constraints on democratic outcomes is that government must respect the protection of procedural rights to participate as a way of showing respect to a person’s “status as a free and equal member of the community”.<sup>31</sup> If the chance to make a difference and participate is to be meaningful, then it should not be subject to uses of government resources to marginalise certain views and promote others in the process of opinion formation. The point will be revisited when looking at freedom of expression, and later the discussion will consider the complexities that arise where government seeks to use its communicative power to promote the substantive values on which the system rests. For the present purposes, the point is that that bootstrapping problems arise in substantive accounts of democracy as well as the procedural.

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<sup>29</sup> R. Dworkin, *Freedom’s Law* (Oxford: Oxford University Press, 1996) at p.17.

<sup>30</sup> *Ibid*, p.24-25.

<sup>31</sup> Ronald Dworkin, “Foreword” in Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), at p.vii.

A challenge to the bootstrapping argument comes from the accounts of democracy that assign a minimal role to citizens and expect only a limited degree of responsiveness. Walter Lippmann saw the inevitability of political leaders using their advantages in acquiring and disseminating information to “manufacture” consent.<sup>32</sup> This inevitability revealed a shortcoming in the “idyllic theory of democracy” that saw government being directed by the people.<sup>33</sup> He later wrote that voters have “no right to command” the elected politician and merely have a “duty to fill the office”, accepting that this “runs counter to the popular view that in a democracy public men are the servants (that is, the agents) of the people (that is, of the voters).”<sup>34</sup>

Similarly, Schumpeter was critical of the idea of public opinion and thought that even if there was such a thing, it was unlikely to consistently produce desirable results.<sup>35</sup> Furthermore, he argued that any opinion of the public would lack “democratic quality”, as the opinions of citizens would amount to “an indeterminate bundle of vague impulses: based on “slogans and mistaken impressions.”<sup>36</sup> Like Lippmann, Schumpeter saw the vulnerability of the people to manipulation by strategic communications as a reason for rejecting the “traditional” theories of democracy. Others writing in the same tradition argue that voting cannot accurately record a general will, and consequently elections produce arbitrary outcomes that are open to

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<sup>32</sup> Lippmann, *Public Opinion*.

<sup>33</sup> Ibid.

<sup>34</sup> Walter Lippmann, *The Public Philosophy* (Boston: Little Brown, 1955), at p.52.

<sup>35</sup> Joseph A. Schumpeter, *Capitalism, Socialism and Democracy, Fifth Edition* (London: Routledge, 1976), at p.254.

<sup>36</sup> Ibid, at p.253.

manipulation.<sup>37</sup> For Schumpeter and his followers, the responsiveness of leaders to public opinion is neither meaningful nor desirable.

If one doubts the idea of public opinion and the mechanisms to identify it, then public opinion is no longer the central legitimating force in democracy. Instead, public opinion becomes a potentially dangerous idea that can afford undue legitimacy to a leader's policies. The minimalist democrat dismisses any grand theories about official decisions being directed by public opinion. Instead, democracy is best seen as a method for selecting leaders from competing political elites, and the main function for the people is to throw out errant leaders at an election. These accounts of democracy recognise the problem of bootstrapping as one reason to reject the "idyllic" traditional theories. Minimalist theories may appear to avoid the problem by dropping the central role for public opinion.

The minimalist approach, however, does not eliminate the bootstrapping problem. To perform this minimal function, elections must at least be competitive and operate independently of the state. For this reason, minimalist democrats recognise the need for "freedom of discussion for all", including press freedom, so that people can be alerted to any major deficiencies of the government or advantages in choosing a rival elite.<sup>38</sup> As the previous section explained, attempts to control political discussion could undermine the competitiveness of elections and give incumbents an

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<sup>37</sup> See William Riker, *Liberalism Against Populism* (Long Grove: Waveland, 1982, reissued 1988).

<sup>38</sup> Schumpeter, *Capitalism, Socialism and Democracy*, at p.272.

advantage.<sup>39</sup> Government communications would similarly undermine the competitiveness of the process by granting incumbent leaders a form of state aid. If state resources are used to generate a more favourable climate for the assessment of the leader's performance, then the political leader may be protected from the negative responses that would otherwise lead to the removal from office. A version of the bootstrapping argument, therefore, re-emerges in relation to government communications that touch on the assessment of political leaders.

The discussion has shown how the scale of the bootstrapping problem may vary according to the role assigned to public opinion in a democratic theory. The problem is not, however, limited to discursive democracy and cannot be sidestepped by embracing a minimal account of democracy. Such theories aim to break with the traditional role assigned to public opinion as a source of authority, but nonetheless require some mechanism for the governed to control or discipline the governors. By requiring such a mechanism, a similar issue emerges where government communication undermine the relationship envisaged between political leaders and the people.

### **III. FREE SPEECH: AN ANALOGY**

So far, the discussion has referred to the connection between the independence of public opinion and certain procedural rights in a democracy. That connection will be

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<sup>39</sup> See Richard Posner, *Law, Pragmatism and Democracy* (Cambridge, Mass.: Harvard University Press, 2003), at p.373.



explored in this section by showing how the concerns with government speech are analogous to democracy-based arguments for freedom of expression. According to such arguments, freedom of expression is necessary for people to form opinions about what they want government to do, and to put pressure on government to do those things.

The analogy between government speech and censorship might initially be rejected if we view free speech as simply aiming to maximise the amount of expression available, which the audience can take or leave. If a “more speech the better” view is taken, then government communications contribute to the totality of informational resources available to the citizen. Nothing is taken away from any speaker. Under this view, even government spending on partisan electoral advocacy could be seen to aid voter decisions.<sup>40</sup>

There are, however, many reasons to reject a view of free speech rights that aims only to maximise the quantity of expression. Maximizing the quantity of speech does not always leave the audience better informed. There may come a point where more speech from a particular source distracts attention from other speakers, overloads the audience or dominates the debate. The “more speech the better” view may be rejected if we see communications as a source of power in shaping and mobilizing public opinion, and that communicative resources are distributed unequally. The criticism is sometimes advanced to explain why spending on political communications by private actors should be constrained, for example in campaign finance laws. Restrictions on

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<sup>40</sup> See Frederick Schauer, “Is Government Speech a Problem” (1983) 35 *Stanford Law Review* 373 at 379-383.

election spending or media regulations may limit the speech of certain actors, but are said to advance the democratic goals that justify free speech rights. Arguments to restrain government speech might therefore be thought to be analogous to the case for controls on private speakers. Those people that worry about the ability of wealthy corporations to skew political debate, might well worry about the government's use of its vast resources to serve the incumbent's own self-interest. There is force in this concern, but there are limits to the analogy. The reference to distortion in relation to both private wealth and government resources masks the difference between the two sources of power. The problem is that there is no simple baseline to determine what level of speech fits the democratic ideal and what level amounts to a distortion of political debate. To understand what is meant by distortion, the source of communicative power needs to be examined more closely.

In the case of private wealth, the democratic process is distorted by allowing economic inequalities to secure unequal chances to influence public opinion. The ideal is that wealthy individuals and their organizations should participate on equal terms with other citizens. The process becomes distorted, for example, when a corporation is able to finance a level of publicity that far exceeds anything proportionate to the level of support for that particular view.<sup>41</sup> By contrast, government communications can be said to reflect the will of the people (in so far as the government has been democratically legitimated). The government acquires its communicative resources through its distinct legal powers rather through the

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<sup>41</sup>In *Austin v Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), Justice Marshall argued that corporate spending distorts elections as the spending power of the companies "have little or no correlation to the public's support for the corporation's political ideas".

marketplace. The distortion caused by government speech does not depend on the level or quantity of the communication, but by the status and role of the speaker. The ideal is not for government to participate with other individuals on equal terms, but to engage with the public on completely different terms and not as a participant in the horizontal level debate.

The distinct status of government and its messages also follows from those theories that justify expression rights from the perspective of the speaker, as a form of political participation. Robert Post's account of free speech emphasises the autonomy of public opinion and echoes the Habermasian focus on the people as authors of collective decisions as central to legitimacy:

If persons are prevented from participating in the formation of public opinion so as to render public opinion responsive to their own point of view, they are not likely to regard themselves as potentially the authors of government decisions that affect them.<sup>42</sup>

Post's account provides an argument against state censorship. While Post notes the risk of government setting the "terms of its own legitimacy" through the control of information<sup>43</sup>, he writes that the arguments for freedom of speech are not directly transferable to make a case for general constitutional limits on government sponsored messages.<sup>44</sup> In this view, communications that engage public opinion are central to the execution of the multiple functions of government.<sup>45</sup> While that point will be

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<sup>42</sup> Post, *Democracy, Expertise and Academic Freedom*, at p.17.

<sup>43</sup> Post, *Democracy Expertise and Academic Freedom*, p.33.

<sup>44</sup> Robert C. Post, "Subsidized Speech" (1996) 106 *Yale Law Journal* 151, at p.183. See also Post, "Compelled Commercial Speech", at p.916.

<sup>45</sup> Post, "Compelled Commercial Speech", at p.916-17.

explored in the following sections, for present purposes my point is that the logic of the “democratic authorship” justification for freedom of speech raises analogous issues in relation to government interventions in opinion formation through the promotion of its own viewpoint. If censorship can subvert the citizen’s sense of authorship, so can attempts by government to move, mobilise and steer public opinion in its preferred direction, in the ways discussed in the previous sections. Just as government is not the editor of public opinion and should not silence certain viewpoints, it is not the co-author of public opinion either.

A similar point can be made in relation to Ronald Dworkin’s argument that for a person to be bound by collective decisions with which he or she disagrees, that person must have an opportunity to express opposition to the outcome:

The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.<sup>46</sup>

On this view, to deny a person that opportunity would be similar to denying them the vote.<sup>47</sup> Without such opportunities the individual becomes the “passive victim” of an authority imposing its will. The argument does not just apply to contributions to “formal” politics, but includes contributions to the “moral environment” in which public opinion is formed.<sup>48</sup> Again, the logic of this argument can be extended to make a case against certain types of government expression. The voice of government is not to be equated with any other speaker that seeks to persuade. Instead, the government has its authority and the state apparatus at its disposal. An attempt by government to

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<sup>46</sup> Ronald Dworkin, “Foreword”, at p.vii.

<sup>47</sup> Dworkin, *Freedom’s Law*, at p.201

<sup>48</sup> Ibid, at p. viii.

use those resources to undermine or discredit a person or group's view may not silence a speaker, but seeks to minimise the effect of the person's participation. Just as silencing a person fails to respect equality of status, so does the use of government power to marginalise the participatory efforts of that individual or his or her viewpoint. The person whose views are opposed may feel that the process has been stacked against them because they do not share the views of the current office holders. The use of government resources to promote particular ideas and views in the process of opinion formation and transmission can undermine the equal participation of citizens.

To summarise, some of the reasons why freedom of expression is valued in a democracy supply an analogous case for constraining certain types of government expression. The two are not identical. Laws banning certain content are an extreme form of government intervention and raise concerns about the disproportionate use of the criminal law. Censorship seeks to banish certain views from political debate. Furthermore, there are various factors that may justify government communications that engage with public opinion, which will be discussed in the following sections. However, to dismiss the analogy between censorship and government communications would be to miss the significance of the various techniques that have been developed by government to manage public opinion. Given that direct censorship can generate problems of adverse publicity and a potential backlash, governments have invested in public relations to promote their interests. For example, the management of information may be more effective in serving national security

than imposing injunctions on publishers.<sup>49</sup> Both censorship and publicity represent attempts to manage public opinion and intervene in the process that is supposed to control government. While the techniques differ, both raise related issues for democratic legitimacy.

#### **IV. GOVERNMENT COMMUNICATIONS IN IMPLEMENTING POLICY**

The role of government speech is complicated by the fact that government often uses its communicative power as a tool to pursue policy goals. Sometimes these communications are used as a way to supplement coercive powers. For example, advertisements warning people not to drink and drive or reminding people to pay the TV licence seek to persuade the public to act in accordance with the existing criminal law controls. In other cases, government expression may be the central tool used to change behavior. Along these lines, government may use advertising to discourage people from pursuing certain lawful activities, such as smoking.

More controversially, government may seek to implement policies through techniques that do not simply aim to persuade people through rational argument. One example, discussed earlier, is where government uses soap operas to promote certain policies, which some critics find objectionable due to the lack of transparency. The government sometimes seeks to steer people towards particular choices through the framing of information.<sup>50</sup> For example, laws mandating a graphic health warning on

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<sup>49</sup> Christopher Moran, *Classified: Secrecy and the State in Modern Britain* (Cambridge: Cambridge University Press, 2013) at p.333 and 347.

<sup>50</sup> See Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue and Matthew Rabin, "Regulation for Conservatives" (2003) 151 *University of Pennsylvania Law Review* 1211, 1230.

cigarettes or alcohol make certain information more prominent at the point of a decision to purchase or consume. In so doing, the location of the message curtails the time for reflection and internal deliberation between receiving the message and the decision. Government can pursue policies not only through persuasion, but also through methods that border on manipulation and rely on non-rational processes.

The concerns about government speech discussed earlier do not typically apply to communications that implement government policy. We may desire government to marginalise messages that promote cigarettes or fast food. In these examples, the government is not seeking to influence public choices as an input into democratic decisions, but is implementing a policy that has been democratically legitimated in a process that respects the independence of public opinion. So even though some people might still want to smoke cigarettes, there has been democratic approval of the health policy that steers people away from that behavior. Government is not expected to be neutral in this context and will pursue its policies in furtherance of its own political viewpoint. As long as the fact of government sponsorship of a message or the use of strategic framing of information is made public, then the government can be held politically accountable for the use of that policy tool.<sup>51</sup> In cases of policy implementation, government can engage in advocacy and campaigning without presenting a balanced view. When state resources are used to encourage people to vote, or to discourage drink driving, there is no obligation to grant similar opportunities to those advocating political apathy or greater alcohol consumption.<sup>52</sup>

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<sup>51</sup> Cass Sunstein and Richard Thaler, *Nudge* (New Haven: Yale University Press, 2008), pp.243-246.

<sup>52</sup> Steven Shiffrin, "Government Speech" (1980) 27 *UCLA Law Review* 565, at p.578.

There are several difficulties in distinguishing communications that target public opinion as an input into democratic decisions and those that seek to implement the outputs of the democratic process. First, the public could specifically authorise government to attempt to direct public opinion on certain matters of political controversy. For example, public opinion could direct the government to spend money on messages advocating the enactment of harsher penalties for certain criminal offences. The difficulty posed by such an example is that it appears to put arguments of democratic legitimacy on either side of the equation. The difficulty can be easily answered, as the need to preserve open democratic processes imposes a constraint on collective decisions to respect and preserve those processes. Just as that need explains why freedom of speech constrains democratic outcomes, it is not for the existing public to perpetuate its own choices through the use of the state machinery to shape the future formation of public opinion. That an interference with opinion formation has been democratically approved does not remove the concerns of bootstrapping in relation the democratic legitimacy of future decisions.

A second difficulty is that even where government communications do not pursue the goal of shaping future inputs into democratic decisions, the communications made in pursuit of policy goals may have a knock-on effect on public opinion and will thereby have an effect on future inputs. For example, government advocacy to promote compliance with an energy efficiency policy can also promote the salience of climate change and attitudes towards that issue, which then leads people to prioritise or campaign on that issue in the future. Such a technique might also give the impression



that the policy is “more popular or accepted than it really is”, or is working successfully.<sup>53</sup>

The point arises not only where government pursues policies through communication, but also where public opinion is influenced by the fact that certain policies have been adopted. The outputs of the political process shape the subsequent inputs. As Dicey observed over a century ago:

Laws foster or create law-making opinion. This assertion may sound, to one who has learned that laws are the outcome of public opinion, like a paradox; when properly understood it is nothing but an undeniable though sometimes neglected truth.<sup>54</sup>

Dicey’s point was that laws must “lay down or rest upon some general principle,” and through parliamentary recognition of that principle the law has an “effect upon the sentiment or convictions of the public.”<sup>55</sup> Dicey provides a number of examples to illustrate how legislation shaped public opinion, such as the Great Reform Act, the Divorce Act 1857 and the poor laws. Public opinion is formed against the backdrop of current laws and policies.

The point shows that it is impossible to make a clean division between democratic inputs and outputs. The process is cyclical, in which current political choices influence future inputs into the democratic process, which in turn determine the

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<sup>53</sup> See Gia B. Lee, “Persuasion, Transparency and Government Speech” (2005) 56 Hastings LJ 983, at p.1010-13.

<sup>54</sup> Albert Venn Dicey, *Lectures on the Relationship Between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1905), at p.41.

<sup>55</sup> Ibid, at pp.41-42.

subsequent collective policy choices. Such incidental effects of the status quo are, however, not the same as an attempt by government to use the apparatus of the state to manage public opinion, so that the government's preferred outcome will be legitimated in a future decision. The difficulty, however, is in determining when the effects of the policy on public opinion are merely incidental or when the goal is to influence future democratic decisions. The example of the advert promoting energy efficiency is a difficult case. On one view, the message merely seeks to promote compliance with its policy. However, if the advert were broadcast close to an election and the governing party were seeking to promote environmental issues in the campaign, that advertisement might be viewed as deliberate attempt to shape future inputs into the democratic process. That difficulty poses a considerable challenge in designing formal restrictions on government speech, which will be considered later.

## **V. RESPONSIVENESS AND LEADERSHIP**

The discussion has emphasised the danger of government communications short-circuiting responsiveness to public opinion. Elected officials are not, however, limited to responding to public opinion and will often take the lead in developing policy. Sometimes government has to respond to events, crises and emergencies and has no choice but to make a decision with minimal signal from public opinion. In many areas, public opinion provides limited direction because people do not have an opinion on certain issues or will not have a view on matters of policy detail.<sup>56</sup> Voters will often choose representatives on the basis that they trust their judgments rather

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<sup>56</sup> Lawrence R. Jacobs and Robert Y. Shapiro, *Politicians Don't Pander* (Chicago: University of Chicago Press, 2000) at p.304.

than on account of specific policy prescriptions. The government, in exercising that judgment, will be expected to show leadership. Furthermore, a politician is sometimes expected to stand against public opinion, for example when that opinion favours the oppression of minority rights or the miscarriage of justice.<sup>57</sup>

These examples show that responsiveness is not the only feature of a modern democracy and that public opinion does not determine all government decisions.<sup>58</sup> Public opinion, however, is an important input that government needs to consider (even if government does not follow that opinion). Along these lines, Pitkin argues that responsiveness means the governed should have the “capacity” to voice their wishes and that the government should show “readiness to respond”.<sup>59</sup> The crucial point is the “potential” of the public to author collective decisions and “to initiate action if they so desired”, rather than the actual exercise of that potential in every decision.<sup>60</sup> When leaders act independently of public opinion, the basis of such action should be clear and the public should have the chance to hold the official to account. That way, politicians have to anticipate how the public will respond when taking a leadership role. The bootstrapping of democratic legitimacy does not arise simply because government acts independently of public opinion. The problem only emerges if the government uses its communication powers to steer public opinion towards a favourable reception of the independent action.

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<sup>57</sup> Ibid, pp.304-305.

<sup>58</sup> See discussion in J. Roland Pennock, *Democratic Political Theory* (Princeton: Princeton University Press, 1979) ch. 7.

<sup>59</sup> Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967) at pp.232-233.

<sup>60</sup> Pitkin, *The Concept of Representation*, at p.233.

Leadership is not, however, limited to acting independently of public opinion, but may arise when the government official seeks to “lead” public opinion. Sometimes government officials seek to explain to the public the merits of its past actions or convince the public that certain policies need to be introduced. For example, the government may wish to convince the public that new powers of interception are necessary to combat terrorism or that cuts to certain programmes are necessary for economic policy. Political science literature has shown that it is a feature of modern politics that politicians attempt to shape public opinion to align the preferences of the public with their own preferences.<sup>61</sup> The question then is whether all such practices pose a threat to democratic legitimacy, or whether an accommodation for some forms of leadership can be secured without undermining the independence of public opinion.

One response is to distinguish communications that rely on manipulation from genuine leadership efforts to persuade the public. According to Pitkin, manipulation is inconsistent with responsiveness in so far as it covertly subverts public opinion, while leadership is distinct because it “is at the mercy of the led” and “succeeds only so long as [the governed] are willing to follow.”<sup>62</sup> However, the bootstrapping argument is not simply concerned with the manipulative content of messages, but more generally with attempts to use the government’s communicative power to shape

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<sup>61</sup> See Jacobs and Shapiro, *Politicians Don’t Pander*, and James N. Druckman and Lawrence R. Jacobs, *Who Governs: Presidents, Public Opinion, and Manipulation* (Chicago: University of Chicago Press, 2015).

<sup>62</sup> Pitkin, *The Concept of Representation*, at p.233.

“inputs” into the democratic process. Along these lines, Jacobs and Shapiro are critical of strategies of “simulated responsiveness”, in which the correlation of policy outcomes with public opinion gives the impression of responsiveness, but the process is inverted with the politician deciding what action to take and then persuading the public to accept that position.<sup>63</sup> The bootstrapping problem arises when the leader uses state resources to construct public opinion in a way that aligns with the government’s preferences, even when the messages rely on persuasion and involve no sleights of hand. While the content of the government communication in such cases may not be manipulative, the overall practice is manipulative in so far as it projects an appearance of public opinion directing government while allowing government to have a central role in selecting the desired outcome.

This does not mean that all attempts by politicians to lead public opinion are to be condemned. Politicians have a foot in both the horizontal level discussions, as citizens and party officials, and at the vertical level as elected leaders. The bootstrapping argument attaches only to the latter. Furthermore, the objection is to the use of government resources to shape the direction and evaluation of government by public opinion, because the use of those resources is the very thing that is supposed to be subject to public judgment. By contrast, the issue does not arise when a government politician gives a television interview aiming to persuade the public of the merits of a policy, or writes a newspaper column to that effect. In such cases the politician does not rely on the apparatus of the state and the content of the coverage is not directed through government power. The expression of the politician can be subject to scrutiny and the media will often give time to opposing views. Similarly the holders of public

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<sup>63</sup> Jacobs and Shapiro, *Politicians Don’t Pander*, at p.66.

office naturally attract attention and incumbents enjoy the benefits of the “bully pulpit” to convert the public to their way of thinking. While incumbent politicians have a strategic advantage in gaining attention, it is different from an advantage secured by government buying time directly on the media or controlling its own media outlet. When relying on mediated communications, the access to the audience and subsequent attention are at the “mercy of the led” (or at least the mercy of those controlling the independent media entities).

There are, however, circumstances where government is expected to use its resources to make a case in relation to an area of policy. To return to the earlier example, when advocating new powers to combat terrorism, the politician is not limited to using media interviews and other private resources. The government may use its resources, for example, to publish a report setting out the need for the new powers. More broadly, government websites will produce vast numbers of press releases and reports that seek to put the government in a favourable light. While such communications may shape inputs into the political process via public opinion, they can also be considered an output of the process. Having been elected, the government is charged not just with implementing specific approved policies, but has also been given a more general duty to govern. The performance of that function will entail telling the public what policies and actions it believes to be necessary to serve the public interest, and the merits of those proposals. In taking such a leadership role in this intermediate setting, the government is expected to use public resources to set out and defend its provisional views, and is not expected to be impartial or simply respond to the public. A similar point can be made in relation to government explanations of past decisions. Such explanations are a part of the process of accountability in which the public

makes a judgment about the conduct of government. To be held to account, government is required to communicate and defend its past decisions.

When making a case to the public for future action or providing reasons for its past actions, the government engages in a conversation with the public. When speaking in such a conversation, the government is not being directed by public opinion, nor is it exercising its authority to direct the public. The setting is intermediate and sits between these two roles. Instead, the government offers reasons, advice and explanations, on which the public will make its own evaluation. Examples of such communications include statements accompanying draft legislation, reports that are laid before Parliament or formal consultation documents. Publications of this sort are central to government functions, and are not neutral. However, the conversation takes place between two actors in a vertical relationship and should be conducted on terms distinct from horizontal level conversation between citizens.

Both the context and the content of the government communication provide a starting point in identifying the distinct terms of the conversation between government and the people. In terms of context, government communications making a case for future action or justifying past action should ideally take place in formal political institutions that are structured to provide scrutiny and opposition. Along these lines, official reports that are laid before Parliament can be compared to formal statements made in the legislature. The official report may be picked up by newspapers, political parties, advocacy groups and interested citizens for use in a campaign in the informal horizontal level of political debate. However, by publishing a policy report within a formal setting, the government is one step-removed from the informal sphere of

opinion formation. That helps to distinguish those uses of state resources that are essential for governing from, for example, the use of state resources to send leaflets to citizens to advocate a policy change.

In addition to the context of the publication, the content of the publication is also important to distinguish those publications that form part of the governing process from those that interfere with public opinion. When making a case for a policy, government is expected to fulfill requirements of openness and transparency, and provide evidence and sufficient information to allow people to evaluate the government's answers. For example, the UK's government's guidance on the propriety of communications provides that government communications should not be party political or polemical, and should be factual and objective.<sup>64</sup> While there are difficulties in enforcing such a limit, the presence of such guidance reflects an expectation that government communications are subject to constraints in relation to content.

The constraints of context and content mean that the methods of communication that are appropriate for government to make a case for a policy or explain past actions are very different from those communication methods that are appropriate for to implement policy. For example, one would not expect government to expend money on advertisements, sponsor a soap opera storyline, or finance a grassroots organization to persuade the public of the merits of a proposal for new anti-terror powers. Similarly, the government might set out its views in a published consultation paper, but we would object if such a document deliberately sought to nudge people

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<sup>64</sup> Government Communication Service Propriety Guidance (2014).



towards a particular result or conclusion. This point explains the concerns about “spin” in relation to government communications, with regular allegations being made about biases, selective information and information being released at strategic times. The managing of information and the deliberate exploitation of cognitive shortcuts to increase the chance of a favourable reception can hinder accountability by using subtle techniques to present policy in a way designed to lead to a more favourable reception than is deserved.

Like government communications that implement policy, government communications that make a case to the public or explain past actions can have knock-on effects on public opinion as an input, even when following the constraints discussed above. One solution to this problem is to provide other groups and voices with resources to challenge the content of the communications. This approach accepts that government resources can generate an indirect subsidy promoting the views of the incumbents among the public. It then aims to ensure that the subsidy is fairly distributed among different views, and reinforces the structures for opposition that are expected in formal political institutions. Such a duty to facilitate challenges arises in the intermediate setting when government communications are central to its function, but where the message conveyed directly addresses a matter for public evaluation as a future input.<sup>65</sup> Along these lines, the provision of Short and Cranbourne money to Opposition parties in Westminster helps to ensure that government communications

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<sup>65</sup> Consequently the government cannot formally endorse a particular party even if it grants money to opposition parties. Conversely, government is under no obligation to provide funds to challenge messages that implement policy goals.

that propose policies and justify past actions are properly scrutinised.<sup>66</sup> The provision of resources provides one such method of countering risks to democratic legitimacy, the following section will turn to further ways that constraints on government communications can be secured.

## **VI. DEVISING CONTROLS**

The discussion has set out a democracy-based argument for restraints on certain types of government communication and noted the different expectations of government according to the context. The question remains as to what can be done to constrain the communications that short-circuit democratic responsiveness, while allowing government to perform its functions. Given the difficulties in distinguishing communications that interfere with the independence of public opinion from those that are a necessary part of government, devising any formal controls will be a challenging task. However, there are some obvious cases where formal rules will prohibit certain types of communication. As discussed earlier, it is a widely accepted rule that government should not use its resources to promote its favoured political party or electoral outcome. The wide acceptance of such a constraint reflects the fact that securing the election of a particular party or candidate is not a function of government, and there is no justification for government resources being used to promote a particular election result. However, even partisan or electoral messages will

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<sup>66</sup> Since 1975, Short money has been provided to Opposition parties in Westminster to support parliamentary work and is allocated in proportion to the number of seats held. A similar scheme for Cranbourne money was introduced in the House of Lords in 1996.

not be self-evident in some cases and a control will be difficult to apply. For example, a legislator's letter to constituents immediately prior to the election season discussing matters that are likely to be a significant electoral issue may not be overtly partisan, but may, nonetheless, have electoral advantage as its covert purpose.

Beyond elections, attempts to impose formal controls on the content of communication are more problematic as it is harder to separate legitimate government communications from bootstrapping messages. Rules that seek to permit factual statements and explanations, but which prohibit advocacy campaigns on matters of political controversy, will generate disputes about whether the communication was biased, strategically selective, sufficiently factual, and so on. Aside from the blatant cases, the strategic exercise of communicative power to influence public opinion will be hard to detect. An announcement that funds will be allocated to a particular project can be framed in a way that generates a favourable impression of the politician making the announcement.<sup>67</sup> Even with informative messages, there will be an element of selection of information; the presentation may assume the audience shares a particular understanding of the issue, and the audience may be invited to draw certain inferences. Similarly, attempts to shape public opinion may be hard to separate from other elements of a communication. In an official press conference, the politician will at times speak both for government and for party.<sup>68</sup> Furthermore, formal rules constraining content can be circumvented through more subtle techniques of communication. As is well known, government actors will cultivate

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<sup>67</sup> Justin Grimmer, Sean J Westwood, and Solomon Messing, *The Impression of Influence* (Princeton: Princeton University Press, 2015) at pp.28-29.

<sup>68</sup> Shiffrin, "Government Speech", at 603-604.

links with certain journalists and supply information with the goal of securing more favourable coverage, or at least getting a message across. If the provision of information to journalists can be considered a use of state resources to “buy” favourable coverage, then problems of bootstrapping can arise.

These difficulties underline Daintith’s point that the major problems of government communications “are just too subtle for formal legal control”.<sup>69</sup> Attempts to devise clear legal restrictions on government speech can play an important role, but are likely to restrict only the more obvious abuses of communicative power, such as deceit or overt bias. Much then rests on the ethical and political standards expected of government actors. However, such non-legal rules face similar problems in deciding whether a breach has arisen, and may have limited effectiveness given the more informal enforcement mechanisms.

Despite these difficulties in application, the framework set out in this article provides some criteria for the public and political actors to assess the ethics of a government communication. To evaluate whether a communication amounts to an unwarranted attempt to construct public opinion as an input, people can consider the purpose of the communication, whether it relates to a democratically approved policy, what resources were provided by the state for others to challenge the statement, and so on. While the framework will provoke disagreement in its application, it allows us to locate the nature of that disagreement. It explains why we have different expectations when government pursues approved policy goals from when government sets out a

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<sup>69</sup> Terence Daintith, “Spin: A Constitutional and Legal Analysis” (2001) 7 *European Public Law* 593, at p.622.

policy proposal. The analysis here identifies a distinct democratic objection that can be advanced against certain types of government speech.

Rather than attempting to constrain specific communications that could raise a bootstrapping problem, a more fruitful way of addressing the issue is to focus on the structure of the system of communication. In this way, the solution can follow a separation of powers approach, to ensure that institutions independent of government are responsible for aspects of official information. These institutions may be state supported, but should not be under the day-to-day management of government. This provides one reason why academic freedom is so important in a democracy.

Universities provide government supported expertise, aid public opinion formation and have independence from government control.<sup>70</sup> Similarly the rules that regulate the publication of official statistics can prevent the release of data taking place at politically convenient times. Freedom of information statutes limit the government's control of data, so that government communications can be properly scrutinised and challenged. The government can provide support for independent watchdogs, including sections of the media, to perform such scrutiny functions. Many of these strategies are already pursued, though the analysis here provides an argument for supporting these institutions and for maintaining independence from government direction. These examples show how institutions can be designed to check government's communicative power, reduce the control over official information, and thereby reduce the opportunities for communicative power to be abused.

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<sup>70</sup> See Post, *Democracy, Expertise and Academic Freedom*.

## VII. COUNTER-SPEECH POLICIES

The final issue to consider is the implication of the bootstrapping argument for government efforts to counter hate speech by sponsoring messages to promote tolerance. By using non-coercive means, counter-speech is often seen to raise fewer constitutional problems than prohibitions on hate speech. Along such lines, Corey Brettschneider argues that while the use of coercive hate speech laws leads to a loss of democratic legitimacy, persuasive measures to counter hate do not.<sup>71</sup> Whether hate speech laws undermine democratic legitimacy is a matter of debate and many democratic countries have enacted hate speech laws.<sup>72</sup> The argument nonetheless fits with the current thinking of the US First Amendment doctrine.<sup>73</sup> The analysis in this article, however, suggests that counter speech is more controversial than is often thought, in so far as it intervenes with the inputs into the democratic process. As the earlier analogy with free speech explained, the difference between the impact of coercion and counter-speech on democratic legitimacy is a matter of degree. If counter-speech policies are to escape this objection, then we need to ask what differentiates such a policy from government communications that threaten democratic legitimacy. If such a distinction can be made, then how far should the counter speech strategy be taken? Should government be able to use state resources to

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<sup>71</sup> Corey Brettschneider, *When Government Speaks, What Should It Say?* (Princeton: Princeton University Press, 2012) at p.66 and 81.

<sup>72</sup> Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012) p.198.

<sup>73</sup> Frederick Schauer, "Book Review: *When Government Speaks, What Should It Say?*" (2014) 42 *Political Theory* 498.

campaign against an extreme political party? Should government subsidies be denied to extreme political parties?

The first response might be to treat counter-speech policies as an output of the democratic process, a strategy of using publicity to pursue certain democratically legitimated goals. For example, the counter-speech may provide a means of promoting race relations or reducing racially motivated violence and other harms to individuals. While that might be the case for certain counter-speech policies, the argument is harder to sustain in so far as state resources are used to change people's core beliefs and attitudes. Where the counter-speech relates to a matter of political controversy, the techniques may impact on the input stages of the democratic process. For example, where the counter speech aims, for example, to prevent the rise of extreme political parties or simply to generate a climate that is less receptive to extreme ideologies, the impact on the democratic inputs is not incidental, but is a central goal of the policy. As stated earlier, existing public opinion should not normally approve a policy to perpetuate that opinion within future publics. So while not coercive, such methods can potentially interfere with the independence of public opinion and can raise the issues of democratic bootstrapping.

A second way to defend counter-speech policies may be to recognise the tension with the independence of public opinion, while accepting certain trade offs with democratic legitimacy. If that is accepted, however, democratic legitimacy does not provide a bright line rule that forbids certain government action, but is a matter of degree. The degree of interference with the legitimisation process is then something that needs to be weighed against other goals. That does not, however, answer the

substantive questions about when it is acceptable to trade off a degree of democratic legitimacy. That begs the question as to which types of government can pursue through counter-speech and what weight should be assigned to such goals as against any costs to democratic legitimacy. Once such a path is taken, then hate speech laws could also be permitted under a similar trade off.<sup>74</sup>

The third response might be to treat certain types of government counter-speech as a special case, in which the normal concerns about the independence of public opinion are less pressing. Under this view, certain types of extreme speech pose particular problems and do not enjoy equal status with other views in the democratic process. Along these lines, Brettschneider limits the case for counter speech to the challenging of viewpoints that “clearly conflict with the ideal of free and equal citizenship” and not to views on which there is “reasonable disagreement.”<sup>75</sup> That approach does not give government a free hand to promote whatever view it wants. The counter-speech strategy is therefore selective in treating certain types of viewpoint as legitimate targets for state-sponsored opposition, while others are not. The extremist viewpoints thereby occupy a grey area in the democratic process, which is neither excluded through coercive means nor enjoys full legitimacy in political system.

There is much to be said for this approach and there may be certain values that are not subject to the normal expectations of democratic responsiveness. The significance of treating certain views as officially disfavoured and subject to government sponsored

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<sup>74</sup> The trade off may still result in a preference for using persuasion rather than coercion, for example the use of the criminal law penalty might be regarded as a less proportionate sanction.

<sup>75</sup> Brettschneider, *When Government Speaks, What Should It Say?*, at p.47.



opposition in the field of political debate should not be underestimated. An advocate of counter-speech policies might point out that the state is not neutral in relation to fundamental values, and that the political system is itself premised on certain values.<sup>76</sup> Various statutes also embody and protect values such as equality and toleration. The reflection of such values in the constitution and the substance of the law is, however, distinct from the use of state power to secure the continued acceptance of those values in the face of challenge in the process of opinion formation and transmission. In directing public opinion, government counter-speech is itself a vertical intervention into the horizontal competition of ideas among citizens, which openly treats some ideas as officially having lower status and necessitating official opposition. Such an intervention is tension with the principle that government should respect the “equality of status in the field of ideas”, which is sometimes relied on by critics of hate speech laws.<sup>77</sup> Attaching such lower status to a view in that field of ideas may be a step that some opponents of hate speech laws are reluctant to take (if they are to be consistent).

The discussion here does not aim to argue against counter-speech laws, but rather to show that if hate speech laws are inconsistent with democratic legitimacy, then similar issues can arise with counter-speech. The use of government-sponsored counter-speech is not a simple way around the legitimacy issues posed by hate speech laws. Instead, the cost to the independence of public opinion in relation to certain issues needs to be acknowledged as a special exception to the general rule.

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<sup>76</sup> Ibid, at pp.73-74.

<sup>77</sup> James Weinstein, “An Overview of American Free Speech Doctrine” in Hare and Weinstein, *Extreme Speech and Democracy*, p.86.

## VIII. CONCLUSION

Government acts in different capacities as a speaker. Sometimes it speaks with authority over the people, sometimes it speaks as a servant of the people, and at other times it converses and debates with the people. At the heart of disagreements about government speech are differing views about the role the government is performing as a speaker and the appropriateness of that role in the particular context. When government acts a servant of the people, responsive to its wishes, then its function is not to determine what those wishes should be. By contrast, when exercising authority and pursuing government functions, then the communication might seek to shape public opinion to act in accordance with the relevant policy.

We can think of these various capacities as representing different stages in the democratic process. The formation of public opinion and the transmission of that opinion provide the first stage in instructing government. It is in relation to these inputs that the problem of bootstrapping arises. By contrast, if the government's engagement with public opinion is made in pursuit of a democratically approved policy, then it represents an output of the process, which will not in itself raise a bootstrapping opinion.

Government often acts in a capacity which fits somewhere between the stages of input and output. When pursuing an approved goal, government will want to consult with the public on the choices it has to make to implement policy. Alternatively, the

process of governing sometimes requires government to make a case for the necessity of certain policies. As stated, the government will sometimes argue for new police powers to combat threats of terrorism. In other cases, the government needs to explain its decisions in order to be held to account. These examples have elements of both input and outputs of the democratic process. In such cases, the communication is a necessary part of governing; the government is not expected to be neutral and will set out its own view. However, such communications are subject to some restraints relating to both the context and content of the message as a way of respecting the independence of public opinion as an input. For example, the case for more police powers should not be made with the same techniques as an anti-drink driving campaign.

Of course, the democratic process cannot be neatly divided into inputs and outputs. In reality, political choices do not follow a rationalist model in which goals are chosen and then public agencies find the best means to pursue those goals.<sup>78</sup> Decision-making is in practice a messy process and does not follow a linear path. Government activities relating to responsiveness to public opinion, implementation of policy and the process of accountability can arise simultaneously. Separating the capacities of government as a speaker nonetheless provides a useful conceptual framework to isolate and analyze different government activities.<sup>79</sup> In particular it shows how the relationship between government and the people varies, and accordingly government takes on different communicative roles that are subject to different expectations.

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<sup>78</sup> Peter John, *Analysing Public Policy* (London: Continuum, 1998), at p.23.

<sup>79</sup> Michael Howlett, M. Ramesh and Anthony Perl, *Studying Public Policy, Third Edition* (Oxford: Oxford University Press, 2009), at p.13.

The argument in this article highlights how the traditional theories of democratic responsiveness to public opinion can be very demanding and face a number of challenges, which will provoke a number of responses. To some, it might suggest that theories relying on responsiveness to government as a key element in a democracy are unrealistic and that alternative accounts of democracy should be adopted. However, that does not provide an easy way to sidestep the bootstrapping issue. All theories of democracy require a link between the people and government. The difficulty is that this link can be undermined through certain types of government communication. In the earlier discussion it was shown that even with theories of democracy that provide a minimal role for the public, problems equivalent to bootstrapping emerge, for example by impacting on the competitiveness of an election. Rather than rejecting responsiveness as an element in a democracy, the discussion shows that some democratic ideals such as the independence of public opinion can only be realised only as a matter of degree. There are, however, steps that can be taken to increase the degree of independence through a combination of formal and ethical standards to constrain the use of government communications together with independent structures to counter government's communicative power. The irony of the argument presented here is that much of the process of democratization has been about getting government *to* speak, whether through the right to publish parliamentary debates, to access official information, or to receive reasons for official decisions. Although democracy, responsiveness and accountability often compel government to speak and provide answers, sometimes we also expect government to refrain from speaking. This is not to deprive the public of information, but to allow public opinion flourish in conditions that provide greater independence from government direction.

