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LAW REVIEW SYMPOSIUM 2010: GOVERNMENT SPEECH: THE GOVERNMENT'S ABILITY TO COMPEL AND RESTRICT SPEECH

INTRODUCTION: GOVERNMENT SPEECH

B. Jessie Hill[†]

“Government speech” is as protean a concept as any in constitutional law.¹ Justice Stevens’s description of the term as “recently minted” in *Pleasant Grove City v. Summum* notwithstanding,² government speech in fact has a relatively long pedigree.³ Yet that pedigree has not remained pure; instead, the government speech concept has become entwined with multiple lines of constitutional doctrine.⁴

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¹ In *The Many Faces of Government Speech*, for example, Professors Randall Bezanson and William Buss identify eight “typologies” of government speech. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384–87 (2001). Much earlier, Professor Steven Shiffrin characterized government speech as including “state support of communications ranging from official government messages, to statements by public officials at publicly subsidized press conferences or in letters mailed at taxpayers’ expense, to the speech of political candidates and artists supported by government political or artistic subsidies, to the publicly financed editorializing of broadcasters and public school newspapers, to the communications of public school teachers, and even to the speech supported by second class mail privileges that once operated as a generous subsidy to periodicals.” Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 565 n.* (1980).

² 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

³ In his classic article on the subject, Shiffrin notes that Professor Mark Yudof had begun exploring the topic in a 1977 lecture. Shiffrin, *supra* note 1, at 569 n.19. This exploration led ultimately to Yudof’s important book, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

⁴ Though the concept of government speech primarily has relevance in the realm of First Amendment doctrine—including both free speech and the religion clauses—some recent

Generalization is therefore difficult. But at a minimum, perhaps, one can fairly state that “government speech” refers to a wide range of phenomena in which, rather than regulating private speakers’ messages, the government controls or supports a particular message using any of a panoply of carrots (such as funding or special access to government property) or sticks (such as denial of funding or exclusion from government property). The speech may originate with the government itself or with a private individual, but the government must control or support the message in some way.⁵ As the array of papers in this symposium demonstrates, government speech may manifest itself in a variety of ways. It may include government-sponsored religious displays, whether those displays were originally designed by governmental actors or donated by private entities.⁶ It may include “platforms” for private speech, like monuments or fellowship funding, where the government broadly approves but does not micromanage the specific message conveyed.⁷ It also includes most of the things that public employees say in the course of their employment.⁸ Less obviously and more troublingly, it may include every message conveyed—whether by state or private actors—at government-sponsored public functions and in public school curricular and extracurricular settings.⁹ The argument might even be

commentary has extended government speech into other realms, such as equal protection under the Fourteenth Amendment. See William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760192.

⁵ See, e.g., Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 575 (2011) (arguing that “‘effective control’ over speech is the primary distinguishing factor in assigning responsibility for speech” as governmental or private). Of course, the category of government-sponsored speech is not necessarily a clear-cut or stable one. Professor Caroline Corbin has thus proposed a category of “mixed speech” for speech that cannot clearly be characterized as governmental or private. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008).

⁶ See, e.g., *Sumnum*, 129 S. Ct. at 1132–34; Mary Jean Dolan, *The Cross National Memorial: At the Intersection of Speech and Religion*, 61 CASE W. RES. L. REV. 1171 (2011); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211 (2011).

⁷ See Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253 (2011) [hereinafter Greene, *Speech Platforms*].

⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 421–43 (2006); see also Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 30–40 (2009) (discussing the applicability of government speech doctrine to public employees’ speech).

⁹ Helen Norton, *Imaginary Threats to Government’s Expressive Interests*, 61 CASE W. RES. L. REV. 1265 (2011).

made that attorneys working in public law school clinics, in their capacity as public employees, are engaging in government speech.¹⁰

In most cases, the label of government speech has functioned as a defense to an opposing claim of free speech rights. If the government is trying to express its own message, the doctrine holds, then it has leeway to exclude or discriminate against private messages in any way it sees fit; the government, as speaker, is not subject to the same constraints against content- and viewpoint-based discrimination as when it acts as regulator of private speech. No government could do its job, after all, if it had to provide a podium for opposing views whenever it expressed its own views on matters like foreign policy or public health. According to a classic example, if the government erects a Statue of Liberty, surely the First Amendment's prohibition on viewpoint discrimination does not require it to permit construction of a Statue of Autocracy as well.¹¹ The government may, and indeed must, exercise dominion over its own message. Indeed, some amount of government speech may in fact be desirable, as it enhances the transparency of government actions and the reasons behind those actions, thus leading to greater accountability for government actors.¹²

Yet like all claims of dominion, the category of government speech has a tendency to expand. Scholars have thus largely responded with skepticism to the recent expansion of government speech.¹³ Professor Helen Norton's contribution to this symposium demonstrates the dramatic expansion in the lower courts of the Supreme Court's decision in *Garcetti v. Ceballos*,¹⁴ holding that speech by government employees, even on matters of public concern, was unprotected by the First Amendment when the speech was part of the employee's official duties.¹⁵ Courts have applied *Garcetti*'s government speech rationale in order to exclude dissenting speakers from public functions and to punish legitimate and useful student speech in public schools, although those cases are a far cry from vindicating the doctrine's goal of furthering, rather than inhibiting, public accountability.¹⁶

¹⁰ See generally Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 BYU L. REV. 2175 (briefly outlining and then refuting the argument).

¹¹ *Sumnum*, 129 S. Ct. at 1138.

¹² Norton, *supra* note 8, at 20–23.

¹³ This tone of skepticism is aptly demonstrated by the title of Professor Steven G. Gey's 2010 article on the subject. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259 (2010).

¹⁴ 547 U.S. 410 (2006).

¹⁵ Norton, *supra* note 9, at 1267–68.

¹⁶ *Id.* at 1269–74.

Similarly, in the case of law school clinics, Professor Peter Joy's and Professor Adam Babich's articles describe striking examples of the extent to which legislators seem willing to assert a right to control clinic attorneys' and law students' speech in order to "de-lawyer" indigent clients.¹⁷ Indeed, in the case of Tulane Law School, the legislature sought to control the speech of a private law school clinic, which received minimal state funding, on the flimsy and specious justification of protecting the state's economic interests.¹⁸

Though the label of government speech may not be appropriate for the activities of law school clinics, it nonetheless seems clear that the First Amendment provides few safeguards against such interference. Moreover, as Professor Jonathan Entin's article demonstrates, governmental interference with speech aimed at law reform—and especially with entities that sue the government or other powerful interests—is nothing new.¹⁹ New solutions and approaches are therefore required. Professors Entin, Babich, and Joy heed this call in a most valuable way, by considering what legal or other remedies might in fact exist. In his thought-provoking essay, Professor Entin suggests that the ideal of academic freedom, while largely lacking in legal teeth, might nonetheless informally constrain both state and non-state actors as a "powerful intellectual and social norm."²⁰ Professor Babich takes a highly original tack, exploring the possibility that the preemption doctrine might protect against de-lawyering strategies in the environmental law realm.²¹ And Professor Joy's thoughtful overview of legal responses to attacks on clinics suggests that the equal protection doctrine, legal ethics regulations, separation-of-powers doctrine, and even—in certain limited circumstances—the right to free speech may provide some small measure of protection.²²

Moreover, for better or for worse, when the government speaks, it mostly says what it thinks we want to hear. In other words, government speech appears to gravitate toward expressing majoritarian viewpoints. For Professor Abner Greene, this tendency is not necessarily a bad thing. He argues in his excellent contribution to

¹⁷ Adam Babich, *De-Lawyering Legislation and Environmental Law Clinics: Can the Preemption Doctrine Protect Public Participation Rights?*, 61 CASE W. RES. L. REV. 1109 (2011); Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087 (2011).

¹⁸ Babich, *supra* note 17, at 1116–23.

¹⁹ Jonathan L. Entin, *Law School Clinics and the First Amendment*, 61 CASE W. RES. L. REV. 1153 (2011).

²⁰ *Id.* at 1169.

²¹ Babich, *supra* note 17.

²² Joy, *supra* note 17.

this symposium that “[t]he state should . . . have the power to refuse to open platforms to speech that offends core, commonly held values grounded in our commitment to the equal protection of the laws”—such as hate speech or vulgarity.²³ But state sponsorship of speech platforms does not justify every sort of content-based judgment, even in Professor Greene’s view. The state should avoid taking sides with respect to contested issues, for example, and it should not sponsor speech that denigrates people on the basis of race or other illegitimate traits.²⁴

When government speech is religious, however, its majoritarian quality appears more troubling. As Professor Douglas Laycock’s contribution incisively demonstrates, many legal opinions upholding the constitutionality of transparently religious monuments endorsing Christianity engage in manipulation and recharacterization in order to avoid acknowledging the obviously sectarian nature of the display.²⁵ Moreover, according to Professor Laycock, government’s attempts to distance itself from such speech should be rejected: it is usually a fair assumption that the government agrees with the content of the sign it erects, absent any clear indication to the contrary.²⁶ Taking these displays at “face value,” Professor Laycock argues, would lead to the conclusion that “government display of a sacred text presumptively endorses the religious message in that text, and the burden is on the government to clearly rebut the presumption of endorsement with [sufficiently clear] objective evidence.”²⁷

Similarly, Professor Mary Jean Dolan’s original and illuminating contribution considers how the recent expansion of government speech doctrine to include what she refers to as “identity” messages has led to greater collision with Establishment Clause principles.²⁸ Using the hypothetical case of a congressional choice to maintain the National Memorial status of the Mojave desert cross challenged in *Salazar v. Buono*²⁹ while refusing that status to proposed alternative memorials, Professor Dolan highlights the point at which such majoritarian religious speech becomes problematic—the point at

²³ Greene, *Speech Platforms*, *supra* note 7, at 1257–58; cf. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2 (2000) (arguing that “government in a liberal democracy not only *may* promote contested views of the good, but *should* do so, as well,” including by way of its own speech).

²⁴ Greene, *Speech Platforms*, *supra* note 7, at 1258–59.

²⁵ Laycock, *supra* note 6.

²⁶ *Id.* at 1252.

²⁷ *Id.* at 1249; cf. B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 539–44 (2005) (arguing for a presumption against religious symbols on government property).

²⁸ Dolan, *supra* note 6.

²⁹ 130 S. Ct. 1803 (2010).

which it becomes a “claim that the Christian symbol better represents the national identity—or (and perhaps even worse) that is more consistent with the image the government administration seeks to present.”³⁰

The multifaceted problem of government speech clearly provides rich fodder for reflection, as the wide array of articles in this fascinating and timely symposium demonstrates. The esteemed group of panelists produced an exhilarating day of discussion as well as this excellent and useful selection of papers. Much credit goes to them and to the student editors of the *Case Western Reserve Law Review*, together with their faculty advisor, Professor Jonathan Entin, for a valuable addition to the burgeoning scholarship on government speech. Indeed, the government speech doctrine, and the questions it raises, will likely be with us for some time.

³⁰ Dolan, *supra* note 6, at 1210.