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Abner S. Greene

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SPEECH PLATFORMS

Abner S. Greene[†]

The state plays different roles, and free speech doctrine should (and sometimes does) respect these roles. We properly insist (with some categorical exceptions) that the state not regulate private speech based on subject matter or point of view. If private speakers want to praise the Nazis or condemn homosexuality, the state has no place stopping them, even if firmly convinced these ideas are wrong. Why we have such firm protection for speech we abhor is a matter of much debate. To some extent, it's because we don't trust the state to make content-based judgments consistently as a matter of principle; we fear that too often it will be merely playing favorites, helping friends and harming enemies. One thing we know is that the state holds a monopoly over legitimate coercive force, and that when it jails or fines, it possesses the ability to squelch speech, and not merely channel it to another outlet.

We have similarly strict rules against the state's drawing content-based lines in public places where people have traditionally gathered. We may build streets primarily for ease of movement and parks primarily for recreation, but citizens also use both to meet and discuss matters of the day, to face ideas with which they may not be familiar (and sometimes find quite odd). We can always walk by or away from such speech, so we are never captive in these settings. Even if streets and parks are technically "owned" by the state and not by private capital, they are held as a kind of public trust. (That the state is really "we the people" acting via delegation can't get us very far; exploding the public/private line in this sense would raise difficulties in any area of free speech law, regarding whether the state is acting in a sovereign/regulatory or some other capacity.) We have made a collective decision—perhaps in part to ensure that not only the wealthy have adequate avenues for their ideas—to reserve some property as space where the state may not regulate speech based on content.

On the other end of the spectrum, the state sometimes speaks itself. Some examples are obvious and it is just as obvious that free speech

[†] Leonard F. Manning Professor, Fordham Law School. Many thanks to Caroline Corbin, Jessie Hill, John Nagle, Geof Stone, and Nelson Tebbe for helpful comments.

doctrine is out of place. So, when the President promotes his agenda or critiques his opponents, he may make whatever content-based statements he likes. Similarly, when the FDA announces warnings regarding a food or drug, it may say what it believes to be true, without giving equal time for the opposing point of view. The state, through these actors, may be advancing content-based, contested positions—even points of view—but we know there are ample opportunities in other fora for disagreement to be stated. Neither a regulatory monopoly nor state control over property held in trust for public gathering is involved here.

The state also speaks for itself in more disguised ways, and we generally are fine with it making content-based judgments there as well. Often this involves conditional funding, and the conditions often turn on speech content. If the state wants to promote childbirth (and possible adoption) over abortion, it may do so, whether it is speaking directly (say, through an official's speech to a group) or indirectly (say, through funding a clinic that agrees to follow these rules). Perhaps we should require that the state's role in such selective funding be transparent at every level, most importantly (in this example) to the women receiving the health services. But such selective funding neither coerces private choice nor dominates the market for the relevant speech. (I am assuming in this example that abortion-related information is otherwise available to the women who seek clinic help. In addition to improving accountability, the transparency concern helps ensure that the women seeking clinic help appreciate they may not be getting standard, purely professional, medical advice, but rather are getting the state's version; this will make it easier for them to appreciate that there may be other sources to which they must turn for other points of view.) Or consider if the state wants to fund the arts. It might not want to do so by lottery, but rather fund art it considers worthy of being backed by taxpayer money. This sort of judgment will inevitably involve attention to content. Perhaps the taxpayers want to fund only paintings of dogs or sunsets; or perhaps they don't want to fund art they find disgusting. Determining what counts as disgusting will involve attention to content. But we're talking about taxpayer dollars only; painters will still be able to produce, display, and sell disgusting art.

In these ways, we permit a great deal of content-based selectivity when the state acts via direct speech or conditional spending, rather than through regulating. And the selectivity may be based on subject matter or on viewpoint. The former is clear. The latter seems harder, but is also clear. When we permit state conditional funding for “we

encourage you to carry your child to term” but refuse such funding for “here are abortion alternatives,” we are permitting a viewpoint distinction. When we permit a government agency to award arts grants only to work that is not indecent, we are permitting a set of case by case viewpoint distinctions. Indecency as a category isn’t obviously viewpoint-based, because it is in large part about taste and what seems disgusting or revolting. This kind of aesthetic judgment is hard to cubby-hole in our free speech doctrine. But if the underlying purpose of the limitation is to refuse taxpayer dollars for art that challenges mainstream sensibility via certain types of sexual images or images related to bodily functions, that desire to preserve mainstream values is similar to what happens when we fund a preferred viewpoint on a contested issue over another.

That we permit content-based selectivity when the state acts as funder has nothing to do with the limited amount of funds available. We could insist on a lottery. We permit it because we want the state, acting in our name, to endorse some speech as good and refuse to give its endorsement to other speech. We don’t live in the type of liberal democracy that would be strictly neutral (if such a thing were possible) as to the good. Because we insist on strict rules for regulation of private speech and for certain types of state-owned property (streets and parks), we can preserve a robust, freewheeling speech marketplace in many arenas. The state as speaker and sponsor or patron of speech can act as the collective voice of the citizens. (I’m assuming a reductionist view of what we want, via a reductionist view of how majoritarian democracy works.) We get the best of both worlds—the world of public debate unfettered by the state and the world of state-sponsored speech that pushes some and not other views of the good.

That the state may be selectively advancing a contested view of the good does not entail that it is adopting the speech as its own, nor that it is correct to attribute the speech to the state. Artists who receive National Endowment for the Arts grants are not necessarily advancing the view of the U.S. government; all we know is they are speaking within the range of acceptable taxpayer-funded ideas. And what about privately donated monuments that a municipality chooses to erect in a city park? It’s one thing to say when a private homeowner erects a monument on her lawn, she expects viewers to attribute the speech to her, and they are likely to do so. This isn’t true for monuments on city-owned property. It all depends on local understandings, perhaps developed over time. Maybe the town park used to be a graveyard for a rich family, and their old tombstones are still up. Maybe the town

park has a history of rotating monuments, placed via lottery. Maybe it has a limited number of monuments, which have gone up in fits and starts over the years. Even in the latter case, it seems unlikely that the average passerby (with or without knowledge of local history) will attribute the content of the monument to the city. Here's a better way to look at it: The city wants to provide a platform for some ideas and not others. It's not regulating, and it's not setting rules for transient speech in the park. It wants to be able to erect a Rotary Club monument and not erect a Nazi Skinhead Club monument. We should treat this no differently from how we treat the state's funding the National Endowment for Democracy but refusing to fund a National Endowment for Totalitarian Dictatorship, although the Endowment example may properly be one of government speech, whereas the Club example is better termed one of providing a platform for private speech. When we let the state make content-based judgments in these settings—even viewpoint-based judgments—the state, acting as sponsor or patron of private speech, is selectively shaping the content of what may be transmitted from state-provided speech platforms. Some of the messages will seem bland and pabulum-like (who could disagree with a monument to the longtime coach of the multi-championship high school football team?) but sometimes not (say, a monument to a certain war, in a town with many pacifists who oppose war generally and many non-pacifists who opposed this specific war). Again, the state isn't preventing opposing views from being vigorously aired.

If the state opens a new park, it has to play by the rules of parks generally, i.e., no content-based speech regulation. Analogues to parks should be treated similarly. Although it's a bit of a harder question, if the state opens a municipal auditorium with an all-comers policy, the all-comers may (and must) include groups many of us find odious (so long as they play by content-neutral time, place, and manner rules). But this gets significantly harder if we alter a few facts—what if the state is acting as a public university, and administering student activity fees for student publications? Should we permit the state *no* content-based leeway? (I put aside obvious permissible distinctions such as “student groups only.”) For example, if the establishment clause is properly read to permit state funding for student religious speech (so long as funds go to secular speech as well), then there is no good reason to forbid funds for such publications. (The concern that the state might be perceived as endorsing the religious views disappears as both a constitutional and policy matter once we determine that a reasonable viewer should see

the state as setting up a platform for private speech of various kinds, neither endorsing nor condemning any of it.) But does that mean the university must authorize funds for the *We Hate Black People* magazine? Why? Because we think that idea may be a good one, and needs its space in the marketplace of ideas? Because we are afraid that if we permit the school to draw this line, we will have to allow it total discretion? Once we are past the basic contours of streets and parks, we should permit the state to make content-based restrictions when it makes available speech platforms—via space or funding—if there are *good reasons to do so*. Now, you might say: Isn't a core concern of free speech doctrine that the state can't make (or should be disabled from making) reasoned judgments regarding speech content (whether acting in its initial policymaking mode or its judicial review mode)? And I'd say: In part that's true, and that's why we cordon off regulation of private speech and some public property in this way. But otherwise, we want the state to make judgments of what's good and bad. Sometimes the state will be speaking when so doing; other times it will be providing (or not) a platform for private speech.

There are many good reasons for the state to open speech platforms while imposing content-based limits. The platforms in question here may be numerous—the public college student publications I mentioned above, ads on public buses and subways, vanity license plates, adopt-a-highway signs, and others. So, for example, perhaps the state wants to permit advertising for various products and services in its subways and buses, but avoid potential controversy from permitting candidate advertising for political office. True, political speech generally is more highly valued than other speech; but here we'd be permitting all the private political speech (and streets/parks political speech) that the candidates can muster. What we'd be saying is that it's a legitimate concern that the average bus rider might mistakenly think the state is endorsing a candidate whose sign is up (when another's isn't). Or that it's a legitimate concern that better-funded candidates will find a kind of captive audience (especially among those citizens who for various reasons have to take public transportation). How about a state-run candidate forum, limited to candidates who are currently polling above a certain percentage? If the justification is that debates work better with a small number of candidates on stage (and isn't simply a clever way for those in power to favor their friends), then we should permit the limitation.

The state should also have the power to refuse to open platforms to speech that offends core, commonly held values grounded in our

commitment to equal protection of the laws. Examples here could include: no vanity license plates that disparage persons on the basis of race and other protected characteristics; no funding for student groups that do the same; refusal to allow the KKK to adopt a section of the highway and say so on a highway sign. Although the state has an interest in avoiding having such speech misattributed to it, the concern is not (or not primarily) about misattribution. Rather, the state's primary concern is to set up speech platforms without providing the opportunity for some persons or groups to cause message-based harm to other persons or groups based on race, ethnicity, national origin, religion, gender, sexual orientation, or other characteristics on the basis of which we think it proper to offer people protection.

That there are good reasons to refuse platforms for hate speech—whether the speech itself reads as hateful or whether the group itself is understood as adopting principles of hate or disparagement—is indisputable. Core free speech doctrine nonetheless protects hate speech in part to ensure an open marketplace for the exchange of ideas; this may provide a peaceful outlet for odious ideas and may allow such ideas to be proven false. There are also arguments based in democratic theory or individual autonomy. But we can protect those underlying free speech values by permitting hateful, disparaging speech by private actors on their own turf and nickel, and by offering them the turf of streets and parks as common meeting grounds. Having done so, we can cordon off other state-provided speech platforms from such speech—as an extension of the idea that the government itself may be content-selective in its own speech. Refusing platforms to speech the state deems offensive to core values of equality will require it to draw some tricky lines, based on the viewpoint of the message or the group. For example, the state might prevent a subway ad that says “Jews Are Horrible People” but permit one that preaches tolerance for all religions. These are clearly viewpoint-based judgments that we refuse the state when it regulates private speech or when it administers streets and parks. In part we do so because we don't want the state skewing the discourse; in part because we don't think the state can draw clear lines in these settings, or can draw lines without playing favorites in a way that serves no valid public purpose. My proposal is that we should run these risks for state-created speech platforms in a way we refuse to run them when the state regulates private speech or administers streets and parks. The values the state is protecting are significant, and ought to have an arena of private speech in which they prevail.

The same arguments should hold for sexual or vulgar speech. Here the viewpoint-discrimination concern is less, because it's less clear that refusing to permit a "FUCK YOU" vanity license plate or a Porn Club at the local high school is a viewpoint-based judgment. But whether it is or not, sexual or vulgar speech—although protected in the private and streets/parks arenas—is sufficiently offensive to most people that the state should be allowed to protect such sensibilities by not offering new speech opportunities for the offense.

I am not suggesting, though, that we should permit the state to make viewpoint-based distinctions of any sort whatsoever when it sets up speech platforms. In particular, it may not open a platform for one side only in a currently contested matter. This is so even if it may use its own speech to promote one side over another. So, although it may promote childbirth over abortion, it may not permit a "RIGHT-TO-LIFE" vanity license plate while refusing the "PRO-CHOICE" plate. Although it may spend money promoting climate change legislation, it may not permit the student environmental club to meet after hours while refusing to permit a club to meet that denies human agency in increased carbon emissions. And so on. Here is where the distinction between government speech and state-provided speech platforms matters. If the state is willing to claim speech as its own, then it may participate in debate without giving equal time to the other side. But if it is merely setting up platforms for private speech, then it forfeits the government speech mantle, and its reasons for making viewpoint distinctions change. To provide a speech platform for one side but not the other in a current debate should be seen as improper skewing of the speech marketplace. To provide a speech platform for the religious tolerance group but not the group that hates a specific sect also skews debate, but we should deem protection against disparagement a trumping value, at least in the setting of state-provided speech platforms.

The state should, though, be permitted to exclude all sides of a currently contested controversy, i.e., to make subject-matter rather than viewpoint distinctions in these settings. So although it may not permit only one or the other vanity license plate in the abortion controversy, it may refuse to authorize vanity plates on the entire issue. The legitimate state interest isn't avoiding improper attribution of one message or another to the state, and it's not refusing to provide a platform for hateful or vulgar messages. Rather, it's the (somewhat weaker) state interest in shunting debate on controversial issues to the private or streets/parks arenas, and keeping other state-provided speech platforms for more mainstream, uncontested matters. There's

a close analogy to the state's power as sponsor or patron of private speech to track mainstream taxpayer sensibility and avoid controversy. (For what it's worth, although I would encourage the state to refuse platforms for hate speech and vulgarity, I don't have a strong feeling regarding whether the state should refuse platforms for controversial subject matter. My argument above is that such refusal should be considered constitutional.)

The Court's opinions on religious speech in schools, when the state has opened space for speech and then refused it for religious speech, are consistent with my approach. To some extent, the state actors in question just had a misguided view of the establishment clause. They thought that if a school permits a religious study or worship group into a space otherwise opened for speech, then the state might be unconstitutionally advancing or endorsing religion. But it wouldn't be, for it would be correct to see the state not as promoting the religious views in question (although one could imagine a case in which that would be true, and thus constitutionally problematic), but rather as providing a platform for religious speech on equal terms with other speech. And there's no good reason not to provide such a platform; religious speech, as such, is a core part of the U.S. fabric, and the state has no legitimate argument against it based on content. It would be a mistake to read this line of cases, however, as extending to a broader, content-neutral rule for how the state must manage platforms it creates for private speech. The doctrine says the state may make reasonable content-based decisions here; that fits my argument. It also says the state may not make viewpoint-based decisions here; that doesn't fit my argument. But apart from the religion setting, there are no Court holdings (as opposed to dicta) to the contrary of my position permitting some viewpoint-based distinctions in state-created speech platforms (again, treating separately streets/parks and perhaps some close analogues). True, in most of the religious speech cases, the Court viewed the restriction on such speech in the public school/college setting as viewpoint-based, and thus invalid. But the better argument is that the restrictions on religious speech—better put, the refusal to provide a platform for religious speech—had no good justification. That they were viewpoint-based was a red herring, not the real reason they were invalid; or put another way, they were illegitimately viewpoint-based, leaving open the possibility of legitimate viewpoint-based distinctions in this setting. This line of cases doesn't hold that once a school opens after-school classroom space, an auditorium, or student activities money for some speech, then it must open it for all speech on a

viewpoint-neutral basis. That is, there is no holding that says the school has to permit the “We Hate Black People” or “Nazi Party” group to have equal access.

Let’s turn, finally, to antidiscrimination norms in the setting of state-created speech platforms. The state may not itself disparage people based on race (put aside whether one would have a cause of action for such disparagement). And it may not sponsor speech that does so. A more limited version of this argument would suggest that, at least, the state may choose to not so disparage persons, and may choose to not provide platforms for such disparagement. Thus, if a state law school chooses to provide meeting space and activities funds for student groups generally, but not for groups that espouse hatred of persons based on race, the law school is acting according to a legitimate public purpose. It shouldn’t matter if the protected characteristic has been deemed to trigger strict or intermediate scrutiny; those are rules for limiting judicial review of legislative action, and not rules that should bind the policy maker itself. If there is a good reason (yes, we will have to judge it) for deeming a trait/characteristic in need of state protection, then that is a good reason for the state to refuse a platform for disparaging speech on the basis of such a characteristic. Thus, a state law school may refuse a platform for antigay speech, even if sexual orientation has not (yet) been treated with elevated scrutiny by the Court. I note again that private speech may not be regulated on this basis.

What about regulation of associations based not on their speech but on their exclusionary decisions based on certain characteristics, say, sexual orientation? A state law school must permit a group—say, a religious one that has a negative view about homosexuality—to exist and its members to associate, even if that involves exclusion from membership and/or leadership to gays and lesbians. This rule is but an offshoot of our freedom of association rules generally—the state may not insist that such groups change their internal practices. But if the state is providing speech and associational opportunities—say, activities funds or announcements in the school’s weekly newsletter or bulletin board space or a school e-mail address or meeting space or use of the school’s name and logo—then it may choose to advance the view of the good it (justifiably, if not necessarily) believes to be true, and refuse these platforms to groups that do not treat gays and lesbians equally. Is this viewpoint discrimination? That’s a hard question. If the school refused to permit the group to speak its views regarding homosexuality, that would be viewpoint discrimination, and illegitimate (as regulation of private

speech). If it refused to sponsor such views as part of a general opening of space or funds, that would also be viewpoint discrimination, but justifiable, as I argued above. If it refuses to sponsor groups on the ground that such groups have exclusionary membership/leadership rules based on sexual orientation, that might not properly be considered viewpoint discrimination, because it's based on conduct, not on speech. But whether or not we properly deem the school's decision one based on viewpoint, it's defensible (and constitutional) because (a) it doesn't regulate private speech or association, and (b) it advances a legitimate (although contested) view of the good, namely, the equality of persons regardless of sexual orientation. Other public law schools might take a different view, permitting space and funds for groups (religious or otherwise) that don't support the equality of gays and lesbians. Unless we consider the equal protection argument to be of the strong version, forbidding the state from sponsoring such groups, we should deem the matter optional, for each school to make its own determination about the view of the good it wishes to advance.

Here is what I have argued in this essay: The state acts in many different ways. Sometimes it seeks to create platforms for private speech. Acting in this capacity, the state is neither regulating private speech nor speaking itself. Nor is it administering traditional places for people to gather, associate, and speak such as streets and parks. The state has good reasons for refusing to provide speech platforms for hateful or vulgar speech. This is not about the fear of improper attribution of such messages to the state. Rather, the state's interests are protecting persons from the sting of hateful speech based on characteristics we consider morally and politically irrelevant, such as race, and, to a lesser extent, protecting persons from the sting of vulgar or sexually indecent speech. These are values we forbid the state from advancing via regulation of private speech. But just as the state may advance these values through its own speech, so may it advance them via selective exclusion from state-created speech platforms. The risk of favoritism and unprincipled line-drawing—a key reason to insist on strong free speech protection when the state is regulating or administering streets and parks—should take a back seat to the protection of core, commonly held values when the state is setting up and administering new opportunities for private speech.¹

¹ I have alluded to the following Supreme Court cases in this essay, in the order cited:

Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (deeming streets and parks public fora for First Amendment purposes); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding an abortion-counseling “gag rule” for projects receiving federal funding for family planning); Nat’l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding an indecency restriction in federal arts funding); Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (upholding a city’s refusal to erect the monument of a religious sect in a public park); Perry Ed. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983) (describing the basic doctrinal trifurcation of traditional public forums, designated public forums, and limited public forums); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (invalidating a state university’s refusal to allocate student activity funds for a Christian newspaper); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (upholding a city’s refusal to open public transit advertising space for political ads, even though it allowed advertising on other subjects); Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666 (1998) (upholding a state-owned public television station’s exclusion of a candidate with low public support from a debate); Widmar v. Vincent, 454 U.S. 263 (1981) (invalidating a public university’s refusal to grant meeting space to a religious group); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (invalidating a public school district’s refusal to grant meeting space to a church group); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (invalidating a public school’s refusal to grant meeting space to a Christian children’s club as viewpoint discrimination); Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971 (2010) (upholding a state law school’s refusal to provide school funds and other support to a religious student group that refused full membership status to those who did not share the group’s views on sexual orientation).

For my prior work relevant to this essay, see Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833 (2010).

For other pieces that were helpful in preparing this essay, see Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79; G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949; Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 CATO SUP. CT. REV. 105; Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357 (2001); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113 (2010); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996); Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006); Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).