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Government Speech in Transition

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GOVERNMENT SPEECH IN TRANSITION

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In *Johanns v. Livestock Marketing Ass'n*,[1] the Supreme Court offered its clearest articulation to date of its emerging government speech doctrine.[2] After characterizing contested expression as the government's, the Court then held such government speech to be entirely exempt from free speech clause scrutiny.[3] In so doing, the Court solved at least one substantial problem, but created others that remain unresolved today.

The good news is that *Johanns* and related cases[4] provide a helpful and important vocabulary for recognizing both the inevitability and the value of government speech. Not only must government speak if it is to govern,[5] its speech is often quite valuable to the public. For example, government speech both informs members of the public on a wide range of topics[6] and enables them to identify their government's priorities (and thus to evaluate its performance).[7] For these reasons, the government speech defense appropriately insulates the government's own expressive choices from free speech clause challenges by private speakers seeking to prevent or alter the delivery of the government's own message.[8]

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1. 544 U.S. 550 (2005).

2. *Id.*

3. *Id.* at 553, 561-62.

4. For a brief history of the Court's government speech doctrine, *see* Helen Norton & Danielle K. Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904-10 (2010).

5. *See* ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 723 (1947) ("Now it is evident that government must itself talk and write and even listen."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980) ("If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs . . . government must be able to communicate.").

6. *See, e.g.*, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) (government report describing the adverse health effects of smoking).

7. *See* THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 698 (1970).

> Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources. In short, government expression is a necessary and healthy part of the system.

Id.

8. In *Johanns*, the entire Court agreed that private speakers can be compelled to pay for government speech with which they disagree, emphasizing that an effective government requires that taxpayers frequently fund government speech with which they quarrel. *See Johanns*, 544 U.S. at 562; *id.* at 574 (Souter, J., dissenting).

> The first point of certainty is the need to recognize the legitimacy of government's power to

Johanns thus solved a problem faced by a number of lower courts that, up until that time, had no vocabulary for dealing with what we now understand as government speech. Indeed, before the emergence of the government speech doctrine, lower courts often struggled mightily by seeking to apply some sort of forum doctrine to what are really government speech problems. In other words, lower courts too often tried to pound the square peg of what we now understand as government speech into the round hole of public forum doctrine[9]—with confusing and unsettling results.

An example helps illustrate this point. In *Griffin v. Department of Veterans Affairs*[10]—a decision that predates *Johanns*—the Fourth Circuit purported to apply forum analysis when rejecting a First Amendment challenge to the Veterans Administration's ("VA's") refusal to fly the confederate flag over one of its cemeteries.[11] Even though the court concluded that "[r]equiring the VA to allow the Confederate flag to fly daily over Point Lookout certainly 'garble[s] [and] distort[s]'" the agency's chosen message,[12] it had no government speech vocabulary from which to draw. It thus strained to characterize the government program at issue as a nonpublic forum, in which government remains free to regulate private speech so long as its actions are reasonable and viewpoint-neutral.[13] Yet an honest assessment of the facts would acknowledge that the Veterans Administration's decision to fly the American, and not the Confederate, flag over a Civil War cemetery is actually viewpoint-based, rather than viewpoint-neutral. Thus forum analysis, if properly applied, would have led the court to strike down the agency's actions. But once *Johanns'* articulation of the government speech defense allowed us to understand that the Veterans Administration's choice about which flag to fly over its property was the government's own expression, this becomes a much easier and more intellectually coherent decision: this was not a case in which the government regulated private speech in some type of forum, but instead a situation in which

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> speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard. To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.

Id. (footnote omitted). The majority and dissent differed vigorously, however, on the question whether government must identify itself as the source of that speech in order to successfully assert the government speech defense to the plaintiffs' free speech claim. *See infra* notes 14, 15 and accompanying text.

9. Under this doctrine, courts first assess what type of forum has been created, and then determine whether the government regulation can withstand the appropriate test. Speakers may be blocked from traditional or designated public fora only when necessary to serve a compelling government interest and the exclusion is narrowly drawn to achieve that interest. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Government may limit or deny access to a nonpublic forum only if its restrictions are reasonable and do not target speakers on the basis of their viewpoints. *See id.* Government's ability to regulate private speech thus often depends on how we characterize the forum, but one caveat remains constant: government generally may not regulate private speech in any type of forum on the basis of viewpoint.

10. 274 F.3d 818 (4th Cir. 2001), *cert. denied*, 537 U.S. 947 (2002).

11. *See generally id.*

12. *Id.* at 822.

13. *See id.* at 820-25.

the government itself was speaking, and was thus free to make its own expressive choices.

The bad news is that in solving one problem with its articulation of the government speech defense,[14] *Johanns* and its progeny created others by failing to identify any limits—or even a need for limits—to such a defense, despite the protests of dissenting Justices.[15] Moreover, the Court's imprecision has led many inaccurately to understand the Court to have created a "right" for the government to speak, even though the government generally possesses no First Amendment rights of its own.[16] Indeed, the Supreme Court's most recent government speech decision in *Pleasant Grove City, Utah v. Summum*[17] misleadingly states that "[a] government entity has the right to 'speak for itself.'"[18] Such language has emboldened some government actors to

14. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563-64 (2005).

15. *See id.* at 578-79 (Souter, J., dissenting) (urging the Court to require the government to affirmatively disclose its authorship of the contested message in order to invoke the government speech defense). *See also* Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Souter, J., dissenting) (objecting to the majority's decision as "portend[ing] a bloated notion of controllable government speech").

16. *See, e.g.*, Columbia Broad. Sys., Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 139-42 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 42-45 (1983) (arguing that government does not possess First Amendment free speech rights); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501-08 (2001) (arguing that, because the First Amendment is drafted as a constraint on government action, recognizing government's own First Amendment rights is inconsistent with constitutional text and purpose). This leaves legislatures free to enact laws limiting government speech—and they often do so. *See* Helen Norton, *Campaign Speech Law With a Twist: When Government is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 229-30, 260-61 (2011) (describing federal and state statutes that constrain government speech in various contexts). Note that the Court has suggested that certain institutions with unique communicative functions—such as universities or broadcasters—may have First Amendment interests regardless of their public or private character. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (observing that universities' academic freedom is "a special concern of the First Amendment"); Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) (noting public and private broadcasters' First Amendment interests in journalistic freedom). *See also* United States v. Am. Library Assoc., 539 U.S. 194, 210-11 (2003) (declining to decide whether public libraries have First Amendment rights); *id.* at 225-26 (Stevens, J., dissenting) (urging the Court to recognize public libraries as First Amendment rightsholders).

17. 555 U.S. 460 (2009).

18. *Id.* at 467. Here the Court inadvertently illustrates Professor Hohfeld's insightful observation that the term "rights" is often used imprecisely to mean very different things. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16, 28-44 (1913) ("One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties,' . . . ."). In Hohfeldian terms, government is better understood as possessing not a right but a privilege to its own speech. *See id.* at 55 ("A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another."); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 914 (2008) ("Existing First Amendment doctrine takes a rather clear position with respect to the Hohfeldian structure: a First Amendment right is a right against the government and only against the government."). The *Summum* majority's later references to government's "freedom" to speak are more in keeping with this understanding and thus more accurate. *See Summum*, 555 U.S. at 468 ("Indeed, it is not easy to imagine how government could function if it lacked this freedom. . . . A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.").

misunderstand the government speech defense as a sword with which they may pierce others' free speech rights,[19] when the defense is instead a shield from certain free speech challenges by private parties who seek to interfere with what is really the government's own expression. Indeed, government bodies increasingly assert government speech interests to claim "—and some courts are permitting them to exercise—the power to punish private parties' speech that [has not been shown to] threaten the government's ability to express its own views."[20] Examples include public entities' efforts to invoke government speech interests to justify not only the punishment of student expression in public schools,[21] but also the exclusion of peaceful dissenters from attendance at the government's public functions.[22]

Moreover, the shield should be smaller in size and scope than the Court has suggested to date. As I have written elsewhere, the Supreme Court "has been too quick to defer to public entities' assertions that contested speech is their own; indeed, it has yet to deny the government's claim to speech in the face of a competing private claim."[23] As just one example, the Court's failure to limit the scope of the government speech defense—and thus the size of the shield—led to its decision in *Garcetti v. Ceballos*[24] that characterized the government's expressive interest in controlling its workers' speech as extremely broad. By treating public employees' speech delivered pursuant to their official duties as the government's own expression that it may control free from First Amendment scrutiny, the majority cut back dramatically on public employees' free speech rights.[25] For example, the *Garcetti* Court concluded that because the

19. For a more general discussion of how recognizing certain actors as having "rights" over others may "facilitate the subordination of the weak by the strong," *see* Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 720 (2011).

20. *See* Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1266 (2011) [hereinafter *Imaginary Threats*] (discussing examples).

21. Doe v. Silsbee Indep. Sch. Dist., 402 Fed. App'x 852, 855-56 (5th Cir. 2010) (rejecting a public high school student's First Amendment challenge to her dismissal from the cheerleading squad when she failed to cheer for a basketball player who she alleged had sexually assaulted her: "In her capacity as cheerleader, H.S. served as a mouthpiece through which [the school] could disseminate speech—namely, support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, [the school] had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit.").

22. *See, e.g.*, Weise v. Casper, No. 05-cv-02355-WYD-CBS, 2008 WL 4838682 at *1-2 (D. Colo. Nov. 6, 2008), *aff'd on other grounds*, 593 F.3d 1163, 1165 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010) (asserting government speech interests to reject a First Amendment challenge by two individuals who were forcibly ejected from President Bush's speech on Social Security that was otherwise open to the public simply because they arrived at the event's parking lot in a car with a "No More Blood for Oil" bumper sticker). For an example of a government's unsuccessful effort to assert the government speech defense to justify the exclusion of peaceful dissenters from a public event, *see* Liberty & Prosperity 1776, Inc. v. Corzine, 720 F. Supp. 2d 622 (D.N.J. 2010).

23. Helen Norton, *Shining a Light on Democracy's Dark Lagoon*, 61 S.C. L. REV. 535, 536 (2010) [hereinafter *Shining a Light*].

24. 547 U.S. 410, 421 (2006) (holding that public employees' speech made "pursuant to their official duties" receives no First Amendment protection from employer discipline).

25. I have catalogued *Garcetti*'s disturbing legacy at length elsewhere. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4-5, 14-15 (2009) [hereinafter *Constraining Public Employee Speech*]; Norton, *Imaginary Threats, supra* note 20, at 1268; Norton, *Shining a Light, supra* note 23, at 546-47;

government should be permitted to "exercise . . . employer control over what the employer itself has commissioned or created[,]" the First Amendment poses no barrier to the government's punishment of its workers who report dangerous or illegal conditions when required to do so by their jobs.[26]

Although the Supreme Court has yet to identify meaningful limits to the government speech defense, a number of commentators[27] and lower courts[28] continue to try to do so. Indeed, some judges have declined to take the Court's implicit invitation simply to defer to government claims to contested speech as its own.[29] As just one example, those lower courts seeking to limit *Garcetti*'s reach may seek to distinguish it by questioning whether a public employee's contested speech actually occurred pursuant to her official job duties, and thus whether her government employer should have the power to control it as its own.[30] Others may require the government transparently to disclose its authorship of a message before permitting it to invoke the government speech defense more generally.[31] Whether such efforts will be successful in cabining the scope of the government speech defense remains to be seen.

In sum, *Johanns* marked the Court's long overdue recognition of the ubiquity and importance of government speech, appropriately exempting the government's own expressive choices from free speech clause challenges by private speakers. On the other hand, the Court's failure to clarify that the government speech defense is a shield and not a sword—much less to define and limit the scope of the defense (and thus the size of the shield)—has emboldened some governments and courts to misappropriate the doctrine to punish individuals for speech that does not encroach on the government's expressive

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Norton & Citron, *supra* note 4, at 911-12. Note, however, that the trend continues. For example, the circuits are now split as to whether *Garcetti* means that the First Amendment does not protect public employees from retaliation when they refuse to obey their employers' orders to utter falsehoods when speaking pursuant to their official duties. *Compare* Bowie v. Maddox, 653 F.3d 45, 46, 48 (D.C. Cir. 2011) (applying *Garcetti* to hold that the First Amendment does not protect a public employee who refused to sign an affidavit drafted by his employer that he believed to be false) *with* Jackler v. Byrne, 658 F.3d 225, 229 (2d Cir. 2011) (holding that the First Amendment did not permit a police department to retaliate against a probationary police officer after the officer refused to retract his truthful report and make statements that would have been false).

26. *Garcetti*, 547 U.S. at 411, 421. *See also* Norton, *Constraining Public Employee Speech*, *supra* note 25, at 13-16 nn. 45-53 (discussing cases).

27. *See, e.g.*, Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008).

28. *See, e.g.*, Norton & Citron, *supra* note 4, at 917-19 (discussing examples); Norton, *Imaginary Threats*, *supra* note 20, at 1272-73 (same); Norton, *Shining a Light*, *supra* note 23, at 546-47 (same).

29. *See, e.g.*, Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 337 (1st Cir. 2009) (Torruella, J., concurring in part and dissenting in part) ("The majority's position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact. What is to stop a governmental entity from applying the doctrine to a parade? Or official events? It is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as 'government speech.'") (citations omitted).

30. *See* Norton, *Shining a Light*, *supra* note 23, at 546-47 (discussing cases).

31. *See* Norton & Citron, *supra* note 4, at 917-18 (discussing cases).

interests. For these reasons, the legacy of *Johanns* in particular, and the government speech doctrine in general, remains in transition.