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### Remedies and the Government's Constitutionally Harmful Speech

Helen Norton

*University of Colorado Law School*

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*REMEDIES SYMPOSIUM*

**REMEDIES AND THE GOVERNMENT'S  
CONSTITUTIONALLY HARMFUL SPEECH**

*Helen Norton\**

I. INTRODUCTION

When we see the terms “government” and “speech” in close proximity, we often think of the constitutional problems triggered by the government’s efforts to regulate others’ expression. In this brief essay, I focus instead on the constitutional issues raised by the government’s own speech. Although the Free Speech Clause prohibits the government from discriminating on the basis of viewpoint when regulating private parties’ speech, the Supreme Court’s government speech doctrine permits the government to express its own viewpoint when it itself is speaking.<sup>1</sup> In so holding, the Court recognizes that the government’s expressive choices are often quite valuable to the public and thus appropriately privileges the government’s ability to make its own decisions about what it will and won’t say.<sup>2</sup>

As I have suggested elsewhere, however, the Court’s doctrine remains incomplete in at least two respects:

First, the Court to date has failed to insist that the government affirmatively identify itself as the source of expression as a condition of claiming the government speech defense, even though meaningful political accountability requires such transparency. Second, the Court has yet to grapple with the ways in which the government’s speech sometimes affirmatively threatens specific constitutional values (apart

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\* Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law. Thanks to Jessica Reed-Baum for excellent research assistance, and to Fred Bloom, Alan Chen, Melissa Hart, Sharon Jacobs, Margot Kaminski, Craig Konnoth, Scott Moss, Scott Skinner-Thompson, and Tracy Thomas for thoughtful comments.

1. See *Matal v. Tam*, 137 S. Ct. 1744, 1757-58 (2017).

2. See *id.* at 1758 (characterizing government speech as “important—indeed, essential”).

from whether and when the government's religious speech sometimes violates the Establishment Clause).<sup>3</sup>

Indeed, the government's expressive choices should sometimes trigger our constitutional concern. Examples include the government's threats or lies to silence the press or other governmental critics,<sup>4</sup> the government's speech that facilitates discrimination against protected class members,<sup>5</sup> and the government's lies that deprive its targets of important liberties.<sup>6</sup>

At the same time, constitutional challenges to the government's speech raise vexing problems of their own. For example, although the potential harms of the government's speech can at times be specific and individualized, at other times they seem more collective and diffuse.<sup>7</sup> Constitutional challenges to the government's speech, moreover, require the judiciary to evaluate the politically accountable branches in ways that trigger separation of powers and related concerns.<sup>8</sup> These complexities, in turn, invite courts to narrow the circumstances under which they will second-guess other governmental actors' expressive choices.<sup>9</sup>

Along these lines, Thomas Emerson and Mark Yudof were among the first to recognize the constitutional harms sometimes inflicted by the government's speech, as well as the barriers to the judiciary's ability to redress these injuries.<sup>10</sup> Yudof, for example, expressed concern about

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3. Helen Norton, *Government Speech and the Manufacture of Doubt*, 16 *FIRST AM. L. REV.* (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3097156](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097156) [hereinafter Norton, *Manufacture of Doubt*].

4. See Helen Norton, *The Government's Lies and the Press Clause*, 89 *U. COLO. L. REV.* (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2998909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998909) [hereinafter Norton, *Press Clause*].

5. See Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 *WM. & MARY L. REV.* 159, 194-98 (2012) [hereinafter Norton, *Government's Hateful Speech*].

6. See Helen Norton, *The Government's Lies and the Constitution*, 91 *IND. L.J.* 73, 89-107 (2015) [hereinafter Norton, *The Government's Lies*].

7. See *id.* at 83 (“[G]overnment lies can inflict the harms of disloyalty in ways that severely injure not only targeted individuals but also the broader public.”).

8. Indeed, questions about remedies (as well as justiciability) are particularly acute with respect to the government's most devastating lies—e.g., its lies about its justifications for military force. As I've written elsewhere: “[O]ne can easily anticipate that constitutional litigation challenging such assertions as lies might be motivated by partisan rather than public interests, and that the judiciary might thus be reluctant to second-guess the choices of the President when exercising her Article II powers as commander-in-chief. . . . These [and other] complexities suggest that the government's most catastrophic lies may be those especially resistant to redress.” *Id.* at 118-19.

9. See *id.* at 83-89. To be sure, concerns about justiciability and remedies are often closely intertwined. See Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 *COLUM. L. REV.* 309, 313 (1993) (observing the “variety of perplexities” that involve the relationship between rights to judicial review and rights to constitutional remedies).

10. See Thomas Emerson, *Freedom of Expression in Wartime*, 116 *U. PA. L. REV.* 975, 1007 (1968) (“There is no effective legal remedy for much of [the government's harassment of political

what he saw as the daunting challenges raised by constitutional litigation to constrain the government's expression: "The difficulties in fashioning remedies are so substantial that they corroborate the wisdom of courts in general in avoiding the attempt to delimit the boundaries of unconstitutional government expression."<sup>11</sup> More specifically, Yudof feared injunctions because of separation of powers concerns and the potential for chilling valuable government speech<sup>12</sup>—even while acknowledging that "[i]njunctions may be appropriate in a few outrageous cases where a course of misconduct is likely to be repeated."<sup>13</sup> He noted the possibility of declaratory relief but wondered about its utility.<sup>14</sup> And he saw at best a very limited role for damages.<sup>15</sup>

But while I agree with Yudof's menu of remedial possibilities, in this brief essay I seek to cast a more positive light on them: in certain circumstances, injunctive relief, declaratory relief, or damages can and should be available to redress the government's constitutionally harmful speech. I seek to show that although the search for constitutional remedies for the government's harmful expression is challenging, it is far from futile. This search is also increasingly important at a time when the government's expressive powers continue to grow—along with the government's willingness to use these powers for disturbing purposes and with troubling consequences.<sup>16</sup> In short, courts and lawyers need to

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dissenters through its own speech]. Statements of public officials or warnings of investigation, for instance, are not subject to judicial redress. Nor is it possible to obtain court review of most activities of legislative committees, apart from citations for contempt . . ."). Indeed, these sorts of concerns have led me elsewhere to examine possible statutory, structural, political, and expressive responses to the government's harmful speech. See Norton, *Press Clause*, *supra* note 4 (discussing engaged counterspeech and oversight by other government actors, the press, and the general public as nonconstitutional remedies for the government's constitutionally harmful speech).

10. See Norton, *Manufacture of Doubt*, *supra* note 3.

11. MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 205 (1983).

12. *Id.* at 206 ("The most dangerous of the remedies is by far the injunction. It operates on government much the way that prior restraints operate on private expression.").

13. *Id.*

14. *Id.* ("Declaratory relief might be available. Whether it would do more than produce ill-feeling among the branches of government is questionable, though it might serve a symbolic function.").

15. *Id.* at 206-07 ("Damages, except in cases of individualized and unique injuries, also strike me as unworkable, even assuming that some constitutional or statutory basis can be found for such suits against government agencies or officials, and that here is no sovereign immunity bar to such remedies. . . . The damage remedy makes sense only when individuals have been discretely harmed, as for example, when government defames particular individuals or invades their privacy. Recoveries would be based on common-law tort doctrines and federal and state tort-claims acts (most of which would need to be amended to encompass such injuries.").

16. See Norton, *Manufacture of Doubt*, *supra* note 3.

identify remedies that permit us to name, and stop, the constitutional harms sometimes inflicted by the government's destructive expressive choices.

To be sure, questions about remedies are far from the only difficult problems raised by constitutional challenges to the government's harmful speech. For example, as a threshold matter, sometimes we are not so sure that the speech at issue is actually the government's, as can be true of expressive interactions between government and private speakers in contexts that create doubt about the source of the contested speech.<sup>17</sup> Even if we focus on the many situations where the governmental source of the contested speech is clear, we might still wonder whether the dispute is justiciable, especially when we understand the government's speech as a form of soft power distinct from its more traditional hard law actions.<sup>18</sup> Finally, even if the dispute is justiciable, we may then struggle with the merits of the constitutional claim; for example, when does the government's speech cross the line from permissible persuasion, praise, or criticism to constitutionally impermissible coercion?<sup>19</sup>

I acknowledge that these are interesting, hard, and important questions (and I have discussed them elsewhere). But in this essay, I seek only to show that there is some number of situations where the contested speech is clearly the government's, where the dispute over its constitutionality is justiciable, and where the government's speech does in fact violate a constitutional provision—and where courts can then appropriately identify and award constitutional remedies to stop, or call out, the government's constitutionally harmful expression. In other words, I seek simply to reframe the conversation: the question should not be whether the government's unconstitutional speech is *ever* remediable, but rather when and how.

## II. MAKE IT STOP: INJUNCTIVE RELIEF

First, injunctive relief can be available to put a stop to the government's constitutionally harmful speech. In fact, courts have long considered injunctive relief in cases challenging what we only now

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17. See Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61 (2015) (proposing a test for determining whether contested speech is actually the government's).

18. Sometimes disputes are found nonjusticiable because political processes remain available to redress concerns about the government's choices. But such political processes may not be available, as a functional matter, when the government lies or otherwise speaks in ways that undermine meaningful political accountability. See generally Norton, *The Government's Lies*, *supra* note 6.

19. See *id.* at 89-197; Norton, *Government's Hateful Speech*, *supra* note 5, at 194-98; Norton, *Press Clause*, *supra* note 4.

describe as “government speech.” Possibilities include court orders that require the government to stop, take down, or excise its threatening, inaccurate, hateful, or otherwise harmful speech alleged to violate specific constitutional protections.

These decisions make clear, for example, that injunctive relief is available to stop the government’s speech that punishes or silences its targets’ expression in violation of the Free Speech Clause. Recall *Bantam Books, Inc. v. Sullivan*, where the petitioners—who were distributors of sexually explicit but non-obscene books and magazines—successfully sought declaratory and injunctive relief against threatening speech by the Rhode Island Commission to Encourage Morality in Youth.<sup>20</sup> There the Commission sent letters to the petitioners stating that it found some of their materials “objectionable for sale” to those under 18 and that it was sharing its views with local police departments.<sup>21</sup> The letters often also mentioned the Commission’s “duty to recommend to the Attorney General prosecution of purveyors of obscenity.”<sup>22</sup> The Supreme Court found that the Commission’s letters were sufficiently coercive to amount to unconstitutional censorship:

The appellees are not law enforcement officers; they do not pretend that they are qualified to give or that they attempt to give distributors only fair legal advice. Their conduct as disclosed by this record shows plainly that they went far beyond advising the distributors of their legal rights and liabilities. Their operation was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress.<sup>23</sup>

Injunctive relief can similarly be available against federal government expression for claims brought directly under the First (or, with respect to equal protection or due process violations, Fifth) Amendments.<sup>24</sup> Consider, for example, *Joint Anti-Fascist Refugee Committee v. McGrath*, where several organizations sought declaratory and injunctive relief under the First Amendment from then-Attorney General Tom Clark’s statement characterizing them as Communist front

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20. 372 U.S. 58 (1963).

21. *Id.* at 59-63.

22. *Id.*

23. *Id.* at 72; *see also id.* at 67 and n.8 (citing a number of cases in which “threats of prosecution or of license revocation, or listings or notifications of supposedly obscene or objectionable publications or motion pictures, on the part of chiefs of police or prosecutors, have been enjoined . . .”).

24. Some plaintiffs seek declaratory and injunctive relief from the federal government directly under the First or Fifth Amendments. With respect to federal agencies, *see also* 5 U.S.C. 702.

organizations.<sup>25</sup> The Supreme Court reversed the lower court's dismissal of the claim, stating that the effect of "the inclusion in the Attorney General's list of a designation [as Communist] that is patently arbitrary or contrary to fact . . . is to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation."<sup>26</sup> As the Court made clear:

These complaints do not raise the question of the personal liability of public officials for money damages caused by their ultra vires acts. They ask only for declaratory and injunctive relief striking the names of the designated organizations from the Attorney General's published list and, as far as practicable, correcting the public records. The respondents are not immune from such a proceeding. . . .<sup>27</sup>

Lower courts have similarly enjoined the government's expressive choices that are sufficiently coercive of its targets' speech to violate the First Amendment, or, with respect to state and local governments, the

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25. 341 U.S. 123 (1951); *see also* *Hentoff v. Ichord*, 318 F. Supp. 1175, 1182 (D.D.C. 1970) ("The conclusion is inescapable that the Report neither serves nor was intended to serve any purpose but the one explicitly indicated in the Report: to inhibit further speech on college campuses by those listed individuals and others whose political persuasion is not in accord with that of members of the Committee. If a report has no relationship to any existing or future proper legislative purpose and is issued solely for sake of exposure or intimidation, then it exceeds the legislative function of Congress; and where the publication will inhibit free speech and assembly, publication and distribution in official form at government expense may be enjoined."); Note, *Blacklisting Through the Official Publication of Congressional Reports*, 81 YALE L.J. 188 (1971) (explaining the subsequent history and implications of the *Hentoff* decision).

26. *McGrath*, 341 U.S. at 138-39 (citations and footnotes omitted); *see also* GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 327 (2004) ("In December 1947, the Truman Administration published its first attorney general's list of subversive organizations, which quickly became the official national 'blacklist.' Inclusion of an organization on the attorney general's list was tantamount to public branding, without a hearing. Contributions to listed organizations quickly dried up, membership dwindled, and available meeting spaces became scarce.").

27. *McGrath*, 341 U.S. at 140-41 ("Finally, the standing of the petitioners to bring these suits is clear. The touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right. It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did. We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them. The complaints here amply allege past and impending serious damages caused by the actions of which the petitioners complain."); *see also id.* at 142 (Black, J., concurring) ("Without notice or hearing and under color of the President's Executive Order No. 9835, the Attorney General found petitioners guilty of harboring treasonable opinions and designs, officially branded them as Communists, and promulgated his findings and conclusions for particular use as evidence against government employees suspected of disloyalty. In the present climate of public opinion it appears certain that the Attorney General's much publicized findings, regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence.").

Fourteenth Amendment. For example, a federal district court awarded injunctive relief against the federal Attorney General's Commission on Pornography, which had sent letters to a number of magazine distributors threatening to list them in its final report as purveyors of pornography.<sup>28</sup> Drawing in great part from the Supreme Court's decision in *Bantam Books*, the lower court found that the Commission's letters were sufficiently coercive to raise serious First Amendment issues, and thus issued a preliminary injunction prohibiting the Commission from listing the distributors in its final report, and requiring the Commission "to send a letter to each addressee of the original letter advising them that the original letter has been withdrawn and that no reply is required."<sup>29</sup> In short, sometimes courts enjoin—and thus put a stop to—the government's threatening speech that endangers key liberties.

Relatedly, and more recently, the Seventh Circuit enjoined a sheriff's threatening speech that sought to shut down certain sexually explicit advertisements:

As a citizen or father, or in any other private capacity, Sheriff Dart can denounce Backpage to his heart's content. He is in good company; many people are disturbed or revolted by the kind of sex ads found on Backpage's website. And even in his official capacity the sheriff can express his distaste for Backpage and its look-alikes; that is, he can exercise what is called '[freedom of] government speech.' A government entity, including therefore the Cook County Sheriff's Office, is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens. '[A] government's ability to express itself is [not] without restriction. . . . [T]he Free Speech Clause itself may constrain the government's speech.'<sup>30</sup>

The government's speech sometimes violates constitutional provisions other than the Free Speech Clause. For example, in *Anderson v. Martin*, the Supreme Court enjoined (what we now understand as) governmental speech that invited and facilitated private discrimination in violation of the Equal Protection Clause. There the plaintiffs filed a section 1983 action to enjoin Louisiana's state law that required the

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28. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 588 (D.D.C. 1986) (quoting the Commission's letters as stating that the Commission had "received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.").

29. *Id.* at 587-88.

30. *Backpage.com v. Dart*, 807 F.3d 229, 234-35 (7th Cir. 2015) (citations omitted).



government to state each candidate's race on all ballots,<sup>31</sup> and the Supreme Court agreed that the government's statement impermissibly "encourage[d] its voters to discriminate on the grounds of race" in violation of equal protection.<sup>32</sup> Other instances of government speech that invite or facilitate private discrimination against protected class members—as well as that which deters protected class members from exercising certain rights or seeking certain opportunities—may similarly violate the Equal Protection Clause.<sup>33</sup> Examples could include challenges to state or local jurisdictions that require that public schools' sex education curriculum include "[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public."<sup>34</sup>

In thinking through these issues, we can also draw from the Establishment Clause context, in which courts often assess whether the government's expressive choices—e.g., to engage in prayer or to display certain religious symbols—unconstitutionally "establish" religion even if they inflict only relatively diffuse or intangible injuries.<sup>35</sup> Elsewhere I've

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31. See STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 30 (2017) (describing section 1983 as "the broadest federal civil rights statute and among the most consequential. It provides a private cause of action against any person who, 'under color' of state law, causes the deprivation of rights secured by the 'Constitution and laws' of the United States. . . . The statute can only be enforced by private lawsuits; it contains no government right to sue of other public enforcement provisions."). Attorney's fees also may be available for prevailing plaintiffs. 42 U.S.C. § 1988(b).

32. 375 U.S. 399, 402 (1964); see also *id.* ("But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. Hence in a State or voting district where Negroes predominate, that race is likely to be favored by a racial designation on the ballot, while in those communities where other races are in the majority, they may be preferred. The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.").

33. See Norton, *Government's Hateful Speech*, *supra* note 5, at 194-208.

34. See ALA. CODE § 16-40A-2(c)(8) (1975); see also Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1463 (2017) (describing a variety of state laws regulating public school teaching and curricula).

35. See Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Sumnum*, 19 WM. & MARY BILL RTS. J. 1, 24 (2010) ("[A] large proportion of all establishment clause jurisprudence could be thought of as involving claims about government religious speech, with the other broad category related to government aid."). Lower courts have recognized at least two circumstances under which the government's religious speech may inflict sufficiently concrete and particularized injuries upon listeners to satisfy the requirements of standing and empower the federal courts to consider the Establishment Clause claim. See David Spencer, *What's the Harm? NonTaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB.

made merits arguments that draw from that tradition: just as courts sometimes find that the government's religious speech is sufficiently coercive of listeners' religious belief or practice to violate the Establishment Clause, so too might government's hateful speech directed at protected class members sometimes be sufficiently coercive to violate the Equal Protection Clause.<sup>36</sup> Here, I focus on remedies. And here too we can find plenty of examples of plaintiffs' successful claims under 42 U.S.C. section 1983 for injunctive and declaratory relief from state and local governments' religious speech that violates the Establishment Clause. Some of these decisions involve challenges to the government's religious speech that takes the form of prayer;<sup>37</sup> others involve challenges to the government's display of the Ten Commandments in certain public places or of religious symbols in holiday settings;<sup>38</sup> others involve challenges to city or county seals or license plates that feature crosses or other religious symbols.<sup>39</sup>

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POL'Y 1071, 1075 (2011) ("The dominant approach requires a plaintiff to show some version of direct and unwelcome contact with the challenged symbol or display. A second approach requires a plaintiff to show that he altered his behavior to avoid contact with the allegedly offensive display."). In the equal protection contest, for example, most potential plaintiffs could show direct and unwelcome contact with the government's hateful or threatening message, and some could also show that the government's message altered their behavior. Note that this sort of injury-in-fact standing as it arises in the Establishment Clause context is very different from taxpayer standing, in which a taxpayer challenges specific congressional appropriations alleged to establish religion in violation of the Constitution. *See, e.g.,* *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 58, 592-93, 610-11 (2007) (holding that taxpayer standing is limited to challenges to Congress's assertion of its power under the taxing and spending clauses and thus not available to challenge executive branch expenditures).

36. Norton, *Government's Hateful Speech*, *supra* note 5, at 194-98.

37. *E.g.,* *Santa Fe Indep. Sch. Dist. V. Doe*, 530 U.S. 290 (2000) (ruling in favor of plaintiff who brought Establishment Clause challenge to public high school's prayer at football games and who sought injunctive and declaratory relief under section 1983); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (ruling in favor of plaintiff who brought Establishment Clause challenge to public high school's prayer at graduation ceremony and who sought a permanent injunction under section 1983); *Joyner v. Forsyth County*, 653 F.3d 341 (4<sup>th</sup> Cir 2011) (ruling in favor of plaintiff who brought Establishment Clause challenge to county board's sponsorship of certain sectarian prayers and who sought declaratory and injunctive relief under section 1983).

38. *E.g.,* *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (ruling in favor of plaintiff who brought Establishment Clause challenge against county's posting of Ten Commandments at its courthouses and who sought injunctive relief under section 1983); *Cnty. of Allegheny v. ACLU*, 492 US 573 (1989) (ruling in favor of plaintiff who brought Establishment Clause challenge to county's inclusion of a crèche in a holiday display and who sought injunctive relief under section 1983).

39. *E.g.,* *Robinson v. City of Edmond*, 68 F.3d 1226 (10<sup>th</sup> Cir. 1995) (ruling in favor of plaintiff who brought Establishment Clause challenge to city seal that depicted a cross and who sought declaratory and injunctive relief as well as nominal damages and attorney's fees under section 1983); *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009) (ruling in favor of plaintiff who brought Establishment Clause challenge to state's license plate depicting a cross and the statement "I Believe" and who sought declaratory and injunctive relief under section 1983).

In short, courts enjoined the government’s unconstitutional speech long before the Court had developed a vocabulary—much less a doctrine—for addressing government speech. And courts are not necessarily limited to traditional forms of injunctive relief that simply require the government to stop or remove its constitutionally harmful speech: as Tracy Thomas explains more generally, courts can also issue prophylactic injunctions to require training, monitoring, and other actions as necessary to ensure the government’s compliance with the Constitution and prevent future violations.<sup>40</sup> Additional possibilities might include requiring the government to apologize or offer possibilities for corrective counterspeech.<sup>41</sup>

### III. CALL IT OUT: DECLARATORY RELIEF AND DAMAGES

To be sure, injunctive relief may well be unavailable in cases where the government is unlikely to repeat or continue its expressive choices that have infringed upon its targets’ constitutional rights.<sup>42</sup> This Part III thus explores other remedies for naming and deterring the constitutional injuries sometimes inflicted by the government’s speech.

#### A. *Declaratory Relief*

Declaratory relief is generally available to “call out” governmental speech that violates specific constitutional protections even absent a

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40. Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 309 (2004); see also *id.* at 380 (“Prophylactic relief counters the lack of compliance with an adjudicated right and its instrumental remedy by (1) avoiding the defendants’ resistance to the right by mandating specific change, (2) providing clear notice to the defendants of expected behavior, and (3) ensuring the practical enforcement of the order by the court.”); see also Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1125 (2014) (“Injunctions come in many varieties. They can prevent future violations or repair past ones. They can take the form of a simple flat prohibition; a positive command; a long statute-like array of prohibitions and commands; or a court’s effective takeover of operational control of an institution, such as a prison, school, or hospital”).

41. For an example of the government’s voluntary apology for its speech (i.e., not the result of an injunction), the Office of the Solicitor General apologized in 2011 for its false representations in its litigation defending the internment of Japanese-American citizens during World War II. See Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T OF JUST. ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/884T-HP2E].

42. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that the plaintiff did not have standing to seek an injunction against the police department’s allegedly unconstitutional use of chokeholds when the plaintiff could not show that he would likely again suffer from such a chokehold).

viable claim for damages or injunctive relief.<sup>43</sup> Moreover, declaratory relief's primarily expressive character may be seen as more respectful of other governmental branches than more coercive forms of judicial relief.<sup>44</sup> Indeed, we can understand declaratory relief itself as a form of "soft law" that nevertheless performs important expressive and deterrent (i.e., naming and shaming) functions.<sup>45</sup> At the same time, declaratory relief leaves open the possibility of further "hard law" relief that may take the form of injunctions or damages.<sup>46</sup>

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43. See 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."). For examples of successful claims for declaratory relief for the government's unconstitutional speech, see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (ruling in favor of plaintiff who brought Establishment Clause challenge to public high school's prayer at football games and who sought injunctive and declaratory relief under section 1983); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (ruling in favor of plaintiff who sought injunctive and declaratory relief against state agency's threatening speech that violated free speech protections); *Joyner v. Forsyth County*, 653 F.3d 341 (4<sup>th</sup> Cir. 2011) (ruling in favor of plaintiff who brought Establishment Clause challenge to county board's sponsorship of certain sectarian prayers and who sought declaratory and injunctive relief under section 1983); *Robinson v. City of Edmond*, 68 F.3d 1226 (10<sup>th</sup> Cir. 1995) (ruling in favor of plaintiff who brought Establishment Clause challenge to city seal that depicted a cross and who sought declaratory and injunctive relief as well as nominal damages and attorney's fees under section 1983); *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009) (ruling in favor of plaintiff who brought Establishment Clause challenge to state's license plate depicting a cross and the statement "I Believe" and who sought declaratory and injunctive relief under section 1983); see also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 140-41 (1951) (discussing availability of declaratory relief with respect to the government's potentially unlawful speech).

44. See *Steffel v. Thompson*, 415 U.S. 452, 466 (1974) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction . . ."); see also *Bray*, *supra* note 40, at 1093-94 (2014) (explaining that, unlike injunctive relief, declaratory relief includes neither a command to the defendant nor a sanction for noncompliance).

45. See *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971) (Brennan, J., concurring) ("Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew."); *Bray*, *supra* note 40, at 1121 ("[O]nce we put aside the simplistic notion that word is less powerful than deed, it no longer makes sense to say that the declaratory judgment is a milder remedy because it merely declares."); *id.* at 1124 ("The central difference between the declaratory judgment and the injunction in contemporary American law is *management*, in the sense of continuing judicial direction and oversight of the parties. The injunction enables a high degree of management. The declaratory judgment does not. As a result, the decision to grant one or the other of these remedies should chiefly be a decision about the degree of direction and oversight that the relationship of the parties requires of the court.")

46. 28 U.S.C.A. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."); see also *Commercial Union Ins. Co. v. Walbrook Ins.*

## B. *Damages*

Sometimes the government's speech inflicts damage of the sort that the law has traditionally treated as relatively quantifiable.<sup>47</sup> Examples include the government's lies that lead to wrongful arrest or imprisonment<sup>48</sup> or the government's threatening speech that leads to its target's job loss. For example, the Sixth Circuit refused to dismiss a section 1983 claim for damages by a plaintiff who alleged that the government had retaliated against her constitutionally protected speech with false and coercive speech of its own that led to her firing.<sup>49</sup> More specifically, after the plaintiff had expressed opposition to the county's proposed highway project at a public meeting, a county official called her employer, falsely stated that the plaintiff had identified her employer in opposing the project, and asked whether the employer was truly committed to local development.<sup>50</sup> The employer fired the plaintiff shortly thereafter, allegedly because the county's false claim led it to believe that she had used the employer's name in opposing the development project.<sup>51</sup> In declining to dismiss the plaintiff's claim for damages, the court concluded that the governmental expression at issue would violate free

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Co., Ltd., 41 F.3d 764, 773-74 (1st Cir. 1994) (“Section 2202 . . . authoriz[es] a district court to grant additional relief consistent with the underlying declaration even though the right to the relief may arise long after the court has entered its declaratory judgment.”).

47. To be sure, the government is sometimes immunized from damages liability. For example, the Court has held that governmental actors enjoy absolute immunity from money damages when they have been found to have violated the law when engaged in certain essential governmental functions. *See Forrester v. White*, 484 U.S. 219, 227-29 (1988) (discussing absolute immunity for judges performing certain judicial actions); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding that the President is absolutely immune from civil damages liability for his official acts). Government actors found to have violated the Constitution when engaged in functions that do not trigger absolute immunity may nevertheless enjoy “qualified immunity” from money damages so long as they did not violate law that was clearly established at the time and of which a reasonable person would have been aware. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Relatedly, the Supreme Court has held that state and local government actors' defamatory speech does not trigger procedural due process protections under section 1983 unless it causes job loss or some other economic injury in addition to a stigmatic injury. *Paul v. Davis*, 424 U.S. 693, 712 (1976). Governmental immunities, however, are sometimes waived or limited. *E.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (declining to find that a prosecutor's allegedly false statements made when announcing a defendant's indictment fell within the zone of prosecutorial functions that are absolutely immune from damages liability).

48. *See, e.g.*, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017) (where the challenger brought a section 1983 lawsuit alleging that law enforcement officers' lies about the content of substances seized from him led to his arrest and pretrial detention in violation of the Fourth Amendment).

49. *Paige v. Coyner*, 614 F.3d 273 (6<sup>th</sup> Cir. 2010).

50. *Id.* at 276.

51. *Id.* at 277.

speech protections if intended, and reasonably likely, to retaliate against the plaintiff's speech by encouraging her employer to fire her.<sup>52</sup>

Even when the constitutional injuries inflicted by government speech can be difficult to quantify in monetary terms, nominal damages can serve both expressive and deterrent functions.<sup>53</sup> This can be the case, for example, when the government's speech silences its targets, or causes them to refrain from exercising a protected right or from seeking a certain opportunity. Indeed, in the section 1983 context the Court has emphasized the value of nominal damages more generally in cases where constitutional injuries are hard to quantify in monetary terms:

By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.<sup>54</sup>

The award of nominal damages can thus establish the unconstitutionality of the government's actions—and, by putting government officials on notice of such action's unconstitutionality, may eliminate the availability of qualified immunity from money damages in future cases. The award of nominal damages also materially alters the legal relationship of the parties, and thus sometimes permits the award of attorney's fees to the plaintiff under 42 U.S.C. § 1988.<sup>55</sup>

James E. Pfander has made similar, and forceful, arguments in the context of *Bivens* claims<sup>56</sup> for monetary damages for federal officials' unconstitutional conduct in the war on terror:

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52. *Id.* at 281-83.

53. Nominal damages, according to Black's Law Dictionary, are a "trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated" and serve as a declaration that the plaintiff's legal rights have been violated. *See* BLACK'S LAW DICTIONARY 396 (7<sup>th</sup> ed. 1999). In contrast, a declaratory judgment is "a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." *Id.* at 846.

54. *Carey v. Piphus*, 435 U.S. 266, 1978; *see also* *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (holding that nominal damages are the appropriate remedy for violations of constitutional rights where actual injury cannot be shown: "Our discussion of that issue makes clear that nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury.").

55. *Farrar v. Hobby*, 506 U.S. 103, 121 (1992).

56. *Bivens* claims are implied private rights of actions for compensatory and punitive damages for "a compensable injury to a legally protected interest by a deprivation of a right secured by the Constitution and the laws of the United States at the hands of a federal official acting under color of

[T]he federal courts should focus on the narrow (but supremely important) task of evaluating the legality of official conduct. Once that understanding of the judicial role has been accepted, existing law furnishes ample tools with which to reach the merits of misconduct claims. First, rather than making case-by-case assessments of the viability of *Bivens* claims, the federal courts should presume the availability of such an action and focus their attention on the nature of the constitutional right at issue. Such an approach would mirror that of the federal courts in Section 1983 litigation against state officials, thus bringing into closer alignment the application of constitutional principles to both the state and federal levels of government. Second, the Court should rethink its qualified immunity jurisprudence to facilitate merits adjudication of legal claims. One way to accomplish such a return to the merits would be to allow litigants to limit themselves to a claim for nominal damages. Such nominal claims would enable the court to reach the constitutional issue in a world of legal uncertainty without confronting the officer with a threat of personal liability and triggering the qualified immunity defense. Public interest law firms and some plaintiffs might agree to take on the burden of litigating nominal claims to secure a measure of vindication and to better define the limits of what government can do in the name of national security. Both of these important changes can be made with no action by Congress; they both have a strong foundation in current law.<sup>57</sup>

For similar reasons, nominal damages should be available to name and deter government expression that violates specific free speech, free press, due process, and equal protection guarantees—such as coercive or threatening government speech that silences its targets, or governmental lies that deprive their targets of the meaningful ability to exercise voting or reproductive rights.

#### IV. CONCLUSION

As James Pfander worries more generally, our failure to identify and provide remedies for constitutional violations leads to a shortage of law about when the government violates the Constitution.<sup>58</sup> I worry about that possibility specifically in the context of government speech; although governments from their inception have engaged in expression, only

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federal law. The only proper defendants are federal employees in their individual capacities, or private actors whose conduct is so related to the federal government that they can be deemed federal agents or actors.” HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *CIVIL RIGHTS LAW AND PRACTICE* 243 (2001).

57. JAMES PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR*, xviii (2017).

58. *See id.*

recently have we begun to consider the ways in which the government's speech sometimes threatens constitutional rights. Again, my ambitions for this short essay are modest: to show that the government's expressive choices that harm specific constitutional interests are amenable to constitutional remedies in some situations, and thus that the judiciary has some role to play in this area. In so doing, I hope to provide a platform for future thinking and problem-solving.