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### A Framework for Thinking About the Government's Speech and the Constitution

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## A FRAMEWORK FOR THINKING ABOUT THE GOVERNMENT'S SPEECH AND THE CONSTITUTION

Helen Norton\*

*This Essay sketches a framework for mapping and navigating the constitutional implications of the government's speech—and then illustrates this framework's application to some contemporary constitutional disputes. My hope is that this framework will help us sort through the constitutional puzzles triggered by the government's expressive choices—puzzles that confront courts and policymakers with increasing frequency. What I call “first-stage government speech questions” require us to determine when the government is speaking itself and when it is instead (or also) regulating others' speech. This determination matters because the rules that apply to the government as speaker are very different from those that apply to the government as regulator—and necessarily so, as the government must have the power to control its own speech in order to govern. What I call “second-stage government speech questions” involve the constitutional questions sometimes raised when the government is simply speaking and not compelling or regulating others' speech. Here we consider whether and when the government's speech by itself violates a specific constitutional provision like the Establishment Clause, the Equal Protection Clause, or the Due Process Clause, among others.*

*The government's power to express itself is important and valuable. But sometimes governmental parties argue (and sometimes courts agree) that designating contested speech as the government's is essentially a constitutional get-out-of-jail-free card—even though constitutional limits on the government's speech remain. One of this Essay's primary objectives is to make clear that even if we determine that contested speech is the government's, our constitutional inquiry is by no means complete. Consider, for instance, governmental requirements that nongovernmental parties affirm or spread the government's message against their will, or the government's viewpoint-based restriction of private parties' criticism of the government's message. Think too of the government's speech that coerces, endorses, or*

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\* University Distinguished Professor and Rothgerber Chair in Constitutional Law, University of Colorado School of Law. Thanks to Katharine Walton, Yongli Yang, and the *University of Illinois Law Review* for their outstanding work in organizing the *Law Review's* symposium on “The Government's Speech and the Constitution;” to Benjamin Bonner and Jessica Zamba for helpful research assistance; and to the symposium's participants and to Scott Skinner-Thompson for thoughtful observations and questions.

*denigrates religious practice in violation of the Establishment Clause, the government's speech that encourages or enables private parties' racial discrimination in violation of the Equal Protection Clause, law enforcement officers' lies to those in custody about their legal rights in violation of the Due Process Clause, and the government's speech that violates the Free Speech Clause by threatening its targets for engaging in protected expression.*

*To be sure, the universe of situations in which the government's speech, by itself, violates our constitutional rights and liberties is a small subset of the government's multitudinous expressive choices. But such a universe nevertheless exists. To help us identify this universe, I propose that we consider a series of questions about the effects of, and the motivations underlying, the government's speech—questions that suggest different ways of thinking about when and why the government's speech is sometimes constitutionally dangerous.*

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## I. INTRODUCTION

Even though “governments have been speaking for as long as there have been governments,”<sup>1</sup> only in the last few decades have courts and commentators begun to give a name to the phenomenon that we now call government speech.<sup>2</sup> As Thomas Kuhn explained in a different context, “discovering a new sort of phenomenon is necessarily a complex event, one which involves recognizing both that something is and what it is.”<sup>3</sup> Thus only recently have we begun to identify significant constitutional issues triggered by the government’s speech where before we saw none.<sup>4</sup>

And so I’m grateful to the *University of Illinois Law Review* for choosing to devote its symposium to the ideas explored in my book, *The Government’s Speech and the Constitution*. This book represents my effort to generate new ways of thinking about the government’s speech. To this end, it shines a spotlight on the vast assortment of the government’s expressive choices and offers a framework for mapping and navigating those choices’ constitutional implications.

This Essay introduces this symposium issue by summarizing that framework and briefly illustrating its application to some contemporary constitutional disputes involving the government’s speech. My hope is that this framework will help us sort through the constitutional puzzles triggered by the government’s expressive choices, puzzles that now confront courts and policymakers with increasing frequency.<sup>5</sup>

1. HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 1 (2019).

2. *Id.* at 6.

3. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 55 (3d ed. 1996).

4. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631, 631 (1980) (discussing how we sometimes need time to process and name various phenomena before we can figure out their legal implications).

5. Indeed, the Supreme Court’s docket for the 2021–2022 Term included two government speech cases. See *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022) (holding that a city’s choice to deny a private group’s request to raise its flag on the city’s flagpole—while granting others’ requests—reflected its constitutionally impermissible viewpoint-based regulation of speech within a public forum rather than its constitutionally permissible control of its own expression); *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253 (2022) (holding that a legislative body’s censure of one of its members for his speech did not violate the Free Speech Clause). During that same Term, the Court also considered a variety of other petitions for certiorari involving government speech problems. *E.g.*, *Bohler v. City of Fairview*, 828 F. App’x 281 (6th Cir. 2020), *cert. denied*, 142 S. Ct. 88 (2021) (characterizing a police officer’s report of possible corruption to a prosecutor as unprotected speech pursuant to his official duties as a public employee rather than his protected speech as a citizen); *Louisiana v. Hill*, No. 2020-KA-0323, 2020 WL 6145294 (La. Oct. 20, 2020), *cert. denied*, 142 S. Ct. 311 (2021) (holding that the

As we'll see, what I call "first-stage government speech problems"<sup>6</sup> require us to determine when the government is speaking itself and when it is instead (or also) regulating others' speech. This determination matters because the rules that apply to the government as speaker are very different from those that apply to the government as regulator—and necessarily so, as the government must have the power to control its own speech in order to govern.

What I call "second-stage government speech questions"<sup>7</sup> involve the constitutional questions sometimes raised when the government is simply speaking and not compelling or regulating others' speech (this is what I mean when I refer to "the government's speech, by itself" or "the government's speech, without more"). Here, we consider whether and when the government's expressive choice by itself violates a specific constitutional provision like the Establishment Clause, the Equal Protection Clause, or the Due Process Clause, among others. As I've written, "[w]hen we discuss constitutional law, we usually focus on the constitutional rules that apply to what the government *does*. Far less clear are the constitutional rules that apply to what the government *says*."<sup>8</sup> But there *are* rules that constrain the government's expressive choices, even as we continue to explore and develop their theoretical foundations and doctrinal contours.

The government's power to express itself is important and valuable. But sometimes governmental parties argue (and sometimes courts accept those arguments) that designating contested speech as the government's is essentially a constitutional get-out-of-jail-free card—even though constitutional limits on the government's speech remain.<sup>9</sup> One of this Essay's primary objectives is to make clear that even if we determine that contested speech is the government's, our constitutional inquiry is by no means complete. Consider, for instance, governmental requirements that nongovernmental parties affirm or spread the government's message against their will, or the government's viewpoint-based restriction of private parties' criticism of the government's message.<sup>10</sup> Think too of the government's speech that coerces, endorses, or denigrates religious practice in violation of the Establishment Clause, the government's speech that encourages or enables private parties' racial discrimination in violation of the Equal Protection Clause, law enforcement officers' lies to those in custody about their legal rights in violation of the Due Process Clause, and the government's speech that violates the Free Speech Clause by threatening its targets for engaging in protected expression.<sup>11</sup>

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state violated the Free Speech Clause by compelling individuals to deliver a governmental message against their will through its requirement that those convicted of certain sex offenses carry an identification card stamped with the words 'SEX OFFENDER').

6. NORTON, *supra* note 1, at 5–6.

7. *Id.* at 6–7.

8. *Id.* at 3.

9. *See id.* at 3, 10.

10. *See infra* notes 41–47 and accompanying text.

11. *See infra* notes 44–47 and accompanying text.

To be sure, the universe of situations in which the government's speech, by itself, violates our constitutional rights and liberties is a small subset of the government's multitudinous expressive choices. But such a universe nevertheless exists. To help us identify this universe, I propose that we consider a series of questions about the effects of, and the motivations underlying, the government's speech—questions that suggest different ways of thinking about when and why the government's speech is sometimes constitutionally dangerous.

Part II fleshes this framework out in a bit more detail, and Part III then illustrates its application to some contemporary constitutional disputes involving the government's speech.

## II. THE FRAMEWORK EXPLAINED

This Part walks through what I call first- and second-stage government speech questions. In so doing, I hope to expose what makes hard government speech problems hard and what makes easier government speech problems easier.

### A. *First-Stage Questions: Is the Government Speaking, Is It Regulating Others' Speech, or Both?*

The government's expressive choices about when, how, and to whom to speak are dizzying in their ubiquity and diversity. Illustrations range from the Centers for Disease Control and Prevention's advisories on infectious disease, the Forest Service's wildfire prevention campaign featuring Smokey Bear, local governments' holiday displays and war memorials, federal agencies' tweets explaining how to file taxes and apply for social security benefits, some Southern states' mid-twentieth-century resolutions declaring *Brown v. Board of Education* to be "null, void, and of no effect," and President George W. Bush's repudiation of anti-Muslim bigotry immediately following the 9/11 attacks.<sup>12</sup> The variety and omnipresence of the government's speech underscore the importance of understanding the relationship between the government's speech and our constitutional rights.

As a threshold matter, the government must have the power to communicate its views in order to govern. And regardless of how you feel about the government's views, its expression can contribute to the marketplace of available facts, opinions, and ideas that informs our thinking and choices and can facilitate political accountability by revealing our government's priorities and values.

The Supreme Court's government speech doctrine now recognizes this reality by permitting the government a defense to certain Free Speech Clause challenges brought by litigants who seek to silence or change what is actually the government's own message.<sup>13</sup> As the Court has made clear, the government does

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12. *Id.*

13. *See id.* at 31–43 (describing the Court's development of this doctrine over the last 30 years). In Hohfeldian terms, the government has a privilege (but not a right) to control the content of its own speech. *See id.* at 27 n.1.

not engage in viewpoint-based discrimination in violation of the Free Speech Clause when it simply expresses its own view: “Were the Free Speech Clause interpreted otherwise, government would not work.”<sup>14</sup> Over time, the Court has extended this principle such that the government’s power to choose its own messages includes the power to pay others to deliver that message,<sup>15</sup> the power to tax to fund that message,<sup>16</sup> and the power to solicit input from nongovernmental parties when developing its own message.<sup>17</sup>

Some first-stage government speech problems arise when both governmental and nongovernmental speakers simultaneously claim contested expression as their own.<sup>18</sup> The answer to this sort of first-stage question is an “either-or” choice: *if* the government is speaking, it is *not* regulating others’ speech within some sort of forum.<sup>19</sup> And *if* a public employee speaks pursuant to her official duties, she is *not* speaking as a citizen.<sup>20</sup>

Other first-stage problems involve situations where the government is assuredly speaking, and the question is whether it is *also* regulating others’ speech in ways that trigger Free Speech Clause scrutiny.<sup>21</sup> The answer to these sorts of first-stage questions can be “both.” In other words, even when the government itself is speaking, the Free Speech Clause still prohibits the government from forcing others to deliver its message against their will without adequate justification.<sup>22</sup> And when the government chooses to speak in a setting or on a platform that permits opportunities for public comment on the government’s views, the Free Speech Clause forbids the government from restricting that comment on the basis of viewpoint.<sup>23</sup>

Let’s look at these two first-stage possibilities in a bit more detail.

1. *Either-or Choices: Is the Government Itself Speaking, or Is It Instead Regulating Others’ Speech?*

Determining speech to be the government’s is usually straightforward. This is the case, for example, of the government’s reports, speeches, proclamations,

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14. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015); *see also* *Matal v. Tam*, 137 S. Ct. 1744, 1757–58 (2017) (“[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.”).

15. *See generally* *Rust v. Sullivan*, 500 U.S. 173 (1991).

16. *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 559 (2005).

17. *City of Pleasant Grove v. Summum*, 555 U.S. 460, 468 (2009); *Walker*, 576 U.S. at 214; *see also* NORTON, *supra* note 1, at 28–29 (describing these developments).

18. *See* NORTON, *supra* note 1, at 29.

19. *Walker*, 576 U.S. at 207 (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”); *see also* *infra* notes 24–40 and accompanying text.

20. *See* *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006); *see also* *infra* note 40 and accompanying text.

21. NORTON, *supra* note 1, at 31.

22. *Id.*

23. *See id.* at 59 (“Properly applied, the government speech doctrine empowers the government to speak to us, including through new expressive technologies, while denying it the power to throttle dissent.”).

websites, tweets, press releases, resolutions, and more where the message is expressly authored by or attributed to a governmental source.<sup>24</sup>

More difficult first-stage government speech problems arise when the government invites interactions with nongovernmental speakers in ways that generate dispute over the message's actual owner or author (problems that will only continue to grow in number and complexity with technological changes that bring new opportunities for expressive partnerships). To date, the Supreme Court's government speech docket has focused primarily on these sorts of first-stage problems that require it to decide whether the government itself is speaking (and where its expressive choices are thus insulated from Free Speech Clause scrutiny) or whether it is instead regulating others' speech in some type of forum (where the government's regulation is subject to Free Speech Clause scrutiny).<sup>25</sup>

Recall, for instance, *City of Pleasant Grove v. Summum*.<sup>26</sup> It required the Court to determine whether a city's selective acceptance of monuments donated by private parties for display in the city's parks involved the government's permissible expressive choices about the messages to be displayed on the city's own property—or instead its impermissible viewpoint-based exclusion from a traditional public forum.<sup>27</sup> A unanimous Court chose the former—that is, that the government was itself speaking, rather than creating a forum for private parties' expression.<sup>28</sup> The Court relied on a number of factors, including whether the speech had the intent and effect of delivering the government's message, whether the public closely identified the speech with the government, and whether the government had historically established and controlled the speech for its own expressive purposes, along with the pragmatic consequences of denying the government the power to control the contested expression (*i.e.*, the Court predicted that the challenger's claim, if successful, would force governments either to “brace themselves for an influx of clutter” or instead to remove all of their existing monuments on their public property).<sup>29</sup>

Recall, too, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, where the Sons of Confederate Veterans (“SCV”) alleged that the State of Texas violated the Free Speech Clause when it denied SCV's request for a specialty license plate that would have displayed the Confederate flag alongside the state's name.<sup>30</sup> SCV argued that the state's specialty license plate program created a type of public forum such that the First Amendment forbade the government's viewpoint-based exclusion of private parties' messages from that forum.<sup>31</sup> A divided Court rejected SCV's claim, holding that the messages displayed on the

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24. *Id.* at 64.

25. *See supra* note 5 and accompanying text.

26. 555 U.S. 460 (2009).

27. *Id.* at 464.

28. *Id.* at 468–80.

29. *Id.* at 479–80; *see also* NORTON, *supra* note 1, at 38 (discussing these pragmatic difficulties).

30. 576 U.S. 200 (2015).

31. *See id.* at 206–07.



state's specialty license plates instead reflected the state's own expression that it remained free to control without running afoul of the First Amendment.<sup>32</sup>

Although *Walker* presents a challenging government speech problem because of the entanglements between governmental and nongovernmental speakers that complicate our first-stage inquiry, I think it was correctly decided. I've asserted that in close cases like these, the government should ensure that the governmental source of its message is clear to the public as a condition for claiming the government speech defense to certain Free Speech Clause challenges.<sup>33</sup> This information enables the public to hold the government accountable for its views: "the government should pay for its ability to invoke the government speech defense by transparently taking political responsibility for its expressive choices."<sup>34</sup> Especially important to my view of *Walker* (and also important to the *Walker* majority<sup>35</sup>) was that "[t]he governmental nature of the plates is clear from their faces: The State places the name 'TEXAS' in large letters at the top of every plate. . . . Texas license plates are, essentially, government IDs."<sup>36</sup>

To be sure, I think that governments can and should make these first-stage determinations much easier. In other words, the government should take the time and trouble when designing and implementing these programs to consider (and then communicate) whether it seeks to engage in its own expression for which it is willing to be held politically accountable in exchange for insulation from certain Free Speech Clause challenges.<sup>37</sup> Or whether it, instead, seeks to provide some sort of opportunity for private parties' speech.<sup>38</sup> Even better, in my opinion, would be if the Court required the government to transparently claim expression as its own as a condition of asserting the government speech defense to these sorts of first-stage claims.<sup>39</sup> Although the Court has yet to expressly adopt this transparency principle, a number of the factors it considers under its current analysis can (and in my opinion should) be applied to require such transparency (*e.g.*, whether the speech has the intent and effect of delivering the government's message, whether the public closely identifies the speech with the government, and whether the government has historically established and controlled the speech for its own expressive purposes).

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32. *Id.* at 208.

33. NORTON, *supra* note 1, at 49.

34. *Id.* at 44.

35. Leslie Gielow Jacobs observes that the *Walker* majority (and I) emphasize political equality as the core Free Speech Clause value at issue here, in contrast to the dissent's focus on political liberty: "[t]o the dissent, animated by a political liberty understanding of the free speech guarantee, this sequence of events appeared like punishing flag burning—'government tyranny' exercised at the expense of an individual's right to express ideas, however outrageous or offensive they may be to some members of the public." Leslie Gielow Jacobs, *Noticing the Government's Voice and Pondering Its Implications*, 36 CONST. COMMENT. 149, 169 (2021).

36. *Walker*, 576 U.S. at 212; *see also* NORTON, *supra* note 1, at 51–52 (discussing these issues in more detail).

37. Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 67 (2015).

38. *See id.*; Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 590 (2008).

39. *See* NORTON, *supra* note 1, at 43–52 (explaining this "transparency principle").

Again, the first-stage question presented in *Sumnum* and *Walker* leaves us with an “either-or” choice: *if* the government is speaking, it is *not* regulating others’ speech within some sort of forum (and thus First Amendment public forum doctrine does not apply). Other important “either-or” questions arise when public employees’ speech occurs pursuant to their official duties and is thereby “commissioned or created” by the government (and thus, under the Court’s doctrine, subject to the government’s plenary control) or instead reflects the workers’ own speech as citizens (and thus protected by the First Amendment from their employer’s unjustified discipline).<sup>40</sup>

2. *Even If the Government Is Speaking, Is It Also Regulating Others’ Speech in Ways That Trigger Traditional First Amendment Analysis?*

When we’re faced with an “either-or” first-stage government speech problem, our decision to characterize the contested speech as the government’s ends the constitutional inquiry (as was the case in *Sumnum* and *Walker*). But in many situations, designating contested speech as the government’s is *not* the end of our constitutional analysis—instead our work has just begun. For example, even if we determine that the government itself is speaking, the Free Speech Clause still bars the government from forcing nongovernmental parties to deliver that message against their will and without adequate justification.<sup>41</sup> And when the government itself speaks in a setting that permits opportunities for public comment on the government’s views, the Free Speech Clause forbids the government from restricting that comment on the basis of viewpoint.<sup>42</sup>

Yet too often, governments (and sometimes courts too) insist that determining contested speech to be the government’s is the constitutional equivalent of a “get out of jail free” card.<sup>43</sup> In other words, governmental bodies sometimes overclaim in government speech cases, seeking to expand the government speech doctrine (which, to be sure, does important work) in dangerous ways.<sup>44</sup> As the

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40. See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006) (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”); see also NORTON, *supra* note 1, at 60–67 (discussing first-stage government speech questions involving public employees). In my view, the better approach to these problems would be to “permit the government to claim the power to control the speech of its employees as its own only when it has specifically commissioned or hired those employees to deliver a transparently governmental viewpoint for which the public can hold it accountable;” “[t]his less deferential approach to the government’s expressive claims, itself an application of the transparency principle, still leaves room to safeguard the government’s significant interests in effectively managing its workforce.” *Id.* at 64–65; see also Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 12 (2009).

41. See MARTIN H. REDISH, *COMMERCIAL SPEECH AS FREE EXPRESSION: THE CASE FOR FIRST AMENDMENT PROTECTION 117* (2021) (describing the “expressive pathologies” of compelled speech and the injuries inflicted on both speakers and listeners).

42. Moreover, as discussed *infra* notes 59–117 and accompanying text, sometimes the government’s choice of message by itself violates specific constitutional provisions like the Establishment Clause, the Equal Protection Clause, the Due Process Clause, and more.

43. See *infra* notes 106–26 and accompanying text (describing Alabama’s arguments in pending litigation); NORTON, *supra* note 1, at 59–60 and n.71 (detailing additional examples).

44. See NORTON, *supra* note 1, at 60.

government's expressive capacities grow, so too does its potential for undermining others' rights and for distorting public discourse.

Consider, to start, situations where the government compels others to utter or display its own speech and thus triggers Free Speech Clause analysis<sup>45</sup>—even though the government's own delivery of that same message raises no such concerns.<sup>46</sup> Here the constitutional problem is not that the government has expressed a certain view; it is instead that the government has required dissenting individuals to serve as a billboard or mouthpiece for that governmental message.<sup>47</sup>

Decided decades before the Supreme Court first used the term “government speech,” *West Virginia State Board of Education v. Barnette*<sup>48</sup> and *Wooley v. Maynard*<sup>49</sup> demonstrated this principle at work. More specifically, the *Barnette* Court did not question the state's expressive choice to start its school day with the Pledge of Allegiance;<sup>50</sup> it held instead that the Free Speech Clause forbids the government from forcing students to endorse that choice by saluting the flag despite their religious objections.<sup>51</sup> And in *Wooley*, the Court objected neither to the state's expressive choice of “Live Free or Die” as its motto nor its choice to display that message on the state's license plates;<sup>52</sup> the Court instead held that the Free Speech Clause prohibits the state from requiring dissenting private parties to be couriers for the state's motto by displaying it on their cars.<sup>53</sup> The Court then applied strict scrutiny, and in neither *Barnette* nor *Wooley* could the government establish any compelling interest served by its requirement that others deliver or endorse the government's ideological message to which they objected.<sup>54</sup>

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45. Indeed, as illustrated *infra* notes 48–54 and accompanying text, much of the Court's compelled speech jurisprudence involves the government's efforts to require others to deliver the government's own speech. But not all. *See, e.g.,* *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (holding that the First Amendment forbade application of a city's antidiscrimination law to require a private parade organizer to include a private group whose message the parade organizer did not want to convey).

46. *See* REDISH, *supra* note 41, at 163–64 (“In a democratic society, a government may seek to influence the choices of the populace not by means of selective suppression, but rather by making its own contributions to the debate.”).

47. *See id.*

48. 319 U.S. 624 (1943).

49. 430 U.S. 705 (1977).

50. *See Barnette*, 319 U.S. at 640.

51. *Id.* at 642.

52. *Wooley*, 430 U.S. at 716–17.

53. *Id.*

54. Note, however, that in some circumstances, the Court's Free Speech Clause doctrine is less suspicious of governmental requirements that private parties display a governmental message or disclose other information that they would otherwise prefer not to reveal. Consider the commercial speech context, where the Court applies more deferential scrutiny to governmental requirements that commercial actors disclose accurate information about their products and services to inform consumers' decision-making—disclosures that sometimes involve the government's speech. *E.g.,* *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985) (applying deferential review to the government's compelled commercial disclosures in certain circumstances in light of such disclosures' value to consumers as listeners). This explains, for instance, the constitutionality of Congress's longstanding requirement that cigarette manufacturers and sellers display the government's speech—that is, the Surgeon General's warning about the health dangers of tobacco—on their packages and in their advertisements. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87, 88 (1970).

Note the difference between these first-stage problems and the sorts described earlier.<sup>55</sup> In *Sumnum* and in *Walker*, the challengers asserted that the government had impermissibly regulated private parties' speech on the basis of viewpoint within some type of forum (while the government insisted that it was instead speaking itself).<sup>56</sup> Contrast *Barnette* and *Wooley*, where the challengers alleged that the government had impermissibly compelled them to deliver or endorse a governmental message with which they disagreed.<sup>57</sup>

Consider next those situations where the government itself chooses to speak in a setting or on a platform that permits opportunities for public comment on the government's views. Again, the fact that the government is speaking is not necessarily the end of our constitutional inquiry, as the Free Speech Clause still forbids the government from restricting the public's comment on the basis of viewpoint. For instance, the Second Circuit held that then-President Trump spoke in his governmental capacity when he tweeted on matters of government business and policy (and was thus insulated from Free Speech Clause challenges from those who sought to change or silence his messages), but then impermissibly restricted private citizens' speech on the basis of viewpoint in his governmental capacity when he blocked his critics from access to that Twitter account.<sup>58</sup>

### B. *Second-Stage Government Speech Questions*

That the government is free to choose its own message as a Free Speech Clause matter (but not to require others to deliver that message nor to block public criticism of that message based on viewpoint), moreover, is a separate question from whether the government's message by itself violates the Equal Protection Clause, the Establishment Clause, the Due Process Clause, or some other constitutional provision. This brings us to what I call "second-stage government speech questions," which wrestle with whether and when the government's choice and delivery of its own message—without more—violates a specific constitutional provision.<sup>59</sup>

Among other things, these second-stage questions require us to consider the ways in which the government's speech is both similar to, and different from, the speech of nongovernmental parties. To be sure, the similarities are many: the speech of both can and does valuably contribute to democratic self-governance, enlightenment, and autonomy; and the speech of both can and does inflict great harm. But so too are there key differences: "[t]he government is unique among

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55. See *supra* notes 18–32 and accompanying text.

56. *Sumnum*, 555 U.S. at 468; *Walker*, 576 U.S. at 214.

57. See *supra* notes 47–49 and accompanying text.

58. See *Knight First Am. Inst. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *vacated and remanded with instructions to dismiss as moot* (when Joe Biden was elected to replace Trump as President), *Biden v. Knight First Am. Inst.*, 141 S. Ct. 1220 (2021). For additional discussion of these sorts of first-stage government speech questions, see NORTON, *supra* note 1, at 56–60.

59. The Court's docket during the 2021–2022 Term included a second-stage government speech question. *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253 (2022) (holding that a legislative body's censure of one of its members for his speech did not violate the Free Speech Clause); see also NORTON, *supra* note 1, at 225–27 (discussing censures and other speech by legislatures).

speakers because of its coercive power as sovereign, its considerable resources, its privileged access to key information, and its wide variety of speaking roles as policymaker, commander-in-chief, employer, educator, health care provider, property owner, and more.<sup>60</sup>

More specifically, that certain speech (like threats, incitement, fraud, etc.) has long been considered sufficiently harmful to be unprotected by the Constitution when uttered by a private party signals that it may sometimes run afoul of constitutional protections when delivered by the government.<sup>61</sup> And sometimes even speech that *is* protected by the First Amendment when uttered by a private party may still run afoul of constitutional protections when uttered by the government, as of course the government—unlike private speakers—is constrained by the Constitution.<sup>62</sup> For these reasons, in some circumstances we might worry more about the government’s speech than we would worry about the same speech when uttered by private parties.

The Supreme Court has signaled its recognition of these independent constitutional constraints, even as it has yet to offer a coherent framework for grappling with when and how the government’s speech, by itself, sometimes affirmatively threatens specific constitutional protections.<sup>63</sup> As tools for considering these second-stage problems, I’ve proposed that we consider three questions about the consequences of, and the motivations underlying, the government’s speech: (1) When does the government’s speech change its targets’ choices or opportunities to their disadvantage, and does a specific constitutional provision bar the government from causing this change? (2) When does the government’s speech inflict expressive, or dignitary, harm upon its targets, and does a specific constitutional provision bar the government from causing this harm? (3) What are the purposes underlying the government’s speech, and does a specific constitutional provision bar the government from seeking to accomplish those purposes?<sup>64</sup>

These questions about the effects of, and the motivations underlying, the government’s speech offer different ways to think about when and why the government’s speech is constitutionally dangerous. Each has advantages and disadvantages of its own. Relatedly, our preferences among these approaches often

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60. NORTON, *supra* note 1, at 11.

61. *Id.* at 11–13.

62. *See id.* at 27 (“[T]he Constitution protects us from the government and not vice versa.”).

63. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) (“That is not to say that a government’s ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit governmental speech. And the Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to compel private persons to convey the government’s speech.” (citation omitted)). I see this as part of the Court’s learning curve, as it continues to encounter and wrestle with the complexities of the government’s speech and its constitutional implications. *See* NORTON, *supra* note 1, at 41 (“[T]he Court started by emphasizing the importance of the government’s power to control its own speech. Only later in this series of cases did it recognize the need to identify limiting principles; at that point it started to search for indicia distinguishing governmental from private speech, and eventually offered its illustrative list of ‘many factors’ to add rigor and predictability to its analysis.”).

64. *See* NORTON, *supra* note 1, at 6–10, 68–211 (introducing and then fleshing out this series of questions).

turn on our understanding of the values to be protected by a particular constitutional provision—and because different constitutional provisions protect different values, our preferences among the approaches may vary from provision to provision.<sup>65</sup>

Let's next turn to each of these three questions in a bit more detail.

1. *When Does the Government's Speech Change Its Targets' Choices or Opportunities to Their Disadvantage, and Does a Specific Constitutional Provision Bar the Government from Causing This Change?*

One approach to thinking about the constitutional implications of the government's speech focuses on certain harmful *effects*, considering whether and when the government's speech interferes with its listeners' choices or opportunities in ways that would violate a constitutional right if the government caused those same changes through its traditional lawmaking or regulation.

The government's speech that commands, threatens, or otherwise coerces its listeners most clearly violates certain constitutional provisions.<sup>66</sup> To illustrate, the Supreme Court held that the Equal Protection Clause prohibited the government's speech that commanded discrimination by private parties, as was the case in the 1960s when New Orleans city officials ordered restaurants and other businesses to continue to segregate.<sup>67</sup> Along the same lines, courts have held that the Free Speech Clause prohibits the government's speech that threatens its targets with legal or other reprisal for engaging in protected expression.<sup>68</sup> And the government's speech violates the Establishment Clause when it coerces listeners to participate in prayer or other religious activity through threats of physical force, legal punishment, or some other retaliation against those who decline.<sup>69</sup>

Not surprisingly, context matters in determining whether and when the government's speech is unconstitutionally coercive: the more physical, legal, financial, or other control the government exerts over its target in a given setting, the more likely we will consider its speech in that setting to be coercive.

As an illustration, the Court has recognized that the government's speech can coerce its listeners' religious participation in violation of the Establishment

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65. See *id.* at 69–85 (explaining how one's view of the Establishment Clause implications of the government's religious speech turns in part on whether one understands the Clause as informed primarily by noncoercion, nonendorsement, or neutrality values); *id.* at 104–06 (explaining how one's view of the Equal Protection Clause implications of the government's hateful speech turns in part on whether one understands the Clause as informed primarily by anticlassification or antisubordination values).

66. A government employer can also violate the Equal Protection Clause when its speech expresses hostility on the basis of class status in a way that would drive a reasonable class member from public employment. *E.g.*, *Wright v. Rolette Cnty.*, 417 F.3d 879, 882 (8th Cir. 2005) (concluding that a government actor's verbal sexual harassment by itself can constitute unconstitutional sexual harassment under 42 U.S.C. § 1983).

67. *Lombard v. Louisiana*, 373 U.S. 267, 273–74 (1963).

68. *Bantam Books v. Sullivan*, 372 U.S. 58, 63–64 (1963) (holding that a state commission violated the Free Speech Clause when it sent threatening letters to the distributors of sexually explicit but not obscene materials); *Backpage.com v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (holding that a sheriff violated the Free Speech Clause when he made false threats of legal action against a website that featured sexually explicit advertisements).

69. See *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (describing governmental threats that coerce religious practice in violation of the Establishment Clause).

Clause through its prayers in certain public-school settings where young people are especially vulnerable to peer pressure and functionally limited in their ability to resist or escape.<sup>70</sup> “The prayer exercises in this case [a middle school graduation ceremony] are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one that the objecting student had no real alternative to avoid.”<sup>71</sup> To be sure, all agree that the government’s religious coercion violates the Establishment Clause, but there is disagreement about whether and when its speech actually coerces religious practice.<sup>72</sup>

Relatedly, courts have found that law enforcement officers’ lies sometimes coerce the waiver of their targets’ constitutional rights in violation of the Due Process Clause. Such is the case with law enforcement officers’ lies to those in custody about their legal rights,<sup>73</sup> or law enforcement officers’ lies to a parent that her child would be taken from her unless she waived her constitutional right to remain silent.<sup>74</sup> In contrast, courts generally find law enforcement officers’ lies *not* to be unconstitutionally coercive when they conclude that a reasonable person would feel free to walk away or would respond in some way other than waiving her constitutional rights.<sup>75</sup>

Even absent coercion, we can sometimes understand the government’s speech to interfere with a protected right or opportunity in violation of a specific constitutional provision.<sup>76</sup> This can be the case, for example, of the government’s speech that encourages or enables third parties to discriminate or retaliate against

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70. *Id.* at 577–78 (majority opinion).

71. *Id.* at 598; *see also id.* at 595 (“Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.”); *Town of Greece v. Galloway*, 572 U.S. 565, 583, 588 (2014) (suggesting that government speech in adult settings can coerce its listeners’ religious practice in violation of the Establishment Clause if it “denigrate[s] nonbelievers or religious minorities, threaten[s] damnation or preach[es] conversion” or “direct[s] the public to participate in the prayers, single[s] out dissidents for opprobrium or indicate[s] that their decisions might be influenced by a person’s acquiescence in the prayer opportunity”).

72. And, as discussed below, disagreement also remains over whether the Establishment Clause additionally requires the government’s nonendorsement and/or its neutrality, along with disagreement about when the government acts contrary to those commitments. *See infra* notes 89, 100–03 and accompanying text.

73. *See United States v. Rogers*, 906 F.2d 189, 192 (5th Cir. 1990) (holding that law enforcement officers’ misrepresentations about the legal consequences of waiving a constitutional right violate the Due Process Clause).

74. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

75. *See Illinois v. Perkins*, 496 U.S. 292, 296–97 (1990) (distinguishing law enforcement officers’ coercive (and thus constitutionally impermissible) lies from their constitutionally permissible “strategic deception”); Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH. L. REV. 1275, 1276 (2007) (discussing this principle).

76. *See Jacobs, supra* note 35, at 170–71 (“The operative question is at what point on the spectrum does the message sufficiently connect to the conduct of third-party listeners so that the government speaker may be deemed responsible, under the Constitution, for provoking the consequences of the third party’s conduct. . . . The key characteristic that dictates the different rules of causation that apply to the different types of private speech is its nature, whether it is part of public discourse, or merely instrumental. This distinction identified explicitly and applied to the examples of government speech aimed at influencing third-party conduct could fruitfully sort them.”).

the government's targets based on their protected class status or protected activity.<sup>77</sup> Along these lines, the Court found that Louisiana state officials violated the Equal Protection Clause when they identified candidates by race on the state's ballots: "[b]y 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."<sup>78</sup> In the same vein, the Court held that a state's speech on ballots that singled out candidates who had failed to support term limits exceeded its constitutional power to regulate elections: "the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office."<sup>79</sup> In a separate concurrence, Chief Justice Rehnquist wrote the First Amendment protects "the right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State."<sup>80</sup>

So too does the Constitution sometimes prohibit the government's lies about its critics. Some courts have found the requisite causal connection between the government's speech and the deprivation of its target's Free Speech Clause rights when the government's lies are intended, and reasonably likely, to encourage third-party retaliation against the target because of her speech.<sup>81</sup> Federal courts, for instance, observed this connection with respect to the Mississippi State Sovereignty Commission's lies in the 1950s and 1960s to the employers, friends, families, and neighbors of civil rights workers in hopes of silencing their speech advocating desegregation.<sup>82</sup>

To be sure, we can and will disagree about when the government's speech coerces the deprivation of, or otherwise interferes with, its targets' constitutional rights. Difficult second-stage problems thus often involve contested causal connections between the government's speech and the deprivation of liberties or opportunities protected by the Constitution—with some quicker to see that connection than others.

2. *When Does the Government's Speech Inflict Expressive, or Dignitary, Harm upon Its Targets, and Does a Specific Constitutional Provision Bar the Government from Causing This Harm?*

Another way to think about second-stage government speech problems remains focused on the harmful *effects* of the government's speech—but looks to *different* types of harmful effects. Rather than focusing on autonomy harms by

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77. See, e.g., *Anderson v. Martin*, 375 U.S. 399, 401–03 (1964).

78. *Id.*

79. *Cook v. Gralike*, 531 U.S. 510, 525 (2001).

80. *Id.* at 530–31 (Rehnquist, C.J., concurring).

81. *Paige v. Coyner*, 614 F.3d 273, 280–83 (6th Cir. 2010).

82. E.g., *Am. C.L. Union of Miss. v. Mississippi*, 911 F.2d 1066, 1070 (5th Cir. 1990) ("We echo the district court in stating that the thwarting of constitutional imperatives is not a legitimate and proper concern. The Commission compiled personal information on suspected civil rights activists largely for the purpose of suppressing speech contrary in viewpoint to the beliefs of the Commission and with the primary goal of preventing any encroachment upon Mississippi's segregated educational system . . .").



asking whether the government's speech has interfered with its targets' protected choices and opportunities, this approach instead focuses on expressive, or dignitary, harm by interrogating whether the government's speech treats its targets with disrespect because of who they are or what they believe—and then considers whether a specific constitutional provision bars the government from inflicting such harm.<sup>83</sup>

This approach requires us to wrestle with difficult questions regarding when the government's speech inflicts dignitary harm and whether a specific constitutional provision protects us from such harm. Some courts and commentators identify equality and inclusiveness as among the key values animating the Establishment Clause,<sup>84</sup> the Equal Protection Clause,<sup>85</sup> or other constitutional provisions.<sup>86</sup> In other words, these thinkers understand constitutional wrongs to include the government's messages that disrespect, denigrate, or humiliate its targets based on protected class status or protected activity regardless of whether those targets suffer material harm.<sup>87</sup>

As a doctrinal matter, while some understand the Establishment Clause *only* to protect individual religious autonomy from government coercion, others feel that an exclusive focus on autonomy is incomplete and that the Clause is also about equality and inclusiveness.<sup>88</sup> This view informs nonendorsement understandings of the Establishment Clause that interpret the Clause to constrain

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83. See Cass Sunstein, *The Ethics of Nudging*, 32 YALE J. REGUL. 413, 440 (2015) (“[T]he antonym of autonomy is coercion; the antonym of dignity is humiliation.”).

84. See Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 381 (2012) (“[T]he government violates the Establishment Clause’s equality component if its religious speech fails to treat believers and nonbelievers with equal concern. Again, the injury turns not on intent or on material harms, but on the state’s message of unequal worth.”).

85. See Helen Norton, *The Equal Protection Implications of Government’s Hateful Speech*, 54 WM. & MARY L. REV. 159, 183 (2012) (“[G]overnment’s hateful speech can be seen as not only morally offensive in demeaning its targets based on their class status but also instrumentally dangerous by contributing to social divisions and instability. In short, government’s hateful speech can communicate a subordinating message repugnant to most antisubordination theorists and can classify its targets in ways that may trouble at least some anticlassification theorists.”).

86. See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 667–68 (2013) (suggesting that we understand the Free Speech Clause to prohibit the government’s disparagement of certain speakers for who they are rather than for what they say).

87. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 507 (1993) (“On this view, the *meaning* of a governmental action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution.”); see also Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1270 (2021) (“[T]he expression of respect for parties’ dignity is a legitimate form of federal judicial relief.”); *id.* at 1269 (“[A] legal violation may inflict dignitary harm on a plaintiff by virtue of the message it sends about a group to which the plaintiff belongs.”).

88. See, e.g., Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 676 (2002).

governmental expression communicating the message that “religion or a particular religious belief is favored or preferred.”<sup>89</sup>

Relatedly, whether informational privacy is a liberty interest protected from the government’s unjustified deprivation by the Due Process Clause remains contested, as we can and do disagree about how broadly or narrowly to understand protected “liberty” or “property” interests.<sup>90</sup> Nevertheless, at times courts have signaled that the Due Process Clause should be understood to constrain the government’s disclosure of an individual’s private matters without adequate justification, disclosures that inflict dignitary harms (and, to be sure, sometimes more material harms).<sup>91</sup> The Third Circuit, for instance, interpreted the Due Process Clause to protect “matters of personal intimacy” from governmental threats of disclosure in a case where a law enforcement officer threatened to inform a young man’s grandfather that the young man was gay unless the young man told the grandfather himself.<sup>92</sup> The young man killed himself in response.<sup>93</sup>

3. *What Are the Purposes Underlying the Government’s Speech, and Does a Specific Constitutional Provision Bar the Government from Seeking to Accomplish Those Purposes?*

Yet another way to think about the constitutional implications of the government’s speech focuses not on the potentially harmful *effects* of the government’s speech, but instead on the government’s *purposes* when speaking along with whether a particular constitutional provision bars the government from seeking to accomplish those purposes.

Under this view, the Constitution prohibits the government’s speech (as well as its conduct) that is motivated by illegitimate purposes, including the government’s “bare desire to harm” certain individuals or groups<sup>94</sup> or its intent to

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89. *Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 637 (1989) (O’Connor, J., concurring in part and concurring in the judgment), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

90. Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 *NEV L.J.* 135, 141 (2019).

91. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977) (suggesting individuals’ constitutionally protected privacy interest in the nondisclosure of certain personal information); *N.A.S.A. v. Nelson*, 562 U.S. 134, 147 (2011) (suggesting individuals’ constitutionally protected privacy interest in the nondisclosure of certain personal information); *see also* Danielle Keats Citron, *Presidential Privacy Violations*, 2022 *U. ILL. L. REV.* 1913, 1939–40 (2022) (advocating that courts recognize substantive due process rights to informational privacy); Scott Skinner-Thompson, *Outing Privacy*, 110 *Nw. U. L. REV.* 159, 205 (2015) (advocating that courts recognize substantive due process rights to informational privacy).

92. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000).

93. *Id.* at 193.

94. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that the Equal Protection Clause forbids state action “inexplicable by anything but animus toward the class it affects”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.”).

interfere with the exercise of constitutionally protected rights like the government's intent to silence disfavored expression.<sup>95</sup> Courts and commentators who describe these objectives as constitutionally illegitimate rely on moral intuitions that the government should not try to hurt us through its words (as well as its deeds), along with theories of constitutional power which interpret the Constitution to deny the government the power to speak (or act) for reasons that are not public-regarding.<sup>96</sup>

Again, while some understand the Establishment Clause *only* to protect individual religious autonomy from government coercion,<sup>97</sup> others feel that an exclusive focus on autonomy is incomplete and that the Clause is also about governmental evenhandedness on all matters religious.<sup>98</sup> A focus on governmental motive informs these neutrality-based understandings of the Establishment Clause to prohibit the government's speech (or actions) intended to advance some religions at the expense of others.<sup>99</sup> Along these lines, the Supreme Court found that a state violated the Establishment Clause when it chose to start each school day with a prayer that it had composed in an effort to advance religion.<sup>100</sup> In later cases, the Court held that public schools violated the Establishment Clause when their curricular choices regarding the teaching of evolution were motivated by their intent to advance certain religious views about the origin of life.<sup>101</sup> And in the Due Process Clause context, at times the Court has signaled that the government's intent to harm its targets violates constitutional constraints on governmental choices that "shock the conscience" because they reflect the government's impermissibly arbitrary exercise of its power.<sup>102</sup>

This approach requires us to confront difficult problems of ascertaining the government's reasons for speaking (especially since those reasons are often multiple and sometimes mysterious), as well as whether a specific constitutional provision prohibits the government's speech motivated by such reasons.<sup>103</sup>

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95. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 (1996) (observing that the government's intent to silence disfavored speech is inconsistent with "the stance or attitude we expect the government to adopt in relation to its citizens"); *id.* at 414 ("[T]he application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.")

96. See NORTON, *supra* note 1, at 118.

97. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2 (1998).

98. *Id.* at 4.

99. *Id.* at 61.

100. *Engel v. Vitale*, 370 U.S. 421, 424 (1962); see also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205, 222 (1963) (concluding that public schools' choice to start the day with the Lord's Prayer and other devotional readings sought to advance religion in violation of the Establishment Clause).

101. *Edwards v. Aguillard*, 482 U.S. 578, 592–93 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968).

102. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."); see also Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 285 (2015) (describing courts' application of this shocks-the-conscience constraint to governmental choices).

103. For a thoughtful discussion of these sorts of challenges in the Equal Protection Context more broadly, see WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 89–104 (2017).

## III. THE FRAMEWORK APPLIED

To illustrate this framework in action, this Part sketches its application to a couple of contemporary constitutional disputes involving the government's speech. Here I seek simply to flag the necessity of considering both first- and second-stage government questions rather than to thoroughly discuss (much less resolve) them. This framework can help us understand why hard problems are hard and why easy problems are easy—what it does not do is make hard problems easy.

A. *Constitutional Challenges to State Requirements that Driver's Licenses' Gender Markers Identify the Carrier's Sex as Assigned at Birth*<sup>104</sup>

In litigation pending before the Eleventh Circuit at the time of this writing, transgender plaintiffs have brought a number of constitutional challenges to Alabama's requirement that its state driver's licenses record only the carrier's sex as assigned at birth even when that designation does not accurately describe the carrier's gender identity.<sup>105</sup>

As a threshold matter, Alabama argues that the information displayed on its driver's licenses reflects its own speech,<sup>106</sup> and the challengers do not contest this.<sup>107</sup> I too agree that the information communicated by driver's licenses generally reflects the government's expressive choice about the information it considers relevant for identifying the carrier for law enforcement purposes and other functions.<sup>108</sup> The licenses' governmental source is transparent to the public as both a formal and functional matter, as driver's licenses prominently display the state's name and have long been associated with the government that produces them; the state requires them for driving and often other important purposes; and the state controls their content and appearance (by, among other things, imposing penalties on those who alter them).<sup>109</sup> We can thus understand driver's licenses (like many other forms of government identification<sup>110</sup>) as species within the genus of government speech.

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104. See also Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845 (2022) (thoughtfully exploring related questions).

105. In the interests of full disclosure, I note that I joined an amicus brief filed in support of the challengers' constitutional claims. Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellees, *Corbitt v. Taylor*, No. 21-10486 (11th Cir. Aug. 2, 2021).

106. Brief of the State Defendants-Appellants at 13, *Corbitt v. Taylor*, No. 21-10486 (11th Cir. May 26, 2021).

107. Brief of Plaintiffs-Appellees at 47, *Corbitt v. Taylor*, No. 21-10486 (11th Cir. July 26, 2021).

108. Like providing the identification required to vote in many jurisdictions. See *id.* at 2.

109. See NORTON, *supra* note 1, at 41 (describing the Court's test for determining whether contested speech is the government's as considering a range of factors that include "whether the speech has the intent and effect of delivering the government's message, whether the contested speech is closely identified with the government by the public, whether the government had historically used the speech in question for its own expressive purposes, and the practical implications of denying the government the power to control the contested speech").

110. See Alexandra R. Genord, *International Megan's Law as Compelled Speech*, 118 MICH. L. REV. 1603, 1612–13 (2020) (describing passports as another instance of government speech).

Again, the government generally possesses a constitutional privilege to control its own speech, which means that it retains a great deal of latitude about its expressive choices. Nevertheless, determining speech to be the government's is by no means the end of our constitutional inquiry (notwithstanding Alabama's protestations to the contrary).<sup>111</sup>

### 1. *First-Stage Questions*

As a first-stage matter, we still need to consider whether the state violates the Free Speech Clause when it requires the challengers to carry and display government identification that delivers a governmental message to which they object—here, by describing their gender in a way inconsistent with their gender identity. The challengers assert that this message will be associated not only with the state but also with the individuals that it purports to accurately describe and identify.<sup>112</sup> The state responds instead that the challengers seek to compel the state to deliver their own speech.<sup>113</sup> It characterizes the litigation as a dispute “about whether sovereign States may objectively define the words they use . . . . Since statehood, Alabama has subscribed to the general proposition that individuals born with penises are male and individuals born with vaginas are female.”<sup>114</sup>

Again, the analysis requires us to parse the separate constitutional claims. The Free Speech Clause does not limit the government's expressive choice to define or talk about gender in a particular way (although, as discussed below, that choice does trigger Equal Protection Clause and Due Process Clause questions).<sup>115</sup> The Free Speech Clause claim instead alleges that the government has compelled an individual to display, and thus communicate, the government's views about their gender against their will, and that the government's compulsion triggers and fails strict scrutiny.<sup>116</sup>

In other words, if the state instead maintained its own public website that listed all drivers along with their sex as assigned at birth, challengers would have no viable first-stage government speech challenge (although, as discussed below, second-stage Equal Protection and Due Process questions would remain).<sup>117</sup> The

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111. See Brief of the State Defendants-Appellants, *supra* note 106, at 13 (“If the sex designation on an Alabama driver's license constitutes speech, it is government speech, and Plaintiffs, by judicial fiat, seek to infringe on the State's right to speak for itself.”).

112. Brief of Plaintiffs-Appellees, *supra* note 107, at 46–49.

113. Brief of the State Defendants-Appellants, *supra* note 106, at 13.

114. *Id.* at 1–2.

115. See *supra* Subsection II.A.2.

116. Note that governmental requirements that individuals display the government's speech despite their objection can occasionally survive strict scrutiny. For example, the government's requirement that driver's licenses display the carrier's name, photo, current address, birth date, height, and weight strike me as narrowly tailored to the government's compelling interest in accurate and useful means of identification. But requiring individuals to display a driver's license that does not accurately identify them fails such suspicious scrutiny (and perhaps even rational basis scrutiny). Note too that the government's compelled disclosures are sometimes subject to more deferential review, as is the case of the government's compelled commercial disclosures. See *supra* note 54 and accompanying text.

117. See *infra* notes 120–30 and accompanying text.

government's choice of how it will describe individuals is its own to make and is thus exempt from Free Speech Clause challenges that simply seek to change the message to the challengers' liking.<sup>118</sup> But here all agree that the state requires individuals to carry and display its speech—which raises the compelled speech question, where the primary point of contestation is whether onlookers will associate the speech conveyed through a driver's license with the individual carrier and not just the state.

## 2. *Second-Stage Questions*

The government can violate the Free Speech Clause when it compels others to deliver that message even when the government's own delivery of that message itself raises no Free Speech Clause problem.<sup>119</sup> But sometimes we must determine whether the government's delivery of its own message, without more, *would* violate a specific constitutional provision: this is what I mean when I refer to "second-stage" government speech problems.<sup>120</sup> This litigation raises second-stage questions about whether Alabama's speech violates the Equal Protection or Due Process Clauses.

### a. Equal Protection Clause Issues

Under the analytical framework I've proposed, we ask and answer a series of questions about the effects of, and the motivations underlying, the government's speech—questions intended to help us think about whether and when the government's speech is constitutionally dangerous.<sup>121</sup> As I wrote in a related context:

We can see the cleavages, the points of contention. The government's speech violates the Equal Protection Clause when it results in certain discriminatory effects, but some will be quicker than others to find those effects. And whether the Equal Protection Clause forbids the government's denigrating messages that inflict expressive harm or the government's messages inspired by animus turns in part on whether we prefer an anticlassification or antisubordination approach as well as on our assessment of courts' institutional competence to ascertain expressive meaning or governmental purpose.<sup>122</sup>

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118. Caroline Mala Corbin, *The Government's Speech and the Constitution: Public School Teachers & Transgender Students & Pronouns*, BALKINIZATION (Mar. 19, 2020), <https://balkin.blogspot.com/2020/03/the-governments-speech-and-constitution.html> [<https://perma.cc/VTX6-GU62>].

119. See *supra* notes 52–54 and accompanying case.

120. See NORTON, *supra* note 1, at 104 (“That the government’s speech may be consistent with free speech values, however, does not mean that it is necessarily consistent with equal protection values, as very different purposes underlie the two constitutional protections.”).

121. For a thoughtful discussion of related issues (whether and when a public school’s misgendering of its transgender students through its speech violates the Equal Protection Clause), see Corbin, *supra* note 118.

122. NORTON, *supra* note 1, at 126.

First, when we focus on harm to protected class members' choices and opportunities, our questions should include whether Alabama's speech coerced, commanded, encouraged, or otherwise caused third parties to discriminate against transgender persons in violation of the Equal Protection Clause.

The federal district court focused on this question as a functional matter (although its vocabulary is not quite the same as mine) when it held that Alabama's expression violated the Equal Protection Clause.<sup>123</sup> More specifically, it concluded that the law "makes it possible for people to change the sex designation on their driver licenses only by surgically modifying their genitals. By making the content of people's driver licenses depend on the nature of their genitalia, the policy classifies by sex" and fails intermediate scrutiny.<sup>124</sup> As the court observed, Alabama's expressive classification threatens significant harm to the challengers:

The alternative to surgery is to bear a driver license with a sex designation that does not match the plaintiffs' identity or appearance. That too comes with pain and risk. . . . More concretely, carrying licenses with sex designations that do not match plaintiffs' physical appearance exposes them to a serious risk of violence and hostility whenever they show their licenses. . . . Whenever plaintiffs show an identification document that calls them male, the reader of the document instantly knows that they are transgender. That, the record makes clear, is dangerous.<sup>125</sup>

On appeal, the state argues that "the State's classification of someone's sex, without accompanying treatment based on that classification, does not implicate the Equal Protection Clause. . . . There is a fundamental distinction between the State (a) simply classifying persons for identification purposes and (b) treating them differently based on a classification."<sup>126</sup> In other words, the state asserts that the government's speech, by itself, never "classifies" on the basis of protected class status in violation of the Clause. But, as explained above, the Supreme Court has recognized that the state's classification of persons for identification purposes sometimes sufficiently enables third-party discrimination to violate the Equal Protection Clause.<sup>127</sup> Recall the Court's holding in *Anderson v. Martin* that the government's listing of candidates' race on state ballots would cause some voters to discriminate on the basis of race by "placing the power of the State behind a racial classification that induces racial prejudice at the polls."<sup>128</sup>

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123. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1312 (M.D. Ala. 2021). Because the district court found for the challengers on their Equal Protection Clause claim, it did not reach their compelled speech claim under the Free Speech Clause.

124. *Id.*

125. *Id.* at 1313.

126. Brief of the State Defendant-Appellant, *supra* note 106, at 13–15.

127. *See supra* notes 76–80 and accompanying text.

128. *Anderson v. Martin*, 375 U.S. 399, 402–03 (1964); *see also supra* notes 76–80 and accompanying text. As I've written elsewhere, "both anticlassification and antisubordination theorists can understand the Equal Protection Clause to forbid the government's speech that commands, threatens, and coerces third parties to discriminate . . . or that otherwise disadvantages its targets' opportunities"—even as we can and will sometimes disagree about how quickly to see that causal connection. NORTON, *supra* note 1, at 112.

Next, when we turn to expressive harm, we ask instead whether reasonable onlookers would understand Alabama to be communicating a message of disrespect towards its transgender residents and whether the Equal Protection Clause bars Alabama from inflicting such dignitary harm.<sup>129</sup> Antisubordination theorists (who understand the Clause to bar the government's choices that perpetuate traditional gender and other hierarchies) will likely be quicker to see a subordinating governmental message that reinforces traditional hierarchies.<sup>130</sup> In contrast, anticlassification theorists (who understand the Clause to bar only the government's classifications based on protected class status) might be reluctant to view the government's speech that inflicts dignitary harm as a classification.<sup>131</sup> Even so, "some anticlassification adherents might emphasize the theory's roots in both moral and instrumental rationales to conclude" that the government's expressive denigration of protected class members is morally offensive and/or instrumentally dangerous by exacerbating existing social divisions.<sup>132</sup>

Finally, when we turn to the government's purpose for speaking, we consider whether Alabama's choice was motivated by a desire to harm transgender persons (which requires that we consider any evidence of animus),<sup>133</sup> and whether the Equal Protection Clause bars Alabama from speaking as well as acting for such purposes. Again, here I tee up the questions to be considered rather than speculate on the evidence that either party might offer in response to those questions.

#### b. Due Process Clause Issues

This litigation also triggers the question of whether Alabama's expressive choice violated the Due Process Clause by disclosing private information about the challengers' genital anatomy. As noted above, some courts and commentators understand the Due Process Clause to constrain the government's disclosure of an individual's private matters (like sexual or medical information) without adequate justification, disclosures that inflict dignitary harms—and sometimes more tangible harms.<sup>134</sup>

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129. See NORTON, *supra* note 1, at 113 ("If we understand the Equal Protection Clause to require that government treat individual members of the polity with equal respect and equal concern regardless of class status, then the government's speech alone may violate this constitutional commitment when it denigrates its targets, when it communicates exclusion or inferiority based on that class status. (And the more the government denigrates a group, the easier it becomes to treat them differently, and not just talk about them differently.); *id.* ("Assessments of a message's meaning can be hotly contested, but law has long wrestled with related questions. Most relevant, statutory antidiscrimination law looks to the perceptions of a reasonable target when determining whether harassing speech in the workplace is sufficiently severe or pervasive to create a hostile environment and alter the terms and conditions of the target's employment.").

130. See Corbin, *supra* note 118 ("It is difficult to imagine a more fundamental gesture of disrespect than refusing to address a person as they wish to be addressed.").

131. NORTON, *supra* note 1, at 114.

132. *Id.*

133. See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

134. See *supra* notes 90–93 and accompanying text.



If we interpret the “liberty” protected by the Due Process Clause to include informational privacy, we then walk through what is by now a (hopefully) familiar set of questions: did the government’s speech that takes this form of disclosure interfere with its targets’ choices and opportunities; did the government’s speech that takes this form of disclosure inflict dignitary harm upon its targets; and was the government’s disclosure motivated by animus or some other constitutionally impermissible purpose?

*B. Constitutional Challenges to the Governmental Motto “In God We Trust” on Coins and Paper Currency*

To further illustrate the framework in action, this Section considers the first-stage Free Speech Clause and second-stage Establishment Clause questions raised by the government’s display of its motto “In God We Trust” on its coins and paper currency.

*1. First-Stage Questions*

As discussed above, a government’s choice of its motto reflects its own speech.<sup>135</sup> Once again, however, determining “In God We Trust” to reflect the government’s own expressive choice does not end our constitutional inquiry. As a first-stage matter, we must still consider whether the government’s choice to print its motto on currency used by the public should be understood as compelling individuals to display or endorse the government’s message against their will.<sup>136</sup> (And, as discussed below, as a second-stage matter, we must still consider whether the government’s religious reference in its motto—by itself—runs afoul of the Establishment Clause.)<sup>137</sup>

As a functional matter, many if not most Americans regularly carry and display coins and paper currency that display this motto. As is also the case with the Alabama litigation discussed above, the key first-stage question here is thus whether reasonable onlookers will understand those carrying such currency to be affirming and disseminating a governmental message to which they object.<sup>138</sup>

The courts that have considered this question to date have distinguished currency from government identification like driver’s licenses<sup>139</sup> and license

135. See *supra* notes 49–54 and accompanying text.

136. See *supra* Section II.B.

137. See *infra* notes 142–49 and accompanying text.

138. See *Mayle v. United States*, 891 F.3d 680, 683 (7th Cir. 2018).

139. See *id.* at 686 (“[M]ost people do not brandish currency in public—they keep it in a wallet or otherwise out of sight until the moment of exchange. And the recipient of cash in a commercial transaction could not reasonably think that the payer is proselytizing. If the recipient thought about it at all, she would understand that the government designed the currency and is responsible for all of its content, including the motto. She would not regard the motto as Mayle’s own speech.”); *State v. Hill*, 2020-0323 (La. 10/1/20), 341 So. 3d 539, 553, *cert. denied*, 142 S. Ct. 311 (2021) (“While currency may have the words ‘In God We Trust’ printed on it, that message is not personalized, as is the case with an identification card. Furthermore, currency is simply exchanged, as the currency passes through many hands. Identification cards, on the other hand, are proof of identity and are frequently displayed for examination by a cashier, bank teller, grocery store clerk, new employer, or for air travel, hotel registration, and so forth.”).

plates.<sup>140</sup> They concluded that onlookers do not associate currency with its holder in the way that they do of personal identification because currency does not name and identify the holder, nor is it permanently retained (and is instead continually exchanged).<sup>141</sup> Under this view, while reasonable onlookers generally assume that a driver's license or other government identification represents information about the holder that is affirmed as accurate by the holder, onlookers generally do not make the same assumption about currency, which enables commercial exchange and does not convey personalized information.

## 2. *Second-Stage Questions*

Distinct from the first-stage compelled speech question is the second-stage question whether the government's choice and display of the motto "In God We Trust" by itself (that is, when it is delivered by the government itself, as on government buildings or government letterhead) violates the Establishment Clause.

One's answer to this question turns on one's preferred theory of the Establishment Clause, as well as one's application of that theory to these facts. Those who take an exclusively noncoercion approach to the Establishment Clause, under which the government's speech violates the Clause *only* when it coerces or pressures an individual's unwilling participation in religious practice,<sup>142</sup> will likely see no violation. Those who emphasize a nonendorsement approach to the Establishment Clause, under which the government's speech also violates the Establishment Clause when it communicates a message endorsing or denigrating religion or nonreligion,<sup>143</sup> will likely be quicker to find the government's speech problematic. But even nonendorsement advocates themselves vary in how quick or slow they are to find a governmental message to impermissibly endorse religion.<sup>144</sup> More specifically, some understand the government's longstanding use of "In God We Trust" to have largely stripped it of a religious character, while others urge the perspective of nonbelievers or other religious outsiders who may be more likely to perceive such longstanding religious references as endorsing religion.<sup>145</sup> Those who take a neutrality approach, under which the government's speech violates the Establishment Clause when it takes sides on religious matters, similarly sometimes disagree about whether the government's choice of motto reflects its impermissible purpose to advance religion or instead simply seeks to achieve secular goals like creating a spirit of unity and gravity.<sup>146</sup>

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140. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

141. *Id.* at 717 n.15 ("[W]e note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.").

142. NORTON, *supra* note 1, at 71–72.

143. *Id.* at 76.

144. *Id.* at 79.

145. *Id.*

146. *See id.* at 84.

Given the lack of controlling Supreme Court precedent on the appropriate approach to Establishment Clause problems,<sup>147</sup> the Seventh Circuit recently worked through all three available options—noncoercion, nonendorsement, and neutrality—and held that the governmental motto “In God We Trust” offended none of them.<sup>148</sup> Lower courts have reached more mixed results when applying nonendorsement and neutrality principles to the government’s choice of other mottos that feature religious references.<sup>149</sup>

#### IV. CONCLUSION

I’ve outlined what I think is a principled and workable framework for organizing our thinking about government speech puzzles, both longstanding and new. In the essays that follow, the contributors to this symposium engage with these and related issues in ways both profound and provocative.

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147. Although the Court has yet to settle on a single approach to Establishment Clause problems, in recent years it has increasingly relied on historical tradition as a guide to determining whether and when the government’s choices violate the Clause (indeed, the Court has been increasingly slow to find any Establishment Clause violations at all). *E.g.*, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2088–89 (2019) (emphasizing the value of tradition to Establishment Clause inquiry); *Town of Greece v. Galloway*, 572 U.S. 565, 578–92 (2014) (emphasizing the value of tradition to Establishment Clause inquiry).

148. *Mayle v. United States*, 891 F.3d 680, 684–86.

149. NORTON, *supra* note 1, at 86.