

# THE MANNER OF GOVERNMENT SPEECH

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## INTRODUCTION

The government speech doctrine began inauspiciously in *Rust v. Sullivan* in 1991.<sup>1</sup> It has grown metastatically since that time. It is now a largely uncontroversial rule that when the government is speaking, its expressive actions are immune from First Amendment freedom of speech limits. Beneath the smooth and judicially-comforting surface of this rule, however, lie many difficult problems. The problem I address is the “manner” of the government’s speech—what forms of speech should count as government speech, and what forms should not.

In addressing this question, I will make two points at the outset. First, the government speech doctrine is mis-named. It is not just immunity for the government’s act of speaking, but also for the government’s exclusion of unwelcomed speech in the time, place, and space of government speech activity. The doctrine, in short, is really a government speech *forum* doctrine.<sup>2</sup> My second point is that because the government speech doctrine reserves a *forum* in which the government possesses a monopoly on the ability to speak—a right to exclude all other speech it doesn’t want or like—we must be concerned about the *way* the government conducts itself expressively—the manner of its speech—in its new forum.

## I. THE GOVERNMENT SPEECH *FORUM*

How is it that we have gotten to this point? Let me begin with a brief history of the government speech forum doctrine. Its beginnings emerged from the public forum doctrine. Public forums are classified in three types.<sup>3</sup> First is the open public forum: public space where private speech of the uninhibited, robust quality is allowed. Examples include streets, sidewalks, and parks. Second, there are designated public forums, which are times, places, and spaces whose public function justifies a limitation on the types of individual speech activity taking place there—for example, schools and concerts. In a designated public forum the gov-

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1. See 500 U.S. 173, 193–94 (1991) (holding that the government can script a doctor’s discussion with a patient on the subject of abortion when the doctor is an agent of the government in a federally funded clinic).

2. See Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953 *passim* (1998).

3. In the interest of simplicity I refer the reader to the wonderful discussion and analysis of the public forum categories and criteria by Erwin Chemerinsky in his treatise, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1127–1144 (3d ed. 2006).

ernment can restrict the forms and even the subjects of individual speech by means reasonably adapted to the function of the forum (time, space, or place), but the government cannot restrict speech solely because of its point of view. Finally, the third kind of forum is the non-public forum, a space reserved by the government where no individual free speech is to take place—an opera in a public hall, a museum, or a Presidential press conference, for example. In this forum, the government can prohibit free speech by non-government speakers, but it cannot selectively permit some individual speech but not other speech because of the speech's point of view. In other words, the government cannot close off a time or place or space from individual speech and then open it up solely for a viewpoint the government favors.<sup>4</sup>

The three-part government forum doctrine worked well for many years, but in due course it ran into a few problems—namely, the government's felt need to selectively admit certain points of view into its forum and not others. Consider a doctor's advice to a patient at a family planning clinic supported by government funds, where the doctor is an agent of the government and thus subject to the government's/clinic's policy against abortion.<sup>5</sup> Can the non-public forum principle do the work necessary to justify excluding abortion advice? Probably not, under the no-point-of-view-discrimination rule. How about a government-owned flag whose desecration is prohibited?<sup>6</sup> Or government arts funding decisions based on artistic quality or even consistency with traditional American values and decency?<sup>7</sup>

The government speech doctrine grew out of these kinds of cases because the Supreme Court found itself unable to squeeze the right result out of the public forum categories. It began with the rather benign idea that of course the government can speak to its public, its democratic rulers. Indeed, the government must speak, and propose, and defend, and inform in order for democracy to work.<sup>8</sup> But the situations in which the cases arose were never benign, though the danger was never apparent to the Court—even to this day, I think. Of course the government can speak. But the government speech claims were of a different ilk: to be the *only* speaker to the patient in the family planning clinic;<sup>9</sup> to be the *editor* of the public television station;<sup>10</sup> to deny government funding to *all* indecent art, even where the government is the only funder in an ex-

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4. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1404–05 (2001).

5. *Rust*, 500 U.S. at 193–94, 198.

6. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

7. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998). See RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH* 7–49 (2009), for a discussion of the *Finley* case.

8. Bezanson & Buss, *supra* note 4, at 1380; see Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 8–11 (2000).

9. *Rust*, 500 U.S. at 193–94.

10. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673–74 (1998).

hibition or performance, or owns an art museum at which only decent art will be shown;<sup>11</sup> to be *the* principal advertiser of beef, even if not in the government's own name;<sup>12</sup> to express through monuments or through government web sites<sup>13</sup> the government's religious, ideological, or even political preferences, *and none other*; to assume control, and authorship, of employee speech in the workplace;<sup>14</sup> to endorse Christianity with a cross in the Mohave Desert, not just for a minute, but for as long as government likes, and without a symbol to the contrary allowed.<sup>15</sup>

The government speech doctrine began, and it has survived, as something other than its name implies. The doctrine does not protect the government's ability to speak. Instead, it grants the government a *forum* for its expression that can span time, place, and space, and in which only ideas it favors may be spoken, and other ideas with which the government would ordinarily have to compete may be excluded.<sup>16</sup> I do not doubt the government's need for such forums for the conduct of executive, legislative, and judicial business, and indeed for other operational purposes,<sup>17</sup> such as a military commander giving troops a motivational talk before going into battle. And I do not doubt the need for the government's right to exclude other and contrary speech in its forum no matter what the subject of its speech. Every day that I teach, I benefit from the right to exclude certain speech in my government classroom.

But when the forum protects government speech on *public* matters *to its publics* in a society committed to individual freedom of speech and democratic self-government, we should recognize that the government's exclusive forum is potentially very dangerous. Frankly, its dangers are not much blunted by the limits on government speech that I and others have previously proposed, such as no government monopoly power over an idea,<sup>18</sup> no ventriloquism;<sup>19</sup> and transparency about government authorship.<sup>20</sup> These may help limit the government's forum power, but they do not limit the *ways* in which the government is free to couch its

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11. *Finley*, 524 U.S. at 574–75, 587–88.

12. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–63 (2005).

13. *See, e.g., Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 329–31 (1st Cir. 2009).

14. *Garcetti v. Ceballos*, 547 U.S. 410, 436–38 (2006); *see* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 11–13 (2009).

15. *See* *Buono v. Kempthorne*, 527 F.3d 758, 772 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 129 S. Ct. 1313 (2009) (awaiting decision).

16. Of course the government itself, through its agents or otherwise, need not speak in the forum; instead, the government may express its views through selected private speech. *See Finley*, 524 U.S. at 587–88; *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

17. Government websites limited to government information and government policy views are an example. *See, e.g., Sutcliffe*, 584 F.3d at 329–35.

18. *Bezanson & Buss*, *supra* note 4, at 1488–90, 1510–11; *Greene*, *supra* note 8, at 27–29.

19. *Greene*, *supra* note 8, at 49–52; *Abner S. Greene, (Mis)Attribution*, 87 DENV. U. L. REV. 833, 844 (2010); *see also* *Bezanson & Buss*, *supra* note 4, at 1457–63, 1467.

20. *Helen Norton & Danielle Keats Citron, Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010).

expression and the objects on which it may speak publicly in its forum—the manner of government speech, as I call it.

## II. THE MANNER OF GOVERNMENT SPEECH

Armed with this more full-bodied idea of a government speech *forum*—a place, time, or space where competing views are not allowed—how should we think about the manner of speech that enjoys the luxury of the government’s forum? My concerns here are twofold.

My first concern is *what* the government says in its forum. The government’s speech activity should be limited by the specific purposes its speech serves under the Constitution. In the government’s capacity as a speaker, just as in its capacity as a regulator, the work of the First Amendment is to limit government, not free it.<sup>21</sup> As my colleague Bill Buss and I have written, to consider the government as a First Amendment rights-holder would be “deeply inconsistent with individual freedom and with constitutional notions of democratic self-government.”<sup>22</sup>

My second concern is *how* government says what it says. That is, the government should be restricted in the expressive ways it carries out its constitutional responsibilities.

[W]hen the means government employs to speak its message interfere with private speech or distort the private marketplace of speech, those means should be closely scrutinized in the interest of protecting the fundamental constitutional purpose of preserving ‘an independent realm of speech within which public opinion is understood to be forged.’<sup>23</sup>

I begin, briefly, with the first concern, the “what.” Government speaking is essential to accomplishing the democratic goals of individual freedom and self-government. It is necessary that the government speak publicly in order to inform, explain, educate, and even attempt to persuade, clearly, transparently, intentionally, and understandably. Without this, Alexander Meiklejohn famously declared, the polity cannot engage in the business of government, evaluate government policy, or disagree and dissent.<sup>24</sup>

In many ways free speech law has outgrown Mr. Meiklejohn. Whether that is good or bad is a matter for another day. But Meiklejohn’s conception of the range and rules of free speech seem, on reflection, particularly apt for the government when it speaks in its own forum. “The

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21. Bezanson & Buss, *supra* note 4, at 1501–08.

22. *Id.* at 1508.

23. *Id.* at 1508–09 (quoting Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 151 (1996)).

24. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26–27 (1948).

principle of the freedom of speech . . . is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”<sup>25</sup> This, in turn, “requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented . . . [so] that all the alternative lines of action can be wisely measured in relation to one another.”<sup>26</sup> Further, “[j]ust so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion . . . which is relevant to that issue, just so far the result must be ill-considered.”<sup>27</sup> “The First Amendment, then, is not the guardian of unregulated talkativeness.”<sup>28</sup> In its own constitutionally favored forum, the government’s speech should be governed by the *duty* to fully inform, and it should be limited by the requirement that the informing be reasoned and fair.

What the government says may often turn on *how* it says it. This is my second concern. The business of government in a democracy is not faith, or force, or unrestrained emotion, or deception. It is instead reason and disagreement and compromise and discourse on matters falling within the realm of government authority. The government’s speech in *its* forum should thus be transparent in its origins, clear in its meaning, and capable of reasoned, cognitive understanding. These are the government’s expressive stock in trade in a democracy in which people rule and in which passion and prejudice are best blunted by the reasoned exchange of ideas and information.

Means of communication that appeal only to the senses and passions short circuit the dialectic with the declarative, reason with force. Individuals are free under the First Amendment to engage in such forms of expression.<sup>29</sup> Government, too, may usually have the power to do so, since the content and even the style of the government’s public communications are, as a general matter, left to the political branches.<sup>30</sup>

But with the government speech doctrine we are dealing with a forum for government speaking that permits the government to exclude all others—that is, all private speakers and all opposing viewpoints—from the forum the government has created for the communication of its own viewpoints: the doctor advising a patient about a choice the government dislikes (abortion); the grant officer declining to support art and artists that the government finds offensive; the tenets of belief in a religion that not all people share and upon which many people, but not the govern-

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25. *Id.*

26. *Id.* at 25.

27. *Id.* at 26.

28. *Id.* at 25.

29. *Cohen v. California*, 403 U.S. 15, 25–26 (1971).

30. Many controls of this sort have been enacted through the political process. See Lyriisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 845 (2010).

ment, find offensive;<sup>31</sup> a web site reserved for expressing the government's political preferences and views.<sup>32</sup> In a democracy, the government can surely arrive at the policies embodied in each of these (and many other) instances of government action through expression. But when the government's action is expressive, the effect of giving the government the power to exclude other views from its speech forum is that the competition in ideas is blunted and the views of individuals are muted in a society in which individuals alone have the freedom of speech.

In this limited setting the government possesses the constitutional power of the censor. This is why the government's power of expression in its forum should be held to the very limits that justify its right to express: reason, not force; explanation, not declaration; cognition, not passion. The government serves the people. In a democratic order it owes them an explanation and justification, if for no other reason than without those things individuals are unable to dissent and disagree in the forums available to them for free speech.

What does this principle of openness and reason mean, especially at a time when technology is opening up new ways in which the government can employ its expressive power?<sup>33</sup> How does reason fit into the new visual, immediate, image-laden forms of expression? My answer is that in its forum the government should not be able, free of counter-speech, to speak publicly on public matters in exclusively aesthetic and emotional ways. To place a monument with the Ten Commandments before the courthouse is a declaration—of faith and belief—and not an argument or reasoned expression. It's not a teachable moment in which the values of the commandments are explained. The monument in that place doesn't invite discussion. It simply "is." The same can be said about a very large cross placed on a promontory in a national park—even, I would say, if the government sold the tiny parcel on which it sits to the private group that originally sponsored it.<sup>34</sup> Government can speak through selling land as easily as it can speak through scripting a private doctor.<sup>35</sup>

This is, in fact, far from a radical idea. The working definition of speech for purposes of the First Amendment has always been a linear one.<sup>36</sup> As Justice Harlan put it in the setting of expressive conduct, free

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31. *E.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129–30, 1138 (2009).

32. *See, e.g.*, *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 334–35 (1st Cir. 2009).

33. *Norton & Citron*, *supra* note 20.

34. *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 129 S. Ct. 1313 (2009) (challenging a large cross on a small piece of land atop an otherwise isolated promontory in the national park in the Mojave Desert).

35. *See id.*; Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY 83, 90 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/31/LRColl2009n31Blocher.pdf>.

36. *See Cohen v. California*, 403 U.S. 15, 18–22 (1971).

speech presumes a speaker intending to send a message to an audience that reasonably understands the message.<sup>37</sup> This is a useful linear model of communication, narrower than it need always be, but appropriate for the public speaking activities of the government in its exclusionary forum. It closely fits the ideal of purposeful, cognitive, and rational discourse in which the government should be engaged when informing, explaining, and persuading in the open marketplace of political debate and discussion.<sup>38</sup> In its own forum it is appropriate to insist that the government have a message that it intends to communicate to an audience that will reasonably understand that message, if for no other reason than that people will thus be able to understand what government is saying and agree or disagree with it in other available forums.

The aesthetic quality of speech can of course be useful and should not be categorically limited in the hands of government. But aesthetics can also be dangerous, for aesthetic expression is capable—indeed, perhaps uniquely capable—of disrupting the linear and cognitive model. This is because much aesthetic expression—just like much art, or advertising—appeals dominantly to the sensual and emotional response of an audience in a process that disengages the text or object communicated from the audience’s sensual act of interpretation and imagination.<sup>39</sup> As Karol Berger puts it, aesthetic expression has the “ability to evoke imaginary worlds, and not representation in the strict and narrow sense.”<sup>40</sup>

[I]n an act of cognition whereby we get to know an object, the . . . powers of imagination . . . and understanding . . . are engaged like two gear wheels. But in an act of aesthetic contemplation, the two wheels spin without engaging and the cognitive mechanism runs on idle . . . .<sup>41</sup>

Thus representations of soup cans can be made to mean quite different and various things to those who see them presented in a certain way, place, or at a certain time. Likewise a perfectly cognitive and logical statement can, by aesthetic additions or amplifications, be made to carry a very different and sometimes inconsistent meaning to readers or viewers, as, for example, the carefully insinuated message of race in the infamous political ad featuring Willie Horton.<sup>42</sup> Lawrence Lessig describes

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37. *See id.* at 21.

38. *See* MEIKLEJOHN, *supra* note 24, at 24–27.

39. “Aesthetic” is defined as: “Of or pertaining to sensuous perception, received by the senses.” OXFORD ENGLISH DICTIONARY (2d ed. 1989). For an extended discussion of aesthetic versus cognitive expression, see generally BEZANSON, *supra* note 7, *passim*.

40. KAROL BERGER, *A THEORY OF ART* 62 (2000).

41. *Id.* at 236 (interpreting IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 59–60 (James Creed Meredith trans., Oxford University Press 1952)).

42. YouTube, Willie Horton 1988 Attack Ad, <http://www.youtube.com/watch?v=Io9KMSSEZ0Y> (last visited Apr. 7, 2010); *see also* Virginia v.

such techniques as “tying,” efforts “to transform the social meaning of one act by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have.”<sup>43</sup>

Is the “de-linearization” of speech through aesthetic and emotional forms of communication like Serrano’s “Piss Christ” photograph or Duchamp’s urinal really any different from the mute object of the cross standing high in the desolation of the Mohave Desert, or the insignia and name of the Ku Klux Klan on a “Helping Keep our Highways Clean” sign on the public interstate as it passes through a Black area of town? These are all instances of speech protected by the First Amendment when communicated by free-willed individuals. But that does not mean that they should be immunized from First Amendment challenge if communicated to the public by the government in its exclusive speech forum. The government is a speaker that enjoys no individual liberty or free will, and whose need to express itself is limited by a different constitutional role and duty.<sup>44</sup> The government’s duty is to facilitate the marketplace of political expression and the process of self-government achieved by information and ideas; indeed, to *model* the form of dialog and exchange that marks the ideals of a free democratic society. Individuals may promote political falsehood, or racial hate, or unleash passion in the service of destruction; the government should not. If it does so it should be denied a government speech forum protected from First Amendment challenge.

Can the line between the cognitive and the aesthetic, between the linear and the broadly aesthetic, be legally drawn and enforced as a limit on government speech activity immunized from First Amendment challenge? My own view is that such a line can be managed. We do so now in the fields of obscenity,<sup>45</sup> evidence,<sup>46</sup> intellectual property,<sup>47</sup> and political campaign speech,<sup>48</sup> to name but a few.<sup>49</sup> Judges and juries seem to do a pretty good job even without special training in aesthetics, or art, or communication theory.

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Black, 538 U.S. 343, 354–55 (2003) (discussing the intimidating effect of the Ku Klux Klan’s burning cross).

43. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1009 (1995) (discussed insightfully in Norton, *supra* note 14, at 42).

44. Bezanson & Buss, *supra* note 4, at 1508.

45. Cohen v. California, 403 U.S. 15, 20 (1971).

46. Courts regularly judge proposed evidence as prejudicial on very similar criteria.

47. For example, whether a use of copyrighted material is “transformative.” 17 U.S.C. § 107 (2006) (outlining the “fair use” of a copyrighted work); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

48. See Wis. Right to Life, Inc. v. Fed. Election Comm’n, 546 U.S. 410, 411 (2006); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment).

49. For a wonderful discussion and analysis of the ambiguities in audience interpretation of the meaning of speech, see Lidsky, *supra* note 30, at 805–09. See also Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 538–41 (2006).

It is worth noting that Congress has placed similar speech restrictions on appropriations resolutions since 1951. The resolutions provide that “[n]o part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.”<sup>50</sup> Recently, the Office of Legal Counsel in the Department of Justice has interpreted the restrictions as “intended to eradicate (i) agency efforts to direct and control public thinking on various issues of public debate, particularly through overt political action; (ii) useless, excessive, or frivolous agency publications; and (iii) agency self-promotion, aggrandizement, or puffery.”<sup>51</sup> The opinion stated, “The overarching concern [is] the use of federal funds to *manipulate and control* public opinion about policy issues,” and “covert attempts to *mold opinion* through undisclosed use of third parties.”<sup>52</sup> There is thus reason to conclude that a similar *constitutional* rule governing the manner of expression in a broader range of government speech forums would succeed.

#### CONCLUSION

Government speech and the government speech forum will not go away. It is a practical necessity—the more so in our information age. Many questions about the role and status of government speech remain to be answered. In the meantime, however, we will be safer and on much firmer democratic and constitutional ground if we insist that government speech on public matters to the public must, in the government’s own forum, be transparent, cognitive and reasoned, and limited to those messages communicated intentionally to a public audience and so understood by that audience. Anything less, I believe, would unleash a very dangerous power in the hands of government, a power, ironically, immunized from challenge by the First Amendment itself.

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50. Consolidated Appropriations Resolution of Feb. 20, 2003, Pub. L. No. 108-7, 117 Stat. 11, § 626, discussed in STEVEN G. BRADBURY, U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF HEALTH AND HUMAN SERVICES (July 30, 2004), available at <http://www.justice.gov/olc/opfinal.htm> [hereinafter DOJ OLC OPINION].

51. DOJ OLC OPINION, available at <http://www.justice.gov/olc/opfinal.htm>.

52. *Id.* (first emphasis added). This longstanding policy has been the subject of numerous OLC opinions over the course of its fifty-nine year history, and it seems to have been largely honored in the promise, not the breach. A few judicial opinions reflect this policy as well. *See, e.g.*, *Nat’l Treasury Employees’ Union v. Campbell*, 654 F.2d 784, 786 (D.C. Cir. 1981).