

## Introduction

### *The Government's Speech and Why It Matters*

Governments must speak in order to govern, and so governments have been speaking for as long as there have been governments. The stone inscriptions on Nebuchadnezzar's Ishtar Gate, for instance, include sixth-century BC boasts of the King's reign and its many achievements.<sup>1</sup> Governments still boast today, just as they also speak in many other ways. Consider a few examples:

- The Surgeon General's report documenting the dangers of tobacco.
- A town council's prayers to open its meetings.
- The Johnson and Nixon administrations' lies about what the United States was doing, and why, in Vietnam.
- Exhortations from the Forest Service's Smokey Bear that "only *you* can prevent wildfires."
- The District of Columbia's motto of protest, "End Taxation Without Representation," displayed on its license plates.
- Apologies, decades after the fact, by Congress, the president, and the solicitor general for the federal government's World War II internment of Japanese Americans.
- President Trump's tweets attacking the press, the judiciary, and many other institutions and individuals.
- A school board's resolution opposing school voucher legislation, posted on its website.
- A Senate subcommittee report entitled "The Employment of Homosexuals and Other Sex Perverts in Government."

The government's expressive choices – and by this I mean the government's choices about whether and when to speak, what to say, how to say it, and to

<sup>1</sup> See BRIAN FAGAN, *A LITTLE HISTORY OF ARCHAEOLOGY* 9–10 (2018).

whom – are neither inevitably good nor evil, but instead vary widely in their effects as well as their motives. The government's expressive choices are at times heroic, at other times banal, and at still other times despicable. Through its speech, the government informs, challenges, teaches, and inspires. Through its speech, the government also threatens, deceives, distracts, and vilifies. Because the government's speech has changed the world for better and for worse, it deserves our attention, at times our appreciation, and at times our concern.

The government's speech can deliver great value. Through its expression, the government disseminates vital information to the public on a broad range of topics. Think again of the Surgeon General's groundbreaking 1964 report on the dangers of cigarettes, a report that challenged the tobacco industry's efforts to discount the mounting medical evidence linking its products to serious health conditions.<sup>2</sup> The government's speech also illuminates the workings of our democracy. Regardless of whether you love or hate the government's views, its expression generates important conversations and helps inform the public's political choices. The State of the Union address reveals the executive's values and policy priorities to the American public, as does a president's resort to the bully pulpit to advocate for everything from environmental conservation to free enterprise, immigration reform to child nutrition. The government's voice can assert moral and political leadership in ongoing battles for equality: consider President Lyndon Johnson's nationally televised promise that "We Shall Overcome" in the midst of 1960s civil rights battles,<sup>3</sup> and President George W. Bush's repudiation of anti-Muslim bigotry in a speech at a mosque immediately after the 9/11 attacks.<sup>4</sup>

But sometimes the government's speech instead wreaks grave harm. This can be the case of its lies told to resist legal and political accountability for its misconduct or to enable the exercise of its powers to imprison or to deploy lethal force. The government's speech can silence dissent: think of the FBI's efforts to muzzle antiwar protestors and other governmental critics during the 1950s and 1960s by spreading false information about them to their families, neighbors, and employers.<sup>5</sup> The government's speech can exclude and divide – and worse. In 1907, Mississippi Governor James Vardaman declared: "[I]f it is necessary every Negro in the state will be lynched; it will be done to

<sup>2</sup> See U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964).

<sup>3</sup> President Lyndon B. Johnson, Special Message to Congress (Mar. 15, 1965).

<sup>4</sup> President George W. Bush, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001).

<sup>5</sup> See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 490 (2004).

maintain white supremacy.”<sup>6</sup> As of 2018, Alabama and Texas required their public schools’ sex education curricula to include “[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public.”<sup>7</sup>

Because the government’s speech holds the potential for great value as well as substantial harm, the constitutional rules that apply to it are important. When 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*. We need to empower our government to serve and protect us, even while we reasonably fear, and should take steps to protect ourselves from, its power to harm us. When does the speech of this unusually powerful speaker violate our constitutional rights and liberties? More specifically, when does the government’s speech facilitate the public’s democratic self-governance and contribute to the marketplace of ideas – and when does the government’s expression instead interfere with public discourse? Under what circumstances does the government’s speech threaten our liberty or our equality? And when, if ever, does the Constitution prohibit our government from lying to us? This book considers these questions, and more.

#### THE CONSTITUTIONAL IMPLICATIONS OF THE GOVERNMENT’S SPEECH

When we see or hear the terms “government” and “speech” in close proximity, we often think of the constitutional issues triggered when the government regulates *our* expression. This book focuses instead on the constitutional issues sparked by the government’s own speech. When I refer to the *government’s* speech, I mean the collective speech of a governmental body like an agency or a legislature. I also mean the speech of an individual who speaks for such a body (like the Secretary of Health and Human Services, or a congressional committee chair), as well as an individual who speaks when backed by the government’s power (like a police officer interrogating a suspect). I put aside for now the speech of an individual government official or legislator when she expresses her own views in a personal, rather than governmental, capacity (although, as we’ll see, the line between the two is not always bright).

<sup>6</sup> See CHRIS DANIELSON, *THE COLOR OF POLITICS: RACISM IN THE AMERICAN POLITICAL ARENA TODAY* 43 (2013).

<sup>7</sup> ALA. CODE § 16-40A-2(c)(8) (2017); TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2) (West 2017) & 163.002(8) (West 2017).

The Constitution itself at times expressly commands the federal government's speech. Article I, for instance, requires Congress to speak in ways that make certain governmental actions transparent to the public. It directs that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,"<sup>8</sup> and that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same" (today this journal is called the *Congressional Record*).<sup>9</sup>

The Constitution sometimes requires the federal government to speak by consulting with other government actors. Article I charges a president who vetoes a bill to return it "with his Objections to that House in which it shall have originated."<sup>10</sup> Article II commands that the president "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."<sup>11</sup> (As we'll see, presidents remain free to choose when, where, and how to deliver their assessments of the State of the Union.) Article II also empowers, but does not compel, the president to "require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any Subject relating to the Duties of their respective Offices."<sup>12</sup>

The Constitution also affirmatively *protects* government speech that takes the form of legislative debate, providing senators and representatives with immunity from criminal prosecution and civil liability for "any Speech or Debate in either House."<sup>13</sup> The Speech or Debate Clause thus prevents executive and judicial branch interference with the federal legislature's independence. "For Congress to compete effectively with the other branches in the public sphere, it must be able to communicate with the public," legal scholar Josh Chafetz observes. "This means that its members must be able to air their views publicly, without the threat of prosecution by the other branches."<sup>14</sup>

The Constitution also identifies, and sometimes requires, what some call "speech acts" or "performative utterances" – in other words, speech that, once uttered, accomplishes a change in legal status. Examples include Congress's Article I power to declare war; this declaration means that the United States is now a belligerent.<sup>15</sup> Article II requires that the president take an oath of office before undertaking service; once pronounced, this oath completes an individual's transition from private citizen to president.<sup>16</sup> And a written declaration of

<sup>8</sup> U.S. CONST. art. I, § 9, cl. 7.<sup>9</sup> U.S. CONST. art. I, § 5, cl. 3.<sup>10</sup> U.S. CONST. art. I, § 7, cl. 2.<sup>11</sup> U.S. CONST. art. II, § 3.<sup>12</sup> U.S. CONST. art. II, § 2, cl. 1.<sup>13</sup> U.S. CONST. art. I, § 6, cl. 1.<sup>14</sup> JOSH CHAFETZ, CONGRESS'S CONSTITUTION 231 (2017).<sup>15</sup> U.S. CONST. art. I, § 8, cl. 11.<sup>16</sup> U.S. CONST. art. II, § 1, cl. 7.

a president's inability to discharge the duties of that office, as provided by the Twenty-Fifth Amendment, initiates the process through which a president may be replaced.<sup>17</sup>

And the Supreme Court has occasionally interpreted the Constitution to compel the government's speech to make specific constitutional protections meaningful. In the now-canonical *Miranda v. Arizona*, the Court required law enforcement officials to disclose available constitutional protections (like the right to remain silent and the right to counsel) to those in their custody.<sup>18</sup>

So the Constitution sometimes *requires* the government to speak. But for the most part, the government's speech reflects its *choice* of whether, when, and how to deploy its expressive power. What are the constitutional rules that govern those choices?

I propose a framework for thinking about this question that requires us to wrestle with what I will call "first-stage" and "second-stage" government speech problems. First-stage problems force us to untangle competing governmental and private claims to the same speech: this is important because the constitutional rules that apply to the government when it speaks itself are very different from those that apply to the government when it regulates others' speech. If we determine that the government itself is speaking (rather than regulating others' speech), we then turn to second-stage problems: these consider whether and when the government's speech infringes specific constitutional rights.<sup>19</sup>

*First-Stage Government Speech Problems: Determining Whether  
and When the Government Is Speaking*

The First Amendment's Free Speech Clause forbids the government from regulating nongovernmental parties' speech based on viewpoint. But the government itself must speak if it is to govern. For this reason, the Supreme Court's government speech doctrine (that is, its body of precedent considering these first-stage problems) generally shields the government's own expression from Free Speech Clause challenge by those who object to the government's views; the Court identifies political checks, rather than First Amendment litigation, as the appropriate recourse for those unhappy with their government's expressive choices. Because the constitutional standards that apply to the government as a speaker differ so dramatically from those that apply to the

<sup>17</sup> U.S. CONST. amend. XXV. <sup>18</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>19</sup> This book focuses on the constitutional rights provided by the Establishment, Equal Protection, Due Process, Free Speech, and Press Clauses. Other constitutional provisions may also constrain the government's speech under certain circumstances, like the Take Care and Guarantee Clauses, but I set those possibilities aside for now.

6      *Introduction: The Government's Speech and Why It Matters*

government as a regulator of other parties' speech, the first step in our constitutional analysis is figuring out whether the government itself is speaking or instead regulating others' speech.

How do we decide whether contested speech is the government's or instead the speech of a nongovernmental party regulated by the government? As the key to solving first-stage government speech problems, I propose what I'll call the transparency principle. I focus on transparency because the government's speech is more valuable and less dangerous to the public when its governmental source is apparent. In other words, the government's expressive choices are valuable, and thus insulated from First Amendment scrutiny, because of what they offer the public: information that furthers democratic self-governance by enabling the public to identify and thus evaluate their government's priorities and performance. Because the public can hold the government politically accountable for its expressive choices only when it actually understands the contested expression as the government's, we should require the government's transparency as a condition of claiming the government speech defense. And when the governmental source of a message *is* clear, we should understand the Constitution to permit the government to control the content of that message – but not to restrict public comments on that message based on their viewpoint. The transparency principle also applies to the government's efforts to restrict the speech of its own workforce: in my view, we should understand the First Amendment to permit the government 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.

Many courts and commentators think of the government speech doctrine as dealing only with these first-stage problems. But we still have work to do. Once we are convinced that the government itself is speaking, then the Free Speech Clause constraints on the government as a regulator – like those that forbid the government from regulating private parties based on their viewpoint – do not apply. But the second step in our constitutional analysis requires us to consider whether and when the government as a *speaker* runs afoul of specific constitutional protections. In other words, some constitutional limits still apply to the government as a speaker, even though they differ from those that apply to the government as a regulator.

*Second-Stage Government Speech Problems: Determining When the Government's Speech, By Itself, Violates the Constitution*

Second-stage government speech problems focus on whether and when specific constitutional provisions (like the Establishment Clause, the Equal

*The Constitutional Implications of the Government's Speech* 7

Protection Clause, the Due Process Clause, and more) restrain the government's speech. Second-stage problems present challenging constitutional questions in part because the government's speech involves an exercise of governmental power distinct from its lawmaking and other regulatory actions that control behavior through, for example, financial or criminal penalties; some describe this distinction as one between the government's "soft" and "hard" powers.<sup>20</sup> The Surgeon General's report on the dangers of tobacco exemplifies the government's speech, its soft power: the government informed but did not imprison, fine, or tax. Contrast, as an illustration of the government's hard power, Congress's later enactment of a law requiring tobacco manufacturers to publish the Surgeon General's warning on their packages and advertisements, with the failure to comply punishable by a \$10,000 fine.<sup>21</sup> As another example, the original Pentagon Papers themselves – the series of reports commissioned by Defense Secretary Robert McNamara to study the history of the United States' involvement in Vietnam – represented the government's own speech, entirely apart from its lawmaking or other regulatory action. But the Nixon administration later exercised its hard powers when it sought – and for a few days, federal courts acquiesced in granting – an injunction to stop *The New York Times* and other newspapers from publishing the papers.<sup>22</sup> New Hampshire's choice of "Live Free or Die" as its motto represents the state's expressive choice, its speech, as does a school board's decision to start the day with the Pledge of Allegiance. But when the government compels private (that is, nongovernmental) parties on pain of punishment to display the state motto or repeat the Pledge, it exercises its traditional regulatory powers, which triggers the Free Speech Clause rules that apply to the government as regulator, rather than speaker.<sup>23</sup>

"Hard" and "soft" power are not legal terms of art, but instead metaphors that describe relative points on a continuum of government power. Even so, it's not always so easy to separate the two. And some things share both qualities at the same time depending on where you look, like an energetic kitten with the fur of an ermine and the teeth of a shark. Stroke it when it's at rest: it's soft. Receive its fangs with your flesh: it's hard (and sharp). The government's speech similarly comes in a variety of textures, some more flinty than others.

<sup>20</sup> E.g., Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 721 (2012); Jacob E. Gerson & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577 (2008).

<sup>21</sup> See Public Health Smoking Act of 1970, Pub. L. 91-222, 84 Stat. 87 (1970), <http://uscode.house.gov/statutes/pl/91/222.pdf>.

<sup>22</sup> See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>23</sup> See *Wooley v. Maynard*, 430 U.S. 705 (1977).

To help us think about these second-stage government speech problems – that is, whether and when the government's speech, by itself, violates our constitutional rights – I suggest that we ask and answer a series of questions about the consequences of, and the motivations underlying, the government's speech. Some of these questions focus on the different types of harmful effects, or injuries, that the government's speech may inflict upon its listeners. When we look at the effects of the government's speech, we ask whether the targets of the government's speech suffered harm, whether we should hold the government responsible for causing that harm, and whether a specific constitutional provision bars the government from inflicting that particular harm. Some of these questions focus instead on the various purposes underlying the government's speech. When we look at the government's motives for speaking, we ask why the government chose to speak in a certain way, and whether the constitutional provision at issue denies the government the power to speak for that reason. Let's preview these questions in a bit more detail:

*When does the government's speech change its targets' choices or opportunities to their disadvantage, and does the Constitution bar the government from causing those changes?*

Here we consider whether and when the government's speech changes its listeners' choices or opportunities in ways that would violate a specific constitutional provision if the government accomplished those same changes through its lawmaking or other regulatory actions. Think, for example, of the government's threats that silence dissenters as effectively as jailing them, the government's lies that pressure its targets into relinquishing their constitutional rights as effectively as denying those rights outright, or the government's religious speech that coerces listeners' participation in prayer or other religious observance as effectively as fining or taxing those who fail to partake. This approach sometimes requires us to wrestle with difficult questions about the requisite causal connection between the government's speech and harm to its targets' choices and opportunities.

*When does the government's speech inflict expressive, or dignitary, harm upon its targets, and does the Constitution bar the government from causing those harms?*

Here we remain focused on the effects of the government's speech but consider instead whether it inflicts expressive, or dignitary, harm upon its targets. Rather than asking whether the government's speech has interfered with its targets' choices and opportunities, we query whether the government's speech has injured their dignity by treating them as outsiders to the political community, by failing to treat them with equal concern and respect because of who they are or what they believe. Think, for instance, of the



*The Constitutional Implications of the Government's Speech* 9

government's speech that communicates hostility to or disrespect for its targets based on their religion (or nonreligion), or their race, gender, or sexual orientation. Under this approach, we grapple with difficult questions in determining when the government's speech delivers a message of denigration or disrespect, and whether the relevant constitutional provision protects us from those harms.

*What are the purposes underlying the government's speech, and does the Constitution bar the government from seeking to accomplish those purposes?*

Here we turn from the possible harmful consequences of the government's speech to consider instead the government's reasons for speaking. Sometimes the government speaks to accomplish objectives that some, perhaps many, of us find morally wrongful or constitutionally illegitimate. This can be the case, for example, of the government's speech intended to advance some religions at the expense of others, to harm members of unpopular groups, or to interfere with constitutionally protected rights. Under this approach, we must identify the government's reasons for speaking and determine whether the constitutional provision at issue denies the government the power to speak for those reasons.<sup>24</sup>

These questions reflect different approaches to the second-stage constitutional law problems triggered by the government's speech. As we'll see, our theory of a specific constitutional provision – in other words, our understanding of the values it protects – often drives our preferences among these approaches. And because different constitutional provisions often protect very different values, our preferences among the approaches may differ from provision to provision. By applying these approaches in different settings in the chapters that follow, I hope to illuminate their various strengths as well as their limitations in solving second-stage government speech problems. My point is not that any one of these approaches is necessarily better than another, nor to persuade you to answer these questions in any particular way; I hope instead to show that this series of questions gives us a helpful framework for thinking about these problems.

<sup>24</sup> In this book, I'll generally use the terms "intentions," "purposes," and "motivations" interchangeably. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 534–535 (2016) (observing that courts often use these terms synonymously). To be sure, we can, and in certain contexts should, recognize shades of distinction among these terms, but for now I put those subtleties aside.

The difficulties of these questions counsel that we proceed with care. We may wonder whether efforts to constrain the government's speech through constitutional litigation will deter government speakers from engaging in important expression. Indeed, a central thesis of this book is that the government's speech often delivers great value: the more the government speaks, often the better for the public. We may worry that the government's critics will exploit constitutional litigation to attack the government's speech for partisan, rather than principled, reasons. We may fear that efforts to identify constitutional limits on the government's speech will force courts to undertake difficult, even dangerous assessments of the political branches' expressive choices. We may query whether claims that the government's speech violates the Constitution are even justiciable – that is, whether the federal courts have the constitutional power to decide them. Difficult government speech problems force us to choose between holding our government constitutionally accountable for its destructive expressive choices and hamstringing the government's communication in counterproductive ways. This is no easy choice.

That constitutional litigation is a limited and imperfect tool for curbing abuses of the government's expressive powers, however, does not mean that it is without value. The ugliest of the government's expressive choices are often those least susceptible to political redress, as the government sometimes speaks in damaging ways precisely because those messages appeal to its preferred constituencies. This can be the case, for example, when the government targets vulnerable communities or unpopular dissenters. An independent judiciary offers a crucial check on the government's politically successful choices that undermine key constitutional values.<sup>25</sup>

As a constitutional scholar, teacher, and lawyer, I view these problems primarily through the lens of constitutional law. Even so, I acknowledge the great value offered by other disciplines in thinking about them. Philosophers and political scientists, for instance, can help us understand when the government's speech is good (or not) as a matter of moral or democratic theory, and behavioral experts can help us understand how speech shapes its targets' responses, for better and for worse. I hope that anyone interested in the uses and abuses of government power will engage these questions.

For these reasons, throughout this book I shine a spotlight on the many shapes and forms of the government's expression to help us recognize its

<sup>25</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (explaining that the Constitution “protects the citizen against the State itself and all of its creatures. . . . [T]hese have, of course, important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).