

NOTICING THE GOVERNMENT'S VOICE AND PONDERING ITS IMPLICATIONS

THE GOVERNMENT'S SPEECH AND THE CONSTITUTION. By Helen Norton* Cambridge, Mass.: Cambridge University Press. 2019. Pp. i + 242. \$29.99 (paperback).

*Leslie Gielow Jacobs*¹

INTRODUCTION

“[M]uch, perhaps most, human behavior takes place through speech”² Justice Breyer’s observation occurred amidst his dissent from the Court’s choice to pay greater attention and direct heightened constitutional concern to government regulation of the ordinary exchange activities of private citizens, which occur by means of speech. In *The Government’s Speech and the Constitution*, Helen Norton, too, seeks to expose and acknowledge the ubiquity and daily impact of speech. As the title indicates, however, she flips her focus from the more usual emphasis on the government as regulator of private speech to the acts and impacts of the government as speaker. It is the government’s speech that, in her view, deserves greater popular and judicial attention than it has yet received . . . and heightened constitutional concern.

Norton’s book follows Mark Yudof’s *When Government Speaks*.³ Legal scholars and courts, Yudof worried, had “failed to grapple with the realities of communication in the twentieth

* Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado Law School.

1. Justice Anthony M. Kennedy Professor of Law & Director, Capital Center for Law & Policy, University of the Pacific, McGeorge School of Law. Thanks to Emma Woidtke for excellent cite checking assistance.

2. Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting).

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

century,” specifically the massive power of the government to “dominate[] the flow of ideas and information” and thereby falsify consent.⁴ His book aimed to evaluate the extent of the problem the government’s speech poses to democracy, expose the failure of classic First Amendment theory to identify and address it, and assess the abilities of various actors, by various means, to counteract the government’s power in the speech market. The danger Yudof identified was structural. The salient injury was “to us all.”⁵ And the aspiration was “the creation of a structure for government and nongovernment communication that enhances autonomy, choice, and respect for the person” to correct the communication loop between government and citizens to put citizens in control.⁶ Constitutional doctrine, and the role of courts in implementing the changes he suggested, appeared as but one part of a survey of democratic and communications theory and research and recommendations aimed at broad, systemic change.⁷ Yudof hoped the book would “spark scholarly debate of long-neglected issues,” and it did.⁸

Fast forward to the twenty-first century and the realities of communication, the government’s power to communicate relative to its constituents and others seeking influence over them, and constitutional doctrine have changed. The rise of the internet and social media has augmented the government’s power to communicate more widely and in new ways. But private corporations own and operate these vast, wide-open spaces for public communication and control the gates, foreign governments vie to manipulate consent according to an agenda that may, or may not, align with the interests of the current American national government, algorithms available to the highest bidder shape citizen opinions and political behavior, and constitutional doctrine increasingly privileges corporate power to communicate free from government restraint. “Government speech” has become a recognized category within the subset of Free Speech

4. *Id.* at xv.

5. *Id.* at 164.

6. *Id.* at 89.

7. *Id.* at 259 (“Courts . . . are risky guardians of government expression that may falsify consent. And the risk is greatest when direct constitutional limits are imposed.”).

8. *Id.* at xvi; Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983) (book review); Steven Shiffrin, *Government Speech and the Falsification of Consent*, 96 HARV. L. REV., 1745 (1983) (book review); Mark V. Tushnet, *Talking to Each Other: Reflections on Yudof’s When Government Speaks*, 1984 WIS. L. REV. 129 (1984) (book review).

Clause doctrine where the government facilitates private speech. And the internet and social media have compounded and made more visible the severe harms to individual autonomy, choice, and security that specific instances of speech by government or nongovernment actors may cause.

Norton builds on Yudof's call to recognize the omnipresence and dangers of the government's speech, but shifts her gaze. She sets her sights firmly on constitutional doctrine and focuses her concern on how the government's speech may violate individual rights. "What are the constitutional rules that govern [the government's speech] choices?" she asks (p. 5). Norton's purpose with respect to that question, for the most part, is to provide a framework to aid readers to think more clearly about what those rules should be, rather than to advocate for particular results. And Norton seeks to reach a wide swath of readers beyond legal scholars and courts. The book is part of a series directed at providing "experts, teachers, policymakers, students, social activists, and educated citizens" "contexts for understanding contemporary . . . dilemmas" and "in-depth analyses of theories, existing and past conditions, and constructive ideas for legal advancements."⁹ Norton adds that she hopes that anyone who is "interested in the uses and abuses of government power"—the core subject of constitutional law in her view—will engage with the questions and issues in her book (p. 10).

Speaking effectively to readers with such varying levels of expertise in a discussion about constitutional doctrine is a challenging task. The niche of doctrine that Norton seeks to isolate—the rules that apply to "what the government *says*"—exists within the much more vast and complicated doctrine of "what the government *does*" (p. 3). The slim book covers a lot of ground. This includes two distinct doctrinal questions—how to define government speech and what rules should limit it. The first exists against the complex background of government processes and the many different ways that government entities may interact with private speakers. The second draws from theory and doctrine that apply to at least four separate constitutional rights

9. The series is the Cambridge Studies on Civil Rights and Civil Liberties, edited by Alexander Tsesis. The quotation comes from the series' web page. *Cambridge Studies on Civil Rights and Civil Liberties*, CAMBRIDGE UNIV. PRESS, <https://www.cambridge.org/core/series/cambridge-studies-on-civil-rights-and-civil-liberties/D30BD9E3FF24C27B641FDFB5E325DAF1> (last visited Jan. 30, 2021).

provisions. Additionally, the book is about reasoning from the core values that underpin constitutional provisions, not about the theories of interpretation that lead to choices among those core values. So, theories appear as “approaches to,” or “understandings” about, constitutional meaning, without further grounding in methodology, the judicial role, or legitimacy. Readers are told to check their “reactions” and “preferences” among the doctrinal possibilities, and to understand that their different “feelings” trace to their own “theor[ies] of the values underlying the constitutional provision in question” (pp. 92, 141). Kind and reasonable people, Norton cautions, may reach different conclusions about constitutional meaning and applications to particular instances of government speech. Provoking principled decision making about the “hard and important” questions raised by government speech is her goal, and prodding readers to recognize the “nuances and complexities” inherent in these constitutional judgments is a step toward it (p. 22).

Some legal experts may chafe at the generalizations necessary to cover so much ground and the lack of interpretative grounding, while even highly motivated lay readers may struggle to gain the context to engage in the principled thinking about constitutional doctrine that Norton seeks to provoke. But these are the extremes. Norton aims wide and, for the most part, hits the sweet spot. The book is one of a kind in isolating government speech and compiling examples across the doctrines of multiple constitutional rights. For legal experts, she shakes up familiar terrain, offering groupings of behaviors, theories, and cases, which some of us may dispute, but which, by means of the novel presentation, make all of us see the doctrine differently, and think about it—which is what she set out to do. For policymakers and advocates, the book provides a unique first-stop overview as they consider strategies and options to address harmful government speech. For those less learned in the law, the book’s clear structure, conversational narrative, engaging examples, concise summaries of theories and cases, and patient explanations make its content accessible, relevant, and interesting, and thus likely to fulfill the book’s purpose of provoking clear thinking about the values and dangers of government speech.

I. THE FRAMEWORKS

“Governments must speak in order to govern,” Norton begins (p. 1). By means of chapters, sections, subsections, and guideposts in the text, Norton methodically slices through the universe of constitutional doctrine as she directs readers to the specific questions the book addresses. The first slice is the most significant, excising force-of-law government actions to isolate the focus of book: the distinct power of speech as exercised by the government. “The government is unique among speakers,” Norton cautions, “because of its coercive power as sovereign, its considerable resources, its privileged access to key information, and its wide variety of speaking roles” (p. 11). Norton begins by mapping out the government’s many and varied audiences, speakers, and types of speech choices. The audience includes listeners, internal and external, domestic and foreign. The speakers may be individuals or entities, located in all three branches of government, and at all levels, federal, state and local. The speech choices include what to say, how to say it, and to whom, and what not to say, by means of a decision to keep a secret or not to express a point of view (pp. 11–22). This prelude “attune[s] our ear to the government’s voice” (p. 11), primes us to “recognize its presence in, and assess its impact on, our daily lives,” (pp. 10–11), and cues the book’s core question: “When does the speech of this unusually powerful speaker violate our constitutional rights and liberties?” (p. 3).

Norton proposes a framework for thinking through this big question, which further partitions the constitutional questions that surround the government’s speech. Her project draws on the many articles she has authored on government speech (pp. viii–ix). The earlier pieces concern the boundaries of the “government speech” category, or defense, which was “recently minted” at the time she wrote.¹⁰ The later pieces survey the harms that government speech may wreak, explore whether those harms may be cognizable within the doctrine of selected individual rights guarantees, and consider possible remedies. The framework she proposes and the chapters of the book mirror this sequence. Norton’s framework asks us to direct our thinking through two “stages” (p. 5). First-stage problems “force us to untangle

10. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

competing governmental and private claims to the same speech” (p. 5). Second-stage problems require readers to “consider whether and when the government’s speech infringes specific constitutional rights” (p. 5).

A. STAGE ONE

First-stage government speech problems—the topic of chapter one—occur in the subset of instances where the government seeks to control the content or viewpoints of speech the speaker asserts is privately expressed. The question in these instances is whether the government acts as speaker on its own behalf or regulator of private speech.¹¹ The answer matters because the Free Speech Clause limits differ dramatically, imposing little or no restraint on the government’s discretion to tailor the message of its own speech¹² and strict limits on government’s ability to censor the content of private speech.¹³

Norton begins with a plain-English explanation of the location of the government speech defense within free speech doctrine and its significance.¹⁴ The chapter then traces the genesis

11. These instances include when private individuals deliver or contribute to speech in government programs or on government property, when they speak with government funding, and when they speak as government employees. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding when health care providers deliver speech pursuant to a government program with rules that prohibit discussing abortion the product is government speech); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (concluding that, when beef producers are required by regulation to fund a government advertising campaign promoting generic beef, the product is government speech); *Sumnum*, 555 U.S. 460 (holding that, when private organizations donated monuments displayed in a public park, the product is government speech); *Garcetti v. Ceballos*, 547 U.S. 410, 430 (2006) (stating that when public employees speak within the scope of their official duties, the product is subject to the control of the government employer). *But cf.* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833–34 (1995) (distributing public university funds to student groups, for the purpose of promoting a broad exchange of viewpoints, is individual speech).

12. *Sumnum*, 555 U.S. at 467 (“Government is not restrained by the First Amendment from controlling its own expression”) (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139, n.7 (1973) (Stewart, J., concurring))).

13. *Id.* at 469 (noting that any government restriction of private speech “based on the content of the speech must satisfy strict scrutiny” (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985))); *id.* at 470 (explaining that, even when government property does not constitute a traditional public forum, to which public access is constitutionally required, when a government entity creates a more limited forum for “private speakers,” access rules must be “reasonable and viewpoint neutral” (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001))).

14. P. 27 (“First, some background.”); p. 28 (“The Court’s government speech doctrine thus provides the government with a defense, a shield, from Free Speech Clause challenges brought by private speakers . . .”).

and evolution of the government speech defense, through review of the Court's decisions. This is a very complicated doctrinal area, intersecting with the complex law that governs legislative and administrative procedures, and the terms that attach to government programs, and with the notoriously obscure judicially created forum doctrine. Norton does a good job explaining the facts and reasoning of the decisions, with helpful italicized headline quotes introducing the cases and summarizing the movement in the doctrine each accomplished. The series of cases, Norton explains, "reveals the Court's learning curve," and through her review, "we can watch the Court teach itself about government speech" (p. 31). These lessons learned are, first, that the government must speak to function effectively, that it may spend taxpayer dollars to deliver its own messages, and that when it does so, the strict rules that limit the government's power to dictate the content of private speech do not apply. Second, although the content of the government's speech choices are not politically examinable, they remain subject to political checks. Third, and most recently, while a realm of government speech must exist for democratic governance to work, it is a doctrine "susceptible to dangerous misuse," and so the Court will "exercise great caution" when faced with appeals to extend it lest the government "silence or muffle the expression of disfavored viewpoints" in the guise of broadcasting its own speech (p. 41).

The case review both marks where we are and "guide[s] our thinking about how to go forward" (p. 30). Norton then offers her "framework for approaching the challenging first-stage problems to come" (p. 30). Norton's "framework" is application of "what [she] call[s] the transparency principle—that is, an insistence that the governmental source of a message be transparent to the public" (p. 30). "[T]he value of the government's speech," Norton explains, "springs primarily from its capacity to inform the public about its government's principles and priorities" so that the citizenry has "more information with which to evaluate [its] government" (p. 43). This value obtains only when "the governmental source of a message is clear to the public at the time of its delivery" (p. 44). Programmatic directives are difficult for ordinary citizens to find, government speakers are inclined to obscure their identities to gain the credibility of private speakers or otherwise to "manipulate the public's attitudes toward its views," and nongovernmental speakers may seek to "mislead

their listeners” by falsely claiming the government’s imprimatur for their own views (pp. 44–45). Therefore, Norton continues, the government must “transparently tak[e] political responsibility for its expressive choices” as a condition to gaining the benefit of the government speech defense (p. 44). Expressly marking speech as its own, she says, is easy and costless for government speakers to do (p. 45). She identifies “source clues” to guide listeners’ and courts’ assessment of speaker identity, and proposes a “doctrinal incentive” for government speakers to mark their speech with “express cues,” whereby the presence of such cues “trigger[s] a presumption that a contested message is governmental in origin,” and their absence creates a presumption that the government may not invoke the government speech defense (p. 46).

Norton then reconsiders the Court’s cases in light of her proposed transparency principle. Cases “early in its learning curve” do not follow her prescription (p. 49). The government source of a regulatory mandate that doctors and other employees of funded family planning programs refrain from discussing abortion was not “apparent to listeners—that is, patients—at the time of the message’s delivery” (p. 50). This source confusion may have misled those patients to evaluate the counseling as if it were the product of the health professionals’ unrestricted opinion and expertise. The government’s “failure to own up to the message” thus inflicted “constitutional injury” (p. 50). Similarly, viewers “watching the ads while sitting at home in their living rooms” would not understand that a message labeled “Funded by America’s Beef Producers” was actually directed by the government (p. 51). The Court’s view that the terms of the program contained in published regulations sufficiently revealed the source of the speech was “an insider’s view of accountability, a judicial choice to privilege form over function” when “transparency would have cost the government nothing while providing value to the public” (p. 51). The transparency principle also shows, Norton claims, why the circumstance of specialty license plate messages present “a hard case” (p. 51). The graphics are placed on a government-created product under the state’s name, but proposed by individuals and displayed on their property. So, the source cues cut both ways. Norton concludes that, in these types of instances of apparently combined government/private messaging, the message should be viewed as

the government's, with individuals free to acquire it and display it as their own, or not (p. 51).

Norton next applies the transparency principle framework to project resolutions to future first-stage issues. New expressive technologies should not confuse application of the core principle that the government must expressly own the speech it generates. Where the government engages in one-way digital expression, on websites and through social media, the speech is its own. Where it invites the public to interact on the sites, and share views, the rules that restrict the government's ability to regulate private speech should apply (pp. 53–55). And “a commitment to transparency should preclude the government's use of opaque technologies that conceal the governmental source of speech,” like sock puppetry and “deep fake” technologies (p. 55). The transparency principle can help guide resolution of whether a government official, like the president, speaks for the government, subject to constitutional rules, or as a private citizen on social media sites and elsewhere (pp. 56–57). The “nature, scope, and power of the speaker's governmental position,” as well as the expression's topic—of public or private concern—and its audience can inform the inquiry (p. 57).

Additionally, the transparency principle contradicts the Court's conclusion that the government may control as its own speech employee speech delivered pursuant to their official duties¹⁵ (p. 61). The Court's “wooden bright-line rule” fails to balance the public value of government transparency, in the form of whistle-blowing and other work-related speech, against the government's interest in workplace control and efficiency (pp. 63–65). A rule that better accommodates the “democracy-enhancing value of the government's speech” “would 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” (p. 64). Employee speech that does not meet “this demanding transparency-based test for government speech” should be subject to the balancing test that applied before the current rule,¹⁶ or else supervisors remain free to discipline internal whistle-blowers “with impunity,

15. *Garcetti*, 547 U.S. 410.

16. For the balancing test that applied prior, see *Connick v. Myers*, 461 U.S. 138, 143 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

chilling valuable expression to the public's detriment" (pp. 65–66).

B. STAGE TWO

The bulk of the book deals with the second-stage problems of “whether and when the government’s speech itself infringes specific constitutional rights” (p. 23). Separate chapters cover the intersection of government speech with the rights guaranteed by the Establishment, Equal Protection, Due Process, and Free Speech and Free Press Clauses. The final chapter surveys the range of possible remedies in and out of court to constrain harmful government speech.

Norton begins with the Establishment Clause because it is “the area in which courts and commentators to date have most often wrestled with whether and when the government’s speech, by itself, violates the Constitution” (pp. 69–70). The structure of the chapter forms the template for the chapters that follow. The approaches Norton draws from Establishment Clause doctrine and commentary form the second-stage framework of three questions about the characteristics of a particular instance of government speech—its effects or purpose—she applies to each constitutional provision. The purpose of the framework, Norton cautions repeatedly, is to guide readers’ thinking in an orderly way through the many second-stage considerations, rather than to resolve them (p. 92). Her goal is to explore and reveal the approaches’ “various strengths as well as their limitations,” their “difficulties, gaps, and ambiguities,” so we can consider for ourselves what the resolutions should be (pp. 9, 26). “The more we recognize the volume and variety of the government’s speech in our lives,” and the better we understand “the complexities of the constitutional questions triggered by the government’s speech,” “the more thoughtfully we can puzzle over its constitutional implications” (p. 233).

Chapter two begins with an imaginary application that places the reader in the midst of a situation where the government’s speech intersects with the Establishment Clause mandate. Examples of other current controversies involving government speech and religion further draw the reader in (pp. 68–69). A background section introduces the anti-establishment mandate, offers options as to its meaning, and identifies three “approaches” to identifying which characteristics of government speech signal a

constitutional violation—noncoercion, nonendorsement, and neutrality (p. 70). Separate sections lead readers through applications of each of these approaches in cases and examples, noting where their advocates agree and disagree, and tracing those opinions to different choices about constitutional meaning (pp. 71–85). A section that follows compares and contrasts the approaches in action¹⁷ (pp. 85–88).

Norton's conclusion establishes the framework for the discussion in the chapters that follow. The Establishment Clause approaches, she suggests, can be “tools for thinking about second-stage government speech problems more generally” (p. 92). From these provision-specific approaches, Norton draws the series of three questions aimed at identifying the circumstances under which government speech may violate other constitutional rights guarantees. The first two questions ask about the effects of the government's speech. Question one asks “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” (p. 8). The second inquires whether the government's speech “inflicts expressive, or dignitary, harm upon its targets” 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” (p. 8). The third addresses the government's purpose for speaking, and asks “whether the constitutional provision at issue denies the government the power to speak for [those reasons]” (p. 9). “Our answers to and our preferences among these questions,” we are told, “will be informed in part by our theory of the values underlying the constitutional provision in question” (p. 92).

Chapter three, which addresses government speech and equality, does a particularly good job of providing the information readers need to trace their conclusions about the constitutionality of specific instances of government speech back into core values that determine the scope and applications of the equal protection guarantee. The presentation follows the template, with a robust presentation of historical and current examples of “the good” and “the bad and the ugly” government speech (pp. 94–103).

17. Norton includes a final note on justiciability (pp. 88–92).

Importantly, in the background section, before posing and addressing the triad of questions, Norton includes brief sketches of what she identifies as the two leading theories of the values the equal protection guarantee implements—anti-classification and anti-subordination (pp. 104–06). These sketches allow readers to ground their preferences about constitutional meaning at the outset, and to check their conclusions about the constitutionality of the many and various instances of government speech set out in the text against this grounding.

The section that addresses the first question presents cases involving speech that causes concrete consequences to its targets, subdivides into speech aimed at third parties, commanding, coercing, or encouraging them to discriminate against the targets, and speech aimed at the targets themselves (pp. 106–12). Finding the point at which the value to individuals of restricting speech outweighs the public value of permitting the government to speak without restriction, Norton notes, “forces us to grapple with important and difficult questions about the requisite causal connection between the government’s speech and discriminatory consequences” (p. 107). The section addressing expressive, or dignitary, harm asks whether “the Equal Protection Clause den[ies] the government the power simply to *say* that its targets are inferior or second-class citizens because of their race or other class status,” even if the speech inflicts no concrete harm (p. 112). This section compares application of the two theories, rather than presenting cases, and draws a connection between criticisms of an expressive harm approach to the meaning of the Equal Protection Clause and those levelled against the non-endorsement approach to the Establishment Clause (p. 115).

The third section explains that a purpose to discriminate signals unconstitutional action under the equal protection guarantee, and asks, “does it also limit the government’s power to *speak*, without more, when motivated by animus?” (pp. 117–18). Norton offers a hypothetical public school announcement that it will stop teaching Latino history as an example of this type of “soft” speech that does not attach to force-of-law action, and notes the difficulty of identifying animus as the intent behind government behavior and the dangers of branding government decision-makers as motivated by it (pp. 118–19). The section that compares and contrasts the three approaches uses the engaging and timely example of display by various government bodies of

the Confederate flag, addressed in depth by a number of lower courts, and returns to the example that opened the chapter, of state laws that require public schools to include anti-gay teaching in their sex education curriculums (pp. 119–24). In separate paragraphs, with respect to the curriculum example, Norton helpfully maps out the questions, issues, and potential conclusions that flow from a focus on harm to class members' choices or opportunities, expressive harm, and the motivations for government speech (pp. 124–26).

Norton again eschews persuasion in favor of a purpose to provoke thought. The problems raised by the material, she explains, “force us to think hard about the meaning of equality, about when the government’s speech threatens our conception of equality, and about our hierarchy of values when we weigh the costs and benefits of constraining the government’s speech related to equality” (p. 126). Next, however, we see the flicker of normativity that underpins the stage-two project of the book. Yes, she acknowledges, the difficulties that attach to the inquiry into the constitutionality of particular instances of government speech “may mean that even the nastiest of the government’s expressive choices may only rarely violate the Constitution” (p. 126). Then she concludes: “[b]ut the answer to the question: ‘When does the government’s speech violate the Equal Protection Clause’ is not ‘never,’ but instead ‘sometimes’” (p. 126).

Chapter four addresses the government’s speech and due process. Examples involve the clause’s substantive and procedural components, including criminal procedure applications. The chapter focuses on the government’s lies, but also includes speech that discloses private information or humiliates its targets (p. 127). It follows the familiar format, once again including a nice prefatory section setting out historical and current examples of the government’s lies (pp. 128–34). The chapter asks, “[w]hen, if ever, does the government’s speech deprive its targets of ‘life, liberty, or property?’” (p. 134). We are told that “[o]ur theory of the Due Process Clause and the nature of the liberty and property interests that it protects” will “drive our doctrinal preferences, our reactions to the various approaches for considering the[] second-stage government speech problems [in this chapter]” (pp. 134–35). This time, however, we do not receive sketches of the possible core meanings of the clause, and more specific meanings of “liberty” and “property,” which readers who do not know this

area of constitutional law well may miss when they attempt to follow the instruction to trace their reactions to specific instances of speech to fundamental values.

Instead, the sections modeled on the three questions proceed, with multiple subsections covering broad terrain. These sections combine information in new and interesting ways, and provoke thought about the constitutional implications of a wide variety of types of government speech. Some readers may have to stop and catch their breath, and think hard about whether they agree with the labeling and groupings of cases, and the progression of the reasoning across disparate applications within the same provision. But, of course, that's the point. Norton employs here the sequenced methodology apparent throughout the book. These characteristics of government speech, which form the basis of the three-question framework, proceed generally along a spectrum from already recognized in the doctrine as unconstitutional to only theorized. The discussion within these sections often employs this sequencing as well. Here, the section addressing the first question, speech that coerces or unduly burdens its targets' liberties, leads with cases finding a constitutional violation when the government's lies lead to a defendant's wrongful imprisonment or coerces suspects to give up their constitutional rights. After establishing that this type of speech may sometimes violate the Due Process Clause, Norton acknowledges that "relevant judicial precedent outside the criminal justice setting is slim," but suggests "we can nevertheless build upon this analysis to identify other circumstances" in which the government's lies or threats to engage in unlawful conduct may violate the due process guarantee (p. 140). These applications include speech that burdens women's reproductive rights, denies voting rights, discloses private information, and inflicts reputational harm. While the applications can be dizzying, repetition of the same analytical structure within this chapter, and others, builds familiarity in the reader, and allows the reader to engage in sequential comparison, within each chapter, and within the subparts.

Chapter five explores whether and when the government's speech may violate individual free speech rights, by causing the harm of silencing individual speech or humiliating or disparaging its targets, or being uttered with the intent to silence others' speech (pp. 158–73). A separate section asks whether and when

the Free Press Clause limits government speech beyond the strictures of the free speech guarantee and helpfully ties the exploration of options to core values distinct to the free press guarantee (pp. 176–82).

Chapter six covers the government’s speech that takes sides in political contests. The constitutional concern, Norton notes, is the one that sparked Yudof’s book—that government will indoctrinate its citizenry rather than respond to, and implement, its will (p. 186). The chapter presents examples, by means of cases and theory, of the many ways government entities may engage in dangerous election speech (pp. 187–204), and contains a thoughtful final section evaluating the values and dangers of such advocacy (pp. 205–11).

The final chapter addresses responses to the government’s harmful speech. These include remedies that are available through courts or legislatures, or could be, counter-speech by government and nongovernment actors, including the press, and more general “pushback” through politics, protests, and other activities from “the rest of us” (p. 234) against abusive government speech.

II. THOUGHTS ON THE “HARD AND IMPORTANT QUESTIONS” RAISED

Norton’s endeavor is ambitious and grand, pulling from “pockets of theory and doctrine . . . to stitch together a coherent framework for understanding the relationship between the government’s speech and our constitutional rights” (p. 26). The hard work is obvious, as are the difficult decisions of what to include and what to omit. Her purpose is to spark reactions and prompt thinking about the complicated and nuanced constitutional implications of government speech, and in that she succeeds. Many thoughts crossed my mind as I read through the book. I will offer a few of them here.

A. STAGE ONE

1. Structure

On a first read, chapter one, which sets out the first-stage framework, proceeds according to an expected scholarly format. Norton explains the doctrine, locates the deficiency, proposes a

solution, and defends it. Norton's defense of the transparency principle's core requirement is thorough, cogent, and, to many of us, convincing.¹⁸ It is not the law, however, and despite Norton's optimism that the Court remains on a "learning curve" with respect to this issue (p. 31), the odds are against it becoming part of the law anytime soon.¹⁹

The transparency principle embeds a choice among competing values that may explain the meaning of the free speech guarantee as it applies to the scope of government speech. Norton draws support for her principle from the Court's early and repeated references to the government's accountability "to the electorate and the political process" as the safeguard against abuse.²⁰ The Court's vision of accountability, however, looks to the legitimacy of the processes that produce the speech program, and the visibility within enacted law of the government as the source of the speech. To support her specific vision of transparency, which depends upon a concept of accountability under which listeners must understand the government source of the speech as they receive it, Norton must draw from the dissenting and concurring comments of Justice Souter, and more general democratic theory (pp. 35, 38).

So, as a contested option, the transparency principle, and the particular concept of accountability that underpins it, together are like one of the "approaches" that structure the thinking Norton seeks to provoke and guide through the second-stage framework. But the two frameworks are not parallel. The first-stage framework is advocacy. The second-stage framework, for the most part, is not. As I went back and forth between the different types of presentations, the first argumentative and filled with authority, the second gently coaxing consideration of options for moving the law to new places, I found myself imagining a stage-two narrative at stage one. If the transparency principle is so obviously the means to deliver the accountability that everyone agrees underpins the government's ability to select among

18. Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 1, 61 (2002) ("[I]n addition to being accountable to the public generally for its effort to influence the speech market, the government must be accountable to listeners who will be particularly affected by the communication.").

19. See *Agency for Int'l. Dev. v. All. for Open Society Intern., Inc.*, 570 U.S. 205, 216–17 (2013) (discussing and distinguishing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

20. Pp. 33–34 (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235–36 (2000)).

viewpoints when it speaks, and application of it so effortless for the government, why won't the Court interpret it into the Constitution? Norton provides some hints of explanations.²¹ Free speech experts can sketch for themselves the theories, or visions of core purposes, that drive Norton's conclusions and those of the Court. But readers with less expertise may find themselves yearning at stage one for the same careful, clear, nuanced explanation from different fundamental understandings of constitutional meaning to implications for doctrine that Norton deploys so well in stage two.

To give a taste of the difference, I will narrow the stage one question to which concept of accountability should determine the scope of the government speech defense and briefly sketch an alternate, stage-two-type presentation. This type of presentation would begin with summaries of the core constitutional meanings that Norton and the Court embrace and guided linkages between those meanings and the rules they generate.²² Norton, I suggest, understands the core free speech value to be political equality. Under this view, the purpose of the clause is to promote the ability of all citizens to participate meaningfully in democracy, power differentials inherent in private ordering corrupt that purpose, and so the Constitution permits, and sometimes requires, the government to restrict the speech rights of powerful speakers to promote the democratic ideal. By contrast, individual freedom to participate without constraint in the competitive ideological market is the ideal under the Court's political liberty view. Government tyranny by means of regulation is more likely to corrupt the flow of ideas than the exercise of private power. Citizens are best at taking care of their own interests and do not need, or benefit from, paternalistic government efforts to adjust the private speech market.

These core values trace to different conclusions about the concept of accountability that must attach to government speech. Norton's concept of accountability looks to the relationship

21. *E.g.*, p. 63 (providing some explanation of the reasoning the Court offered to support its choice of a "wooden bright-line" "formalistic rule" to determine the scope of government control over employee speech).

22. The two concepts of free speech Kathleen Sullivan drew from the majority and dissenting opinions in the *Citizens United v. FEC* decision provide models for identifying the core meanings that animate the different conclusions about the rules that should determine the boundaries of government speech. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010).

between citizen listeners and the government because this is where the transaction critical to effectuating the democratic ideal occurs. The government is a particularly powerful speaker, inclined to obscure its identity for the purpose of skewing messaging in its favor, to the detriment of citizen listeners' equal participation in democracy. The transparency principle, interpreted into the Constitution by the Court, adjusts this power dynamic.

For the Court, the only accountability that must attach to government speech is the same process-based accountability that validates other government actions. Citizen listeners have the ability and responsibility to seek out the information they need to understand the source of communications and make accurate evaluations of the quality of the information and ideas they receive. Efforts by the democratic branches of government to restrict, supplement, or equalize the information listeners receive are more likely to skew messaging and subvert the efficient functioning of democracy than efforts by powerful speakers to hide their identities. This conclusion is equally true with respect to Court interpretations—like imposition of a transparency principle—that burden the government's expression within its legitimate domain.

This altered presentation, I suggest, brings the subtle power of the second-stage advocacy into stage one. Because advocacy it is, albeit with a velvet touch. Despite Norton's protestations that she does not seek to persuade readers to a point of view at stage two, her clear aim is to open readers' minds to new options for restricting government speech to promote political equality. Exposing the core values that underpin the conservative and the expansive views, and their implications in interpretation, forces readers to examine and evaluate them. Tracing their linkage to particular applications educates readers that such a link between result and principle should exist in judicial decision-making, and trains them to demand it when they examine judicial opinions articulating constitutional doctrine. And for those who seek to move from examination to action, it provides the tools to understand and attempt to extricate the root of burgeoning constitutional doctrine, rather than just swat at its discrete manifestations.

2. The Limits to Transparency

As Norton's review reveals, the Court has applied the government speech label to a number of different circumstances in which the government and private individuals combine to broadcast speech. Although this is not reflected in her sorting, the circumstances can be grouped into instances where the government commissions individuals to accomplish an objective, which can be done, in part, by speech,²³ and instances where the government facilitates broadcast of privately generated messages, by granting access to its property or through funding.²⁴ The transparency principle applies well to the first type of instance, because the government source of the speech is likely to be located within the programmatic mandate and not visible to the listener absent doctrine that requires it. In application to this type of commissioned speech, the transparency principle would contract the availability of the government speech defense in comparison to existing doctrine.

The second type of circumstance overlaps with private speech forums.²⁵ The government invites or otherwise agrees to broadcast a wide range of privately generated viewpoints. The government seeks to excise one or just a few of them because it does not want to include that or those viewpoints. Resolution of its power to do so hinges on characterizing the speech that it broadcasts—is it the broadcast of individual messages or does the broadcast create a combined message that is government speech? The transparency principle, to the extent that it functions as a mandate that the government disclose its role in broadcasting speech, works less well to resolve this question than it does in the context of commissioned speech, because, most frequently, the government's participation in producing the speech is apparent to listeners. The question is whether the circumstances of the

23. *Rust*, 500 U.S. 173 (regulating abortion counseling provided by health care staff in federally funded facilities); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (financing generic beef advertisements through required monetary contributions from cattle producers).

24. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (placing private monuments in public parks); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) (messaging of private groups on state license plates); *Matal v. Tam*, 137 S. Ct. 1744 (2017) (trademarking name of musical group).

25. *Summum*, 555 U.S. at 467 (considering whether park monuments should be analyzed under the precedent that applies to government speech or to private speech forums).

government's obvious involvement transform the private submissions into government speech.²⁶ In these applications, Norton's preferred scope of availability of the government speech defense aligns with current doctrine, and the transparency principle does not distinguish the cases.

Once again, I suggest, application of Norton's second-stage methodology can assist here at stage one. The transparency principle stems from the political-equality value. Reasoning from that base value, or its alternative, can explain inclinations about the scope of the government speech defense more fully than the transparency principle alone in the forum-intersection circumstances when citizen listeners' need to understand the genesis of the communication are met. So, as Norton explains in much more depth, the triad of forum-intersection cases involved park monuments, specialty license plates, and trademarks. The Justices agreed unanimously that park monuments created and donated by private groups to the government for display on its property are government speech,²⁷ and that trademarks are not.²⁸ In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,²⁹ the Court split 5–4, holding specialty license plates to broadcast government speech. Norton agrees with this result in this close case.

Facts matter when tracing results from core values. Free speech libertarians and egalitarians are likely to view the circumstances of the specialty license plate design selection process differently. Texas claimed the right to exclude a Confederate flag logo from its program that included 300+ other designs. In response to the Confederate plate proposal, the Texas Department of Motor Vehicles Board invited members of the public to comment on its website and at a public meeting. After considering the responses, the Board voted unanimously not to approve the plate. It explained that “public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable,” adding “that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed

26. *Id.* (looking to the “nature of [the government’s] conduct”).

27. *Id.*

28. *Matal*, 137 S. Ct. 1744.

29. 576 U.S. 200.

toward people or groups that is demeaning to those people or groups.”³⁰

To 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.³¹ Those like Norton, operating from a political equality understanding, may see this sequence of events differently. With speaker/listener transparency satisfied, those who value political equality would ask whether recognizing this type of program as producing government or individual speech would better fulfill that value. The process might well appear to them as a political community’s effort to acquire broad citizen input into what meaning a proposed submission may send. And the result—as opposed to the classic “heckler’s veto” that the dissent perceives—they might view as the legitimate, and equality-promoting excision from a collective broadcast of a message that a “significant portion of the public” interprets as subordinating other members of the community. Into the future, those who view political equality as the Free Speech Clause’s animating value will likely define the circumstances of government speech as somewhat broader than political-liberty adherents, because they will be more willing to see government broadcast of even a very large number of contributions as a statement of collective identity.³² So, as private parade organizers send a collective message through the combination of units, even though the organizers may not endorse the specific messaging of each, so, too, can the government, in circumstances similar to these.³³

B. STAGE TWO

Early on, Norton excises government regulation from her sphere, seeking to focus our attention on the constitutional limits that may apply to government speech “by itself” (p. 110). The

30. *Id.* at 206 (alteration in original).

31. *Id.* at 221 (Alito, J., dissenting) (“The Court’s decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing.”).

32. See Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New Walker Test*, 44 PEPP. L. REV. 305 (2017).

33. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995) (holding private organizers of St. Patrick’s Day parade could exclude gay group).

excision is helpful in that it directs our thinking to the distinct behavior of speech as a means by which the government may accomplish its objectives, and causes us to focus on how government speech may implicate the core meanings of various constitutional provisions in the same way as its conduct, or differently. Segregating government speech as a distinct means by which the government may harm individuals creates a novel and important perspective from which to consider the appropriate scope of a number of constitutional rights guarantees. Yet, as I read through the carefully sequenced sections, chapter by chapter, each of which explores the characteristics of government speech that should trigger constitutional liability, the cutaway of government regulation of private speech seems too blunt.

The relevant characteristics of government speech that Norton identifies are the harms caused by an instance of government speech, including the standard of causation, and the purpose for which it was uttered, and its motivation. Developed doctrine establishes the circumstances under which the government may, consistent with the Constitution, restrict individual speech to avoid these same types of harms, or because of the motivation behind the words. The doctrine implements constitutional values that may or may not apply in the same way to government speech. But as I, as a reader, am repeatedly asked to evaluate which characteristics of government speech should trigger constitutional liability, I find myself referring back to what I know about the rules that apply to the government's efforts to limit private speech that has the same characteristics, to make the comparison. So, too, readers less familiar with this doctrine that Norton seeks to reach might benefit from the backdrop in some places. I will mention a few of these.

One such place that suggests the comparison is in the subset of examples of government speech that coerces or encourages third parties to engage in conduct that would violate the Constitution if the government compelled it directly. Subdivisions direct readers' attention to particular methods or targets of these efforts, which helpfully segregate the readers' thinking and, in the order presented, roughly chart the efforts on a spectrum from blatant lies that prompt third-party action to more gentle encouragement to do so. 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. Identifying this point requires tracing free speech principles to identify the circumstances that signal that the government's authority to avoid harm outweighs the value of the restricted speech.

The doctrine surrounding incitement of unlawful action³⁴ and speech integral to crime³⁵ provides these judgments when the value in the balance comes from individual speech. These rules provide a baseline for thinking about how the same free speech principles should trace to rules when the type of harm is the same, but the value in the balance comes from the government speech.³⁶ 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. For example, the due process chapter begins with cases involving police deception of suspects in the criminal justice setting, and moves through government-mandated communications from doctors to patients about abortion to election ballot statements (pp. 136–46). While it may not be clear precisely where these communications fall on the instrumental/public discourse speech spectrum, adding this consideration to this sequence and others, helped me, and could assist other readers, to consider the “[difficult] causal questions” the third-party government speech cases raise (p. 110).

Another place that suggests the comparison is in the sections asking whether and when government speech inflicts expressive, or dignitary harm, such that it should trigger constitutional liability even when it does not cause concrete harm. These sections rely primarily on theory, with Norton offering suggestions as to why the provision at issue might support such liability, in some circumstances, and noting difficulties with the theories and with identifying and proving the harm. Here, some

34. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

35. See Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981 (2016).

36. YUDOF, *supra* note 3, at 260 (arguing that the “incitement standards under the First Amendment . . . should be applied with far greater stringency to the utterances of the government”).

brief background as to the almost absolute constitutional protection for the expression of ideas by individuals, and the few intangible harms the Court has interpreted the Constitution to allow the government to restrict individual speech to prevent can assist readers to evaluate the liability and causation questions that attach to government speech that may cause the same types of harms. The distinction the Court has drawn between private communications and those of public concern, with respect to speech that defames, invades privacy, or intentionally inflicts emotional distress,³⁷ may help sort instances where the Constitution should prohibit the government's speech "inflicting discriminatory expressive harm" from those where the potential value of the speech, or the difficulty of identifying a determinate meaning, dictates a different result (p. 113). Understanding the broad protection for private expression of "thought that we hate,"³⁸ and the narrow fighting words exception,³⁹ may also help readers evaluate whether free speech values should trace to the same results when the messages come from the government, or whether particular constitutional provisions beyond the Establishment Clause should be interpreted to restrict the government from expressing certain ideas, in certain circumstances.⁴⁰

One more place that suggests comparison is in the sections addressing government speech motivated by animus. For me, understanding that the Constitution absolutely forbids regulating what individuals say merely because of the thoughts that animate the speech is critical to evaluating the proposals, with respect to the various constitutional provisions, that government animus should, in some circumstances, render speech that does not cause concrete or tangible harms to the targeted individuals, unconstitutional.⁴¹ The proposals are interesting and, as is their purpose, thought provoking. Readers who do not understand the

37. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Snyder v. Phelps*, 562 U.S. 443 (2011).

38. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

39. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

40. P. 112 ("[D]oes the Equal Protection Clause deny the government the power simply to say that its targets are inferior or second-class citizens because of their race or other class status?").

41. *E.g.*, p. 152 (proposing that government speech intended to interfere with abortion access may be unconstitutional because of that purpose even if the speech does not actually impede access).

novelty, however, of holding speakers liable for expressing ideas merely because of their reasons for saying them, will lack important information with which to assess the proposals, and some of the commentary. For example, Norton notes that the judges reviewing constitutional challenges to Confederate flag displays “did not consider the possibility that the Equal Protection Clause might forbid the government’s expressive choice if motivated by the government’s animus or other discriminatory purpose alone, absent any discriminatory change in its targets’ choices or opportunities” (p. 124). Although values drawn from the equal protection guarantee may mean that different rules apply to the scope of government, as opposed to individual speech, understanding the broad protection for individually uttered statements of hate, and the constitutional values the rule implements, provides important background to considering the rules that should apply to government speech.

CONCLUSION

This book is an achievement. Norton has taken an area of doctrine that many would not even think of as a discrete unit, and made it her own. “[T]he government’s speech,” Norton argues from the outset, “deserves our attention” because of all the good things and, more urgently, because of all the bad things it can do (p. 2). The call to attention is timely, and the support she offers for it, cogent and captivating. A wide range of readers will refer to it as a resource when they encounter government speech questions in their legal research, or other fields, as they draft laws or regulations, as they lobby for change, as they report on current events or respond to media inquiries about them, and as they notice the government’s speech, more and more, due to Norton’s hard work and patient instruction, and seek a guide to what to think about and how to do it. To the extent that my comments ask for more, it is for more of a very good thing.

