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Government Endorsement: A Reply to Nelson Tebbe's Government Nonendorsement

Abner S. Greene

Response

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Our First Amendment enshrines a key free speech principle—the state may not regulate private speech merely because it is persuasive. Much persuasive speech contributes to harmful ends—people listen to madmen and do bad things. But usually unless there is a tight nexus between speech and harm, the speech must be let free. Or so the U.S. Supreme Court has said, many times.[1] If there is no or little time for more speech in response to incitement of unlawful action, face-to-face epithets, or excitement of crowds, then the police may step in.[2] But with time for more speech, we are supposed to combat bad speech with better speech, fight persuasion with persuasion.[3] There are a few areas other than the clear and present danger of physical harm in which doctrine permits speech regulation based on content—some libel,[4] with its unique form of harm that is often impervious to more speech as a complete remedy; and some sexual speech, regulable in part because of outdated mores the Court has not seen fit to revisit,[5] and in part because

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1. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–72 (2010); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

2. *See Brandenburg*, 395 U.S. at 447 (incitement); Feiner v. New York, 340 U.S. 315, 320–21 (1951) (excitement); Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 574 (1942) (fighting words).

3. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg*, 395 U.S. 444.

4. *See generally, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

5. *See generally, e.g.*, Paris Adult Theatre I v. Slaton, 418 U.S. 939 (1974); Miller v. California, 418 U.S. 915 (1974).

of harm to children.[6] At bottom, though, the law robustly protects the right to try to persuade others of all sorts of ideas and ends.

When the state speaks, we are usually not concerned with the kinds of harm that sometimes render private speech regulable. Much of the debate over the proper scope of government speech is about whether and when it is appropriate for the state to take sides on controversial, unsettled matters of public policy. Should the state in a liberal democracy be as neutral as possible, in its speaker role, regarding conceptions of the good life? If it may endorse one view over another in a matter of current social contest, what are the limits? And if there are limits, are they properly seen as enshrined in the Constitution, or are they a matter of ideal political theory only? (As such, we could still plead with our representatives to toe such a line, rendering the ideal actual, but not based in constitutional argument.)

I have taken what is sometimes called a "thick perfectionist" (or what Nelson Tebbe calls an "engaged democracy")[7] position in this debate.[8] With a few limits, the state, as a representative of the people in their capacity as citizens, may and should take distinctive positions on contested issues to achieve certain public goods and to teach what the state believes to be true. Citizens generally should understand that the state is just one voice in such debates, and should give the state's point of view whatever weight it deserves on the merits, adding whatever dollop of authority is appropriate because it is the state speaking. Just as we permit and desire a robust exchange of many points of view when private persons are speaking, so should we adopt a similarly pluralistic attitude toward government speech. Some governmental units may, for example, want to teach their teenagers about condom use to prevent disease and teenage pregnancy; others may prefer to tout the virtues of abstinence; still others may want to teach both possibilities; and others may prefer to stay out of the subject matter

6. *See generally, e.g.*, New York v. Ferber, 458 U.S. 747 (1982).

7. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 700 (2013).

8. *See generally* Abner S. Greene, *Ordered Liberty: Rights, Responsibilities, and Virtues*, 28 CONST. COMMENT. 421 (2013) (reviewing James E. Fleming and Linda C. McClain's *Ordered Liberty*); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000) [hereinafter Greene, *Government of the Good*].

entirely. There's nothing in the Constitution or in liberal democratic theory, properly conceived, that should limit the state here, or in most other matters of social policy debate.

Others have argued for a kind of strict neutrality in state speech—either for classic libertarian reasons or because of the notion that it is proper for the liberal democratic state to promote certain ends of the just and the right, but not of the good.[9] Still others have adopted more "thin perfectionist" (or what Tebbe calls "framework democracy")[10] positions. Linda McClain (sometimes writing with Jim Fleming) urges the state to help citizens develop their capacities for autonomy, or self-government;[11] Corey Brettschneider advises the state to promote free and equal citizenship.[12] These virtues of autonomy and equality are ones we should applaud and seek to promote in various ways. But they are comprehensively liberal ideas, and the state should not be limited to promoting them, at least not in a pluralistic nation such as ours, where political liberalism should be seen as generating a multitude of ideas about the good life, from both the private and public sector.

In *Government Nonendorsement*, Tebbe isn't really concerned with this debate about the proper scope of government speech. His "nonendorsement" is not the nonendorsement of either the strict neutralists or the thin perfectionists. Rather, he is (properly) concerned with various constitutional rights that the state might violate through, inter alia, speaking or funding speech. If the state were to engage in racist speech or fund private speakers to advance a racist message, Tebbe credibly argues this would violate the Equal Protection Clause.[13] When the state erects a religious symbol that a reasonable observer would take as endorsing one religion over others, doctrine holds, and Tebbe agrees, that this violates the Establishment Clause.[14] (He also thinks it might violate the Equal Protection Clause.)[15] Tebbe also correctly notes that some state speech

9. *See* Greene, *Government of the Good*, *supra* note 8, at 18–22.

10. Tebbe, *supra* note 7, at 697.

11. *See generally* JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY (2013); Linda C. McClain,*Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998).

12. *See* COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? (2012).

13. *See* Tebbe, *supra* note 7, at 658–65.

14. *See id.* at 649.

15. *See id.* at 709–12.

might rise to the level of placing an undue burden on a woman's right to choose whether to have an abortion, thus violating the Due Process Clause.[16]

None of this has anything to do with the freedom of speech. That part of the First Amendment says that "Congress shall make no law . . . abridging the freedom of speech."[17] The Free Speech Clause is properly understood as placing various limits on federal, state, and local governmental regulation of private speech, as discussed above. Why should we think it also limits state speech? State speech might violate other constitutional rights—such as equal protection, nonestablishment, and due process—but there's no reason to think the kind of state speech discussed in the preceding paragraph also violates the Free Speech Clause.

For the most part, at least regarding these three examples, Tebbe does not disagree, but he does offer an alternative theory regarding the state racist speech example, suggesting such might abridge the freedom of speech as well as violate equal protection.[18] In part he references an argument advanced by Owen Fiss: just as the regulation of private hate speech might be permissible because such speech tends to silence its victims, so might state hate speech improperly marginalize the expressive lives of racial minorities. I don't have a firm position on this, but it is a plausible use of the Free Speech Clause. It's certainly possible, though, for state racist speech to be unconstitutional under the Equal Protection Clause without going so far as to silence private speakers; thus, the Free Speech Clause wouldn't come into play.

In this section of his article, Tebbe also suggests that a concern for "*full* citizenship—for meaningful participation in political and social life"—may be properly understood, in the government speech setting, as a "citizenship theory of free speech."[19] To the extent this is something other than a recapitulation of the Fiss theory of state speech harming private speech by drowning it out or otherwise marginalizing it, why should we ground the concern in free speech values rather than in equal protection values? State action that improperly vilifies persons by race or other protected characteristics may indeed diminish the citizenship of such persons. If the Equal Protec-

16. *See id.* at 688–92.
17. U.S. CONST. amend. I.
18. *See* Tebbe, *supra* note 7, at 665–67.
19. *Id.* at 667.

tion Clause is properly read as covering state speech as well as other forms of state action, it is the proper doctrinal home for the diminishment of citizenship that derogatory state speech might foster.

Tebbe also claims that an incumbent political party could not constitutionally use the apparatus of state to urge voters to keep the ins in and the outs out.[20] This seems right, and the question is, where does the Constitution say so? Tebbe offers the Free Speech Clause. This kind of use of dominant political power to block the channels of political change—or at least to place the heavy machinery and cash of the state behind such change—is one of the key concerns of the famous *Carolene Products* footnote four.[21] But is the problem really that citizens' freedom of speech is being abridged? To the extent that voting is speech, I suppose it makes some sense. But there are a plethora of provisions in the Constitution that are either specifically about voting or that in some instances apply to voting. The Free Speech Clause is one of them. Rather than specifically locating a constitutional right against "government electioneering" in freedom of speech, we would do better to see this as a structural right that has its home in many places at once.

Other than the possibility that state hate speech could, under certain circumstances, violate the Free Speech Clause, and that clause's presence among others in preventing incumbent officials from using state power to promote their own reelection, where else might the Free Speech Clause limit government speech? Here's an area of the case law that Tebbe does not discuss:[22] When the state speaks, it should own up to that fact. It should not hide behind hired agents, giving the (mis)impression that the agents, as private persons, are speaking.[23] This concern with attribution and misattribution might have a proper home in the Free Speech Clause, in the following way. The Court has long protected a robust right not to speak, or right against compelled speech, and has said that right is the inverse of our normally protected right to speak.[24] Although I

20. *See id.* at 668–76.

21. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

22. He mentions transparency and anti-ventriloquism as theoretical concerns, but does not explore their connection to the compelled speech case law. *See* Tebbe, *supra* note 7, at 656–57.

23. *See* Abner S. Greene, *(Mis)Attribution*, 87 DENVER U. L. REV. 833, 844–48 (2010) .

24. *See id.* at 839–44 (discussing cases).

find that doctrinal move complicated,[25] and never fully justified by the Court, plenty of cases so hold. In two recent opinions, the Court addressed the intersection of state speech and compelled speech, with some Justices expressing a concern that state-fostered misattribution of speech could violate the freedom of speech or the freedom of expressive association.

In *Johanns v. Livestock Marketing Ass'n*,[26] the Court confronted a First Amendment challenge to beef advertisements funded by Department of Agriculture assessments targeted at beef producers and importers. The claim, based on prior case law, was of the compelled speech (or compelled subsidization of speech) variety—that the targeted assessments compelled plaintiffs to support speech they didn't want to support. *Johanns*' core holding was that if speech is the government's, neither a compelled speech nor a compelled subsidy challenge is available; here, the ads were formally those of the U.S. government.[27] In dissent, Justice Souter asserted that the government should have a duty of transparency in these settings, to make clear that it and not a private party is responsible for the ads. Otherwise, if a reasonable viewer would see the ads as those of a private party, a compelled speech claim should lie (via the compelled subsidization of speech).[28] Justice Scalia's majority opinion was at least open to the possibility of an as-applied First Amendment challenge "if it were established . . . that individual beef advertisements were attributed to [the plaintiffs]."[29]

In *Washington State Grange v. Washington State Republican Party*,[30] the state of Washington allowed primary election candidates to self-designate party preferences, which would then be listed on the ballots that voters would see. The plaintiff political party's concern was that voters would misattribute such preferences, assuming party backing. This is a case not about state speech per se, but rather about a distinctive kind of

25. *See id. See generally* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

26. 544 U.S. 550 (2005).

27. *See id.* at 559–62.

28. *See id.* at 570 (Souter, J., dissenting). Strictly speaking, a compelled speech claim and a compelled subsidization of speech claim are different, but the difference doesn't matter for purposes of this discussion.

29. *Id.* at 565. For more detailed discussion of *Johanns*, see Greene, *supra* note 23, at 834–37.

30. 552 U.S. 442 (2008). For more detailed discussion of *Grange*, see Greene, *supra* note 23, at 837–38.

private speech authorized by state law, in the setting of elections administered by the state. As in *Johanns*, the argument was that the system was not transparent enough, that voters would make incorrect assumptions about the candidates' self-designations, violating the freedom of expressive association (a type of First Amendment claim) of the party. The Court rejected the facial claim, because the system (which had not yet been tested) might work just fine to clarify the self-designations.[31] Chief Justice Roberts, concurring, was concerned that in practice misattribution might occur,[32] and Justice Scalia, dissenting, would have invalidated the law on its face, because of compelled association between a self-designating candidate and the named political party.[33]

Tebbe criticizes some dicta from *Pleasant Grove City v. Summum*[34] as suggesting that, apart from the Establishment Clause, there may be no constitutional limits on state speech.[35] And as discussed above, Tebbe discusses various constitutional provisions that might be violated by egregious instances of government speech. *Summum*, though, on its facts, was not a hard case, and we should see its dicta as just that. The core holding was that municipalities may choose which fixed monuments to place in state-owned parks, even if such choices (necessarily) reflect support for some viewpoints over others. The *Johanns* holding is similar: once we identify the beef advertisements as government speech, then there is no constitutional objection to them, from compelled speech, compelled funding of speech, or any other clause or doctrinal hook. The government is indeed promoting a specific idea—it's good for y'all to buy and consume beef. That's not uncontroversial—neither are choices about which monuments to erect in city-owned parks—but the contested nature of the speech in these cases proved irrelevant to the Court's constitutional analysis, and correctly so.

Tebbe concedes that whether and when the state may engage in viewpoint-based speech is not what he is writing about.[36] That's fine, but then it is a bit problematic to call the piece "Government Nonendorsement" and to write: "[T]he Constitution properly imposes a broad principle of *government*

31. *See Wash. State Grange*, 552 U.S. at 454–58.
32. *See id.* at 459 (Roberts, C.J., concurring).
33. *See id.* at 462 (Scalia, J., dissenting).
34. 555 U.S. 460 (2009).
35. Tebbe, *supra* note 7, at 648–49, 654–56, 668, 709–10, 712.
36. *See* Tebbe, *supra* note 7, at 655 n.25.

nonendorsement. That principle cuts across multiple provisions—including equal protection, due process, and free speech itself . . . ."[37] Furthermore, that the state may engage in viewpoint-based speech extends to contested issues and to conditional funding situations (bracketing here the ventriloquism/transparency issue); nowhere does Tebbe dispute this. Thus, there are really two separate debates potentially in play here—one about whether liberal democratic political theory, or our Constitution, imposes limits on state persuasion generally, and a separate one about whether state speech sometimes might violate specific constitutional provisions, such as the Equal Protection, Establishment, or Due Process Clause (or perhaps the Free Speech Clause itself).

Generally speaking, we live in a nation with an active and vibrant principle of government endorsement. There are some exceptions, and Tebbe's article helpfully picks them out. State speech that disparages based on race, or that promotes one religion over others, or that places a significant burden on a woman's right to choose whether to terminate her pregnancy, or that uses the apparatus of state to push the electorate to keep incumbents in office—these are all constitutionally problematic and are properly seen as exceptions to an otherwise capacious government speech power. That capacious power is in play every day when federal, state, and local governments seek to persuade citizens to make certain choices over others, and that some ideas are better than others. The state does this by supporting enacted legislation and promulgated regulations, and through public-service advertisements, school curricular choices, curatorial choices at public museums and in public parks, and funding conditions for public support of the arts. It does so through government employees and through hired private agents. And it does so regarding constitutionally protected rights as well as in settings that do not involve such rights. Thus, the state might promote a vigorous anti-smoking campaign (there's no right to smoke cigarettes). But the state might also promote a vigorous campaign to persuade women to carry their fetuses to term; so long as such a campaign does not place an undue burden on the choice, it is constitutional. And the state might promote speech itself—even though we have a right not to speak, indeed, a right to remain silent.

Government endorsement—even in hotly contested mat-

37. *Id.* at 650.

ters, and even in the realm of constitutionally protected rights—is a proper tool of state, even in liberal democracies such as ours, and so the Court has properly held. Government nonendorsement, at times, is appropriate, but it is the exception to an otherwise fairly robust rule.