When the *Institution* Speaks: Considerations for Public and Private Universities Related to Institutionally-Sponsored Speech
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I. Institutional Speech in the Headlines

Institutions speak thousands of times a day. Presidents issue statements about current events; boards approve recommendations to rename buildings; various administrators publish web pages or post to institutional social media accounts, and so on and so on. Most institutional speech takes place without much fanfare. From time-to-time, institutional speech makes headlines:

1. Presidential Statements: Princeton's Efforts to Combat Systemic Racism (September 2020)

On September 2, 2020, President Eisgruber at Princeton University wrote a letter to the Princeton community about the institution's efforts to combat systemic racism.[2] Observing the nation's "profound national reckoning with racism", President Eisgruber charged the cabinet with undertaking an institution-wide effort to address systemic racism within the world and within the Princeton community. In so doing, he acknowledged that "for most of its history, [Princeton] intentionally and systematically excluded people of color, women, Jews, and other minorities" and that "[r]acist assumptions from the past . . . remain[ed] embedded in structures of the University itself." As a result of the Cabinet's work, they recommended a series of priorities to advance Princeton's commitment to diversity equity, and inclusion."

This statement made headlines when the U.S. Department of Education opened a compliance investigation pursuant to its authority to enforce Title VI of the Civil Rights Act.[3] According to the Department of Education, President Eisgruber "admitted Princeton's educational program is and for decades has been racist" while routinely making "material nondiscrimination and equal opportunity representations to students, parents, and consumers." This, according to the Department, justified a compliance investigation that could result in the recovery of Title IV funds as a sanction for unlawful discrimination.

The next day, Princeton issued a new statement which, in part read,

> It is unfortunate that the Department appears to believe that grappling honestly with the nation's history and the current effects of systemic racism runs afoul of existing law. The University disagrees and looks forward to furthering our educational mission by explaining why our statements and actions are consistent

[1] This manuscript was first prepared for a webinar hosted by the National Association of College & University Attorneys.
[2] Letter from Eisgruber to Princeton Community re: Combatting Systemic Racism (Sept. 2, 2020).
[3] Letter from Robert King, Assistant Secretary, Office of Postsecondary Education, U.S. Dep.'t of Educ. to President Chistopher L. Eisgruber re: Title VI Compliance Investigation (Sept. 16, 2020).

not only with the law, but also with the highest ideas and aspirations of this country.[4]

Many factors weigh in institutional decisions regarding whether a senior leader might speak on behalf of a University. Frequency is just one example—if you speak about everything, the message gets diluted. Politics, of course, is another, lest an institution dependent on state funding draws the ire of the state legislature or influential donors. Perhaps one of the most important factors, though, is mission, and this exchange between Princeton and the U.S. Department of Education is a beautiful illustration of how institutional mission may shape institutional speech at the highest levels and inform higher education legal practice.[5]

2. Removal of Confederate-Era Monuments and Building Names

Several campuses have undertaken recent efforts to remove, replace, or relocate Confederate-era monuments or rename buildings. For example, on June 19, 2020, the University of Mississippi Board of Regents approved a resolution to relocate a Confederate monument from the center of campus to the University cemetery.[6]

When it comes to removing monuments or renaming buildings gift instruments and state and local laws are important. But the government speech doctrine also plays a central role for public universities. *Pleasant Grove City v. Summum* is instructive. In *Summum,* the City of Pleasant Grove maintained a 2.5-acre square, in which it displayed 15 monuments or displays, some of which had been donated by private groups. Summum, a private religious organization, asked to erect a stone monument that memorialized "the Seven aphorisms of Summum," but the City rejected their request. Summum filed a lawsuit, alleging that that the City engaged in impermissible viewpoint discrimination by allowing some private groups to donate monuments but not others. At issue was whether the City denied Summum's request to speak as private citizens in a traditional public forum, or alternatively, whether the City itself was speaking by choosing the monuments it wished to display. The U.S. Supreme Court sided with the City, holding that the monuments in the square represented government speech.[7] In so holding, the Court explained, "Permanent monuments displayed on public property typically represent government speech."[8] It continued, "The City has selected those monuments that it wants to

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[4] University Statement on U.S. Department of Education Letter Regarding Nondiscrimination Practices (Dept. 17, 2020).

[5] Notably, as election season approaches, private institutions (and public institutions with analogous state laws) may want to consider one additional nuance related to targeted lobbying. Normally, non-partisan, issue-specific lobbying is permissible for 501(c)(3) organizations if not designed to influence the election of a specific candidate. American Council on Education, "Election Year and College Political Campaign-Related Activities in 2022", at 8 (Issue Brief Sept. 19, 2022). However, ACE cautions that "[h]eightened and targeted lobbying and public policy education activities conducted during a campaign season, directed at candidates' signature issues or others that are closely aligned with candidates" likely are impermissible. *Id.* at 9. As an example of political activity that is likely impermissible, ACE references institutional advocacy statements on an issue that "becomes a singular dividing issue between two candidates for public office."

[6] Scott Jaschik, "University of Mississippi will Remove Confederate Monument," *Inside Higher Ed* (June 19, 2020).

[7] *Id.* at 472.

[8] *Id.* at 470.

display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park."[9] The Court also noted that "allowing a monument to remain on [government] property" also conveys a message, that can be "altered by the subsequent additions of other monuments in the same vicinity."[10]

Especially when considered in light of local laws restricting the removal of historical monuments, the reasoning articulated in *Summum* sharply focuses the expressive nature of relocating a Civil War-era monument to its final resting place at the University cemetery.

3. **Speech Through Institutional Marks**

From time to time, an enterprising student organization may wish to use the University's trademark to convey a message at odds with University values. In these instances, the University may try to argue that the mark itself conveys a message that is eroded by the student organization's conflicting message. The Government Speech Doctrine again governs the analysis with respect to public universities, starting with a 2015 U.S. Supreme Court case, *Walker v. Texas Division, Sons of Confederate Veterans*.[11] In *Walker,* the Texas Department of Motor Vehicles denied plaintiffs' application for a vanity license plate that featured the Confederate flag. The Board charged with administering the application process denied the application on the following grounds: "[A] significant portion of the general public finds the design offensive, and . . . such comments are reasonable."[12] The Board also acknowledged that "a significant portion of the public associate[s] the confederate flag with organizations advocating expressions of hatred directed toward people or groups that is demeaning to those people or groups."[13] Plaintiffs then filed this law suit, saying that the denial of their application amounted to impermissible viewpoint discrimination that abridged their First Amendment rights.

The U.S. Supreme Court disagreed, instead relying on the government speech doctrine, which broadly states that "[w]hen the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[14] In other words, "as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."[15] With that foundation, the Court concluded that vanity plates issued pursuant to the State's statutory authority conveyed government speech, and thus, the State of Texas could determine the content of that speech without running afoul of the free speech rights of private citizens.[16] Applying *Summum*, the Court reasoned that (1) Texas license plates have a long history of communicating messages from the State, (2) that the general public often links Texas license plates with the State, and (3) that the State exercised direct control over the messages conveyed on vanity license plates. The Court also rejected plaintiffs' argument that the expressive activity on Texas license plates either took place in a traditional public forum, or that

[9] *Id.* at 473.
[10] *Id.* at 477.
[11] 576 U.S. 200 (2015).
[12] *Id.* at 206.
[13] *Id.*
[14] *Id.* at 207 (citing *Pleasant Gove City v. Summum*, 555 U.S. 460, 467-68 (2009)).
[15] *Id.* at 208.
[16] *Id.* at 220.

Texas had created a designated or limited public forum by allowing private parties to submit license place designs. The Court explained, "The fact that private parties take part in the design an propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider."[17]

The Eight Circuit distinguished *Walker* in *Gerlich v. Leath*[18], when it enjoined Iowa State University from regulating the messages associated with an institutional mark. Plaintiffs, a student chapter of the National Organization for the Reform of Marijuana Laws at Iowa State University (NORML ISU), brought First Amendment claims against the University after it denied a trademark licensing request that incorporated a cannabis leaf. ISU argued, in part, that the government speech doctrine afforded it discretion to deny NORML ISU's request pursuant to its trademark licensing regime. The court disagreed because the government speech doctrine does not apply when the government creates a limited public forum, as it did when it created the trademark licensing regime for 800 registered student organizations. Even if it did not create a limited public forum, the government speech doctrine still did not protect ISU because it could not show (1) that it had "long used the particular medium at issue to speak" and (2) that the medium is 'often closely identified in the public mind with the state."

Arizona *Board of Regents v. Doe*[19], decided under the Lanham Act, examined whether a student's unauthorized use of institutional trademarks could be confused for institutional speech. In this case, John Doe posted a series of inciting and vulgar Instagram messages featuring the Arizona State University logo and colors, in an effort to persuade college students to attend maskless COVID-19 parties during the peak of the first wave of the pandemic. Dismissing the action, the district court held that a reasonably prudent consumer would not be deceived or confused into believing that ASU was the source of the posts and messages from the account. The Ninth Circuit affirmed that a reasonable consumer would not confuse Doe's profane posts with official University speech. In addition, because Doe's use of the marks was not commercial activity, the court properly dismissed the Board's claims under the Lanham Act.

4. Featured Website Content

Every single day, colleges and universities make decisions about what messages to share and feature on institutional websites. Public universities have a constitutional right to determine what it will post and prioritize. In *Viewpoint Neutrality Now! v. Regents of the University of Minnesota*[20], students and Viewpoint Neutrality Now!, an unregistered student organization, brought First Amendment claims alleging that the University unlawfully favored some student organizations over others by distributing funds unfairly and otherwise prioritizing favored student organizations. Specifically, plaintiffs alleged that the University (1) unlawfully created a limited public forum that preferenced media groups over other student organizations, (2) engaged in viewpoint discrimination by funding lounge space for cultural centers and disproportionally promoting identity-based student organizations on its website; and (3)

[17] *Id.* at 217.
[18] 847 F.3d 1005, 1012-15 (8th Cir. 2017).
[19] 9th Cir. (May 13, 2022).
[20] No. 20-CV-1055 (D. Minn. Feb. 1, 2021).

improperly deemed partisan political organizations to be ineligible for student funding. The court determined that the University's allocation of funds to the cultural centers was subject to the constitutional safeguards of a viewpoint neutral analysis. However, invoking the government speech doctrine, the University had its own First Amendment right to determine which student groups it wished to promote on its website.

5. University Social Media Accounts

Various departments and divisions on campus often host social media accounts with carefully curated content. Like with website content, public and private universities alike can control the messages they choose to post. However, to the extent that public universities invite members of the campus community or the general public to comment on posts, they have limited control over that responsive content, except to the extent that established First Amendment exceptions apply.

In *Robinson v. Hunt County*,[21] plaintiff, a private citizen and Facebook user, alleged violations of her First and Fourteenth Amendment rights, when her comment, among others, was deleted from a post on the Hunt County Sheriff's Office (HCSO) Facebook page. Plaintiff's comment criticized an HCSO post stating that "ANY post filled with foul language, hate speech of all types, and comments that are considered inappropriate will be removed and the user banned." Assuming without deciding that the HCSO Facebook page was either a limited or designated public forum, the court concluded that defendants' actions in deleting plaintiff's post amounted to viewpoint discrimination, and that Hunt County's Facebook post announcing that it would remove foul language, hate speech, or inappropriate content constituted an explicit policy of viewpoint discrimination. The court reversed dismissal of plaintiff's request for a declaratory judgment and remanded the case to the district court to reconsider plaintiff's motion for a preliminary injunction.

More recently, in *People for the Ethical Treatment of Animals, Inc. v. Banks*[22], a district court enjoined Texas A&M University from removing public posts from a livestreamed graduation ceremony. In an earlier action, PETA and Texas A&M settled First Amendment litigation that came about when Texas A&M deleted PETA's comments from the institution's Facebook page regarding the use of dogs in animal research. PETA posted similar comments to the livestreamed virtual graduation ceremony for Texas A&M's College of Veterinary Medicine & Biomedical Sciences, which a university administrator again deleted. The court allowed PETA to proceed in its claims against Texas A&M's President, in part based on an alleged breach of express obligations set forth in the settlement agreement from the earlier litigation. The court also concluded that plaintiffs alleged a concrete and particularized injuries: (1) a

[21] 5th Cir., Apr. 15, 2019).
[22] S.D. Tx., Sept. 2., 2022.

posting injury (post removed), (2) a restoration injury (posts were not restored), and (3) reading injury (plaintiffs deprived of the opportunity to read replies to their posts).[23]

II. Employee Speech or Institutional Speech?

Sometimes, a question emerges as to whether employee speech amounts to institutional speech. The issue boils down to whether the employee is speaking as a private citizen on a matter of public concern, or whether the employee is speaking on behalf of the institution. A number of factors weigh in this analysis, including: (1) the employee's position in the university hierarchy, (2) whether the employee is speaking pursuant to official job duties[24], (3) whether the employee invokes his/her University affiliation in connection with the speech, and (4) whether a reasonable person may impute the speech to the University. The following cases explore circumstances in which employee speech becomes conflated with institutional speech, extinguishing any First Amendment rights the employee plaintiff may have otherwise had:

In *Dixon v. University of Toledo*[25], plaintiff, the Interim Associate Vice President of Human Resources at the University of Toledo, alleged that the University retaliated against her for protected speech after it fired her for writing an op-ed that spoke about University benefits administration and criticized comparisons of the Civil Rights Movement and the Gay Rights Movement. Though plaintiff did not identify her University affiliation in the op-ed, she was placed on administrative leave and fired for expressing an opinion at odds with the University's efforts "to expand and support diversity on campus."[26] The issue before the court was "whether the speech of a high-level Human Resources official who writes publicly against the very policies that her government employer charges her with creating, promoting, and enforcing, is protected." Applying the Sixth Circuit's standard in *Rose v. Stephens*, which says that "where a confidential or policymaking public employee is discharged on the basis of speech related to his policy or policy views, the *Pickering* balance favors the government as a matter of law," and finding that (1) plaintiff, as associate Vice President of Human Resources, held a "policymaking position" at the University and (2) that plaintiff's op-ed was about a political or policy issue directly related to her position, the court applied the *Rose* presumption and found that the University's interests outweighed plaintiff's interests as a matter of law.

Bowers v. Rector and Visitors of the University of Virginia[27] went even further when it concluded that a university employee "los[t] the cloak of First Amendment protection" by sending a personal email with her signature line affixed. Plaintiff, a human resources employee at the University of Virginia, used the University email server to send a message to the National

[23] Thanks to NACUA Law Fellow Alan Grose for unearthing this case.
[24] This is a nuanced difference from a *Garcetti* analysis: Of course, at public institutions, speech is not protected when offered pursuant to official job duties, but separate from that analysis is whether the employee is speaking on behalf of the institution. *Garcetti v. Ceballos,* 547 U.S. 410 (2006).
[25] 702 F.3d 269 (6th Cir. 2013).
[26] *Id.* at 272.
[27] 478 F.Supp. 2d 874 (W.D. Va. 2007).

Association for the Advancement of Colored People (NAACP) that criticized proposed legislation that would have allowed the University to restructure its pay scale.[28] Plaintiff left her University "signature" and "stamp" on the bottom of the email, which was eventually forwarded to hundreds of people, some of whom erroneously believed that the email reflected official University information.[29] The University fired plaintiff, prompting her to bring First Amendment claims against the University.

Qualified immunity barred plaintiff's First Amendment retaliation claim against individual defendants. No one disputed that the content of the communication constituted a matter of public concern. The question was whether it was clearly established that plaintiff was speaking as a private citizen, when she used university computers to send the communications and affixed her University signature and stamp on the email that identified her as a University of Virginia Human Resources employee. Finding that the First Amendment did not protect the speech, the court concluded that the signature conveyed false authority by "purporting to be Human Resources" statements.

[28] *Id.* at 877-78.
[29] *Id.* at 878.