



When the *Institution* Speaks

Thursday, September 29, 2022

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*Views expressed by the speakers are their own and do not represent those of Brooklyn College, Kennesaw State University, or the City University of New York.

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Agenda

- What is University Speech?
- Speech from Presidents/Senior Leaders
- Q&A #1
- Reputational Risks and Opportunities
- Social Media
- Contractual Considerations
- Q&A #2

What is University Speech?

- Working Definition: Messages (whether spoken or written) that are developed, endorsed, and/or expressed by the University through those authorized to speak on the University's behalf, including, without limitation, presidents and senior administrators, or through a channel (e.g., webpages and social media) owned, managed, or controlled by such personnel.

Examples: Letters to Campus, Policies, University-Sponsored Programming, Press Releases, and Speeches

Who counts as the "University?"

- What do we mean when we refer to the University as a speaker?
- External perspectives of the "University" as speaker include:
 - President
 - Board of Trustees
 - Senior Administrators
 - Faculty
 - Students
 - Guest Speakers

Who counts as the "University?"

- How do we determine whether the University is the speaker?
- Several Circuits (4th, 5th, 9th, and 10th) determine whether speech belongs to the government or a private individual by analyzing the following:
 - Purpose
 - Editorial Control
 - Identity of the actual speaker
 - Ultimate Responsibility

Why is certainty about the speaker's identity important?

- Establishes the rights to speak affirmatively (to promote a particular message) and to speak negatively (refusing to adopt a private speaker's message). Together, these rights comprise the "Government Speech Doctrine."
- Provides listeners more context to evaluate the message
- Provides stakeholders an opportunity to respond appropriately

University Speech: Sources of Authority

- Government Speech Doctrine
 - "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to speak for itself [and] is entitled to say what it wishes, and to select the views it wants to express."
 - *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460,467 (2009), quoting *Board of Regents of the Univ. Of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000) (internal citations omitted).

University Speech: Sources of Authority

- Three Characteristics of Government Speech:
 - The government has long used the medium at issue to speak
 - The medium is closely identified with the state in the mind of the public
 - The state maintains direct control over the messages conveyed through the medium
 - See *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015); *Gerlich v. Leath*, 861 F.3d 697, 708 (8th Cir. 2017).


Speech v. Forum Analysis

- Government Speech v. Forum Analysis

Government Speech Doctrine	Forum Analysis
Government as speaker	Government as neutral arbiter
Creates an absolute* defense to free speech claims	Creates individual rights
Allowed to promote or refuse to adopt a particular message	Required to maintain viewpoint neutrality

"For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses." - *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring).

Speech v. Forum Analysis (cont.)

Amount of Government Control	Type of Forum	Government Justification for Content Restriction
Least 	Traditional	Necessary to achieve a compelling state interest and narrowly drawn to achieve that end
	Designated/Limited Public Forum	Establishment and application must be reasonable and viewpoint neutral
	Nonpublic Forum	Reasonable
	Government Speech	None needed
Most		

University Speech: Sources of Authority (cont.)

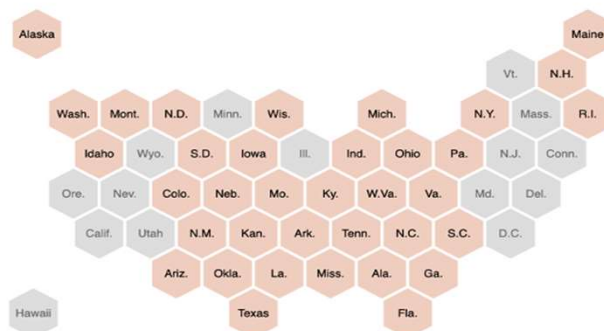
- Institutional Academic Freedom
 - “It is the business of a university to provide that atmosphere most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the ‘four essential freedoms’ ***of a university*** – to determine for itself on academic grounds who may teach, who may be taught, how it shall be taught, and who may be admitted to study.”
 - *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), Justice Frankfurter, concurring (emphasis added)

University Speech: Sources of Authority (cont.)

- Institutional Academic Freedom + Government Speech Doctrine
 - "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."
 - *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995)

Challenges to University Speech

- University's Right to Speak v. Divisive Concepts



As of Summer 2022:

- 36 states were considering or had passed legislation focused on restricting education on racism, bias, and related topics
- 10 states have adopted bans of "divisive concepts" or banned the teaching of Critical Race Theory
- Significant rise in "book bans" and bills regarding transparency ("Parental Bills of Rights")

Challenges to University Speech

- Implications of the University as speaker in the "marketplace of ideas"
 - "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom...The classroom is peculiarly the **marketplace of ideas**."
 - *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal quotations omitted)



Is the University a Neutral Speaker?

- Neutrality v. Neutralism when the University is speaker
 - Neutrality: "Legal doctrine" that prescribes that government entities should protect the expression of all opinions
 - Neutralism: A "political theory" that the state should not promote or express any particular set of values

(Definitions adapted from scholar Corey Brettschneider, author of *When the State Speaks, What Should It Say?* (Princeton University Press 2012))
- General (but contested) rule: The government is required to maintain viewpoint neutrality *except* when it is engaging in its own speech



University v. Employee Speech

- The problem of *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

Interest of the Public Employee

- Speaking in the capacity of official duties
- Speaking as a citizen
- Speaking as an individual concerned with own personal interest
- Speech: a matter of public, not private concern



Look at: (1) form of the speech (2) content in which of the speech; and (3) context in which the speech is made

Interest of the Public Employer

The speech must not disrupt the function of the public employer's ability to promote the efficiency of service through its employees or the employee's performance

University v. Employee Speech (cont.)

- The problem of *Garcetti* (cont.)
 - "...I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to ... official duties." 547 U.S. 410, 438 (Justice Souter, dissenting).

University v. Employee Speech (cont.)

- The problem of *Garcetti* (cont.)
 - “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” 547 U.S. 410, 425.
- More gray area: Official capacity when the employee is speaking as the University
 - See, e.g., *Dixon v. Univ. of Toledo*, 702 F.3d 269 (6th Cir. 2012)

Policy Development

- State systems, boards, or schools may also develop policies to restrict or clarify when the University is speaking. Key considerations:
 - Define "official" channels
 - Identify who has authority to speak on the University's behalf distinguish the views (and pages) of student groups from the views (and pages) of the University (See *Arizona Board of Regents v. Doe*, 555 F.Supp.3d 805 (D. Ariz. 2021))

Policy Development

- Key considerations (cont.):
 - Clarify the use of University marks (*See Bowers v. Rector and Visitors of the University of Virginia*, 478 F.Supp. 2d 874 (W.D. Va. 2007))
 - Gray areas (e.g., monuments, building names, faculty resource pages, course pages, student-created content)
 - Existing policies

Policy Development

Unique Considerations for Private Institutions

Decisional law focuses largely on public institutions, given First Amendment considerations

Private institutions are governed by their own policies

Failure to comply with institutional policies can lead to common law claims (breach of contract) and other potential claims in equity (e.g., New York's Article 78)

Policy Development at Private Institutions

Why have a policy at all?

Default position is often to mimic policies of public institutions, but private institutions enjoy greater flexibility

Private institutions have a unique opportunity to exercise more control over the different mediums through which the college or university interacts with constituents

Policy Development

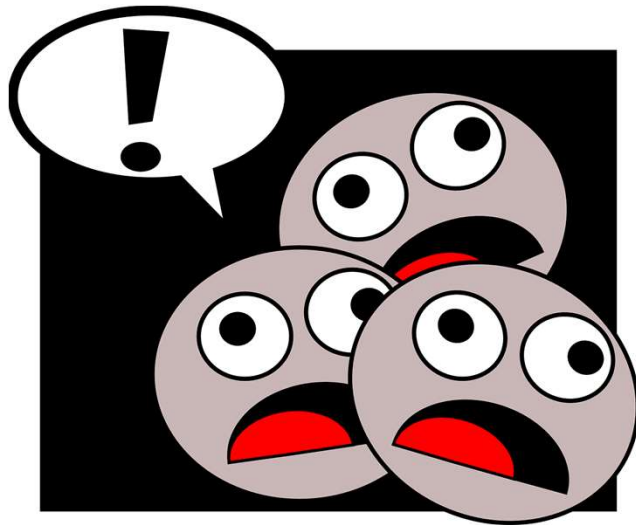
The Role of Counsel

Identify	Consider	Avoid
Identify the myriad of ways the institution interacts with the public that may constitute institutional speech	Consider how institutional mission statements, governance documents, and strategic plans should inform the scope and terms of official engagement	Avoid "cookie cutter" adoption of policies from other institutions whose policies may not meet the needs of your own

Speech from Senior Leaders

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**To Speak or
Not to
Speak?**



Potential Benefits

- Opportunity to reaffirm institutional values and mission
- Show support for constituents (particularly relevant in response to crisis or tragedy)
- Highlight positive student initiatives and introduce the public to scholars
- Introduce researchers and other institutional experts on topics of public interest
- Increase community interest and engagement in the work of the college or university

Potential Drawbacks



Dignifying speech outside the scope of academic discourse



Adding "fuel to the fire" - encouraging provocateurs



Appearance of arbitrary decision making



Appearance of favoritism

Reactive v. Proactive

Another opportunity for good lawyering

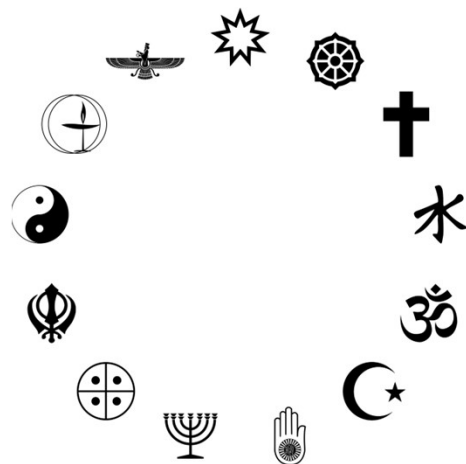
Who Should Speak?

Hint - Not always the President!

Key Considerations

- President's philosophy and role as CEO
- Other Senior Administrators
- Role of the Board
- Role of the Faculty
- Audience
- Media and public relations

Religious Institutions





Special Considerations

**Understand your
unique governance
structure**

**How might
religious identity
inform the scope
and nature of
institutional speech**

**Explore the
influence of
religious identity
through a few
examples**

Academic Freedom at Religious Institutions

Example: Brigham Young University

- "The freedom to form religiously distinctive intellectual communities is protected not only by the principle of religious freedom but also by long-established principles of academic freedom."
- "BYU claims the right to maintain this identity by the appropriate exercise of its institutional academic freedom."

See BYU Academic Freedom Policy, *available*
at <https://policy.byu.edu/view/academic-freedom-policy>

Organization Recognition at Religious Institutions

Example: Yeshiva University

Alliance v. Yeshiva University

- Denial of recognition of Pride Alliance student group on religious grounds – challenged under NY Human Rights Law
- Yeshiva's concern about *religious autonomy*
 - Relationship between official recognition and endorsement of message
 - Impact that such recognition would have on Yeshiva's mission
- Court issued permanent injunction – Yeshiva is appealing the decision

Speech Through Naming of Buildings and Programs



Speech Through Naming of Buildings and Programs

- Example: **Metropolitan Museum of Art**

- Removal of the Sackler name from seven exhibitions, December 2021
- Museum had already refused to receive additional gifts from the family in 2019
- Two wings of the museum continue to bear Sackler name
- Sackler family joined in the announcement

See Met Museum Removes Sackler Name From Wing Over Opioid Tie, Robin Pogrebin [The New York Times](#) (December 9, 2021).



Speech Through the Naming of Buildings

- Context and Controversy
- Role of the Academy
 - Met's decision characterized as a shift from museums as, "gatekeepers of the elite to arbiters of social change"
- Time of the Gift
- Current Status of Donors
- Opportunity to Educate or Raise Awareness



Key Considerations

- Who are the Stakeholders to Include in Decision Making
- Advisory or Binding Authority
- Threshold Amount(s)
- Buildings or Programs Not Wholly Owned by the Institution
- Demolition of Buildings and Retirement of Programs
- Honorary Naming Without Donation
- Name Changes

• Example: Rutgers University Policy on Naming of Facilities and Programs, [file:///C:/Users/Staff/Downloads/20-1-13-current%20\(2\).pdf](file:///C:/Users/Staff/Downloads/20-1-13-current%20(2).pdf)

Institutional Responses to Crisis and Tragedy



Role of Institutional Values

- **Case Study – Princeton University**
- September 2, 2020, President of Princeton University wrote a letter to the university community:
 - 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.”
 - Charged the cabinet with undertaking an institution-wide effort to address systemic racism within the world and within Princeton
 - As a result, the cabinet recommended a series of priorities to advance Princeton’s commitment to diversity equity, and inclusion.



Role of Institutional Values

- U.S. Department of Education opened a compliance investigation pursuant to its authority to enforce Title VI of the Civil Rights Act.
- According to the Department, Princeton's President had “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 justified a compliance investigation that could result in the recovery of Title IV funds as a sanction for unlawful discrimination.



Role of Institutional Values

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



Reputational Risks and Opportunities

- **Timing and Frequency:**

- "Frequent and persistent pronouncements by college or university leaders on the various views within the community risk creating a campus orthodoxy of opinion, and it is the primary responsibility of campus officials to ensure that no such orthodoxy is created."
 - Chemerinsky, Erwin and Howard Gillman. "What Campuses Can and Can't Do." *Free Speech on Campus*, Yale University Press, New Haven, CT, 2018, p. 149.

Reputational Risks and Opportunities

- **Breadth:** May invite scrutiny from federal agencies or other stakeholders (e.g., alumni, faculty, students, public)
- **Impact:** Tepid, vague statements can damage trust among community stakeholders and increase isolation/exclusion of vulnerable communities and individuals

Reputational Risks and Opportunities

- **Navigating state legislation and watchdog groups**

- Campus Free Speech Movement and Defining Public Forums
 - Between January 1, 2016 and July 1, 2020, fifteen states enacted statutes regarding public universities and public fora based on model legislation from think tanks and activist groups.
 - (See American Association of University Professors, "Campus Free-Speech Legislation: History, Progress, and Problems," April 2018)
- Divisive Concepts and Parental Bills of Rights



Reputational Risks and Opportunities

- **Rise of Neutrality as a Requirement**

- The Goldwater Institute's model legislation identifies neutrality, rather than neutralism, as the appropriate framework, though it notes:
 - "No institution can be perfectly neutral. Universities must, for example, be able to advocate for tuition increases and other matters essential to their day-to-day functioning. That is why the boundaries of institutional neutrality must remain a matter of judgment for university administrators, to be addressed by a committee of trustees..." Stanley Kurtz, James Manley, and Jonathan Butcher, "Campus Free Speech: A Legislative Proposal," The Goldwater Institute, March 2019, at p. 9



Reputational Risks and Opportunities

- **Evaluate all the ways the University speaks** (e.g., Strategic Plans, Admissions Brochures, etc.)
- **Effective counter-speech can:**
 - Challenge the implied authority of the speaker and viewpoint
 - Prevent the discriminatory (but protected) speech from being normalized
 - Reduce the chilling effect of unchallenged, discriminatory speech

Social Media

- The new forum: Under Supreme Court jurisprudence, the public forum analysis is not premised on physical locations and includes, by definition, virtual spaces

Amount of Government Control	Type of Forum	Government Justification for Content Restriction
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Most	Government Speech	None needed

Social Media

- Specific considerations for University social media:
 - Purpose
 - Ownership
 - Who has the right to post?
 - Who has the right to remove?
 - For public universities, do stakeholders have to tell the University that they dislike the speech?
 - Emerging technologies and existing policies

Contractual Considerations

Managing expectations: university publications as contracts or implied contracts



Students as Consumers

Gainful employment

Obama-era scorecard

Focus on student debt

Managing Expectations Through Institutional Speech

- Case Study – The University of Chicago
- Letter from Dean of Students to Incoming Class of 2020

"Our commitment to academic freedom means that we do not support so-called 'trigger warnings,' we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual 'safe spaces' where individuals can retreat from ideas and perspectives at odds with their own."

See *U Chicago to Freshman: Don't Expect Safe Spaces*, Scott Jaschick, [Inside Higher Education](#) (August 25, 2016).



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