GOVERNMENT SPEECH AND THE SCHOOL CURRICULUM - WHO DECIDES?

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Category: Opinions

Remarks by Professor Ann M. Lousin at The John Marshall Law School on 10 September 2009

Between college and law school, Ann Lousin studied political science at the University of Heidelberg in Germany. After graduating from law school in 1968, she was a research assistant at the Sixth Illinois Constitutional Convention, where she worked on the drafting of the 1970 Illinois constitution. From 1971 to 1975, she was on the staff of the Speaker of the Illinois House of Representatives, including two years as Parliamentarian of the House.
She has served on several not-for-profit boards and governmental commissions, including a term as Chairman of the Illinois State Civil Service Commission. She is active in the commercial law committees of the American and Chicago Bar Associations, and has been the chair of the CBA Constitutional Law Committee. She has been a leader in other legal organizations, including service as Chair of the Board of Governors of the Armenian Bar Association from 1995 to 1998. She lectures and consults on the Illinois Constitution, general public law issues, and commercial law in the U.S. and abroad.

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Traditionally, the curriculum of a public school in the United States has been the creation of the school district and, to some extent, the State Board of Education. A recent decision affirmed that position against claims by public school students, their teachers, and a Turkish-American association that the Massachusetts school system refused to "give both sides" to the issue of the Armenian Genocide.
Another recent decision, which arose in California, has suggested that the foreign policy positions of the federal government can, again in the context of the Armenian genocide, pre-empt attempts by a state to force insurance companies to pay on claims of the heirs to policies issued to those who

perished in the genocide. This second case suggests that in the future there may be claims that the curriculum of a public school cannot contravene the foreign policy of the United States.

Let me say at the outset that I am not a disinterested observer of the dilemmas created by these cases. First, I am the daughter of a survivor of the Armenian Genocide of 1915, the descendant of many who did not survive, and a participant in Armenian community activities. I am especially active in The Armenian Bar Association, which has played a role in these cases. Second, and on the other hand, I am an advocate for free speech and academic freedom. I am a long-time member of the American Civil Liberties Union and am an officer of the John Marshall Law School chapter of the American Association of University Professors.

So I am conflicted here. But I think I can see ways to deal with this conflict.
The first case is Griswold v. Driscoll, 2009 WL 1610178 (D. Mass.), in which Judge Mark L. Wolf of the United States District Court for Massachusetts held that decisions regarding the curriculum of the public schools in Massachusetts are "government speech" and therefore not subject to the Free Speech Clause of the First Amendment of the United States Constitution.
The story began in 1998, when the Massachusetts legislature passed a statute concerning the teaching of certain matters in social studies classes, apparently only in high schools. The pertinent part reads:

> The board of education shall formulate recommendations on Curriculum materials on genocide and human rights issues, and guidelines for the teaching of such material. Said material and guidelines may include, but shall not be limited to, the period of the transatlantic slave trade and the middle passage, the great hunger period in Ireland, the Armenian genocide, the holocaust and the Mussolini fascist regime and other recognized human rights violations and genocides. In formulating these recommendations, the board shall consult with practicing teachers, principals, superintendents, and Curriculum coordinators in the commonwealth, as well as experts knowledgeable in genocide and human rights issues. Said recommendations shall be available to all school districts in the commonwealth on an advisory basis, and shall be filed with the clerk of the house of Representatives, the clerk of the Senate, and the House and Senate chairmen of the joint committee on education, arts, and humanities not later than March 1, 1999.
> (1998 Mass. Acts 1154 (emphasis added).)

Clearly, the events listed had in common the characteristics of having occurred outside of the United States and of having affected the history of certain groups now in Massachusetts. It is also clear that the Guide was to be advisory. It does not appear that social studies teachers in the public

schools were required to teach these events or to teach these events in a special way. Indeed, the legislature used language that suggested that the teaching of the subjects and the use of the Guide were to be advisory only. Nonetheless, the statute and the creation of the Guide clearly were products of the Massachusetts state government.
As Judge Wolf's opinion noted, the draft Curriculum Guide,

included a section on the "Armenian Genocide,", that began, "n the 1890's, and during World War I, the Muslim Turkish Ottoman Empire destroyed large portions of its Christian Armenian minority population."
("Massachusetts Guide to Choosing and Using Curricular Materials on Human Rights (Draft, January 15, 1999), quoted at 2009 WL 1610178 (D. Mass.) at 7.)

Shortly thereafter, a Turkish-American group, the Turkish American Cultural Society of New England (TACS-NE), contacted the Commissioner of Education. It urged him to "include references to sources supporting the viewpoint

that the fate of the Armenians did not result from a Turkish policy of genocide, but rather from other factors, including an Armenian revolt in alliance with Russia against the Ottoman Empire. The parties refer to such sources as 'contra-genocide' materials."
(ibid.)

Members of TACS-NE made a presentation to the Board of Education. Commissioner Driscoll asked TACS-NE to propose contra-genocide material for the Curriculum Guide. (2009 WL 1610178 (D. Mass.) at 9.) TACS-NE and an employee of the Massachusetts Department of Education found a list of contra-genocide materials. Their efforts produced a

"list of recommendations, including four contra-genocide websites. Though the Board did not vote to alter the Curriculum Guide, in March, 1999, Driscoll submitted to the Legislature a version of the Curriculum Guide that included the four contra-genocide websites."
(2009 WL 1610178 (D. Mass.) at 9 and 10.)

Apparently the state did not put the "contra-genocide" material into the Guide itself, but it added references to contra-genocide websites. As amended, the Guide was filed with the Legislature in March, 1999.
As anyone could have predicted, the inclusion of these contra-genocide websites provoked anger in the Armenian community of Massachusetts. As the opinion put it, this inclusion "prompted a strong response from the Armenian community and its supporters." The Armenian-Americans asked

Governor Paul Cellucci to have the references removed. Apparently at the request of the Governor, the Commissioner removed those references in June, 1999. (2009 WL 1610178 (D. Mass.) at 7.)

The Turkish community then responded. In August, 1999, some Turkish-American groups, including the Assembly of Turkish American Associations ("ATAA"), objected to the removal of the references to the contra-genocide websites. The Commissioner refused to re-instate the references. He based his refusal upon the intent of the legislature, which had specifically included "the Armenian Genocide" in its list of topics that could be covered. He said that this "legislative intent" precluded inclusion of genocide denial materials. He also noted that the Guide

> was only advisory, school districts could develop their own approaches to teaching about the matter in controversy, and the Turkish community was free to advocate its viewpoint. The Commissioner recommended that if the Turkish community wishes to pursue its concerns, it do so through "legislative channels."
> (Second Amended Complaint, Sec. 30, ex. 14, quoted at 2009 WL 1610178 (D. Mass.) at 7)

It is not clear if anything happened between 1999 and 2005. However, in 2005 three students, one of them Theodore Griswold, their fathers, and two teachers filed the lawsuit based on viewpoint discrimination and academic freedom grounds. The ATAA joined in the lawsuit. The crux of the complaint was that the Board of Education and defendants removed the references to the contra-genocide websites "solely for political, rather than educational, reasons."
(2009 WL 1610178 (D. Mass.) at 7.)
It is important to note that the complaint apparently did not claim that including "the Armenian Genocide" in the list of topics to be covered in the Guide was unlawful. The plaintiffs based their claim upon a very narrow ground: that the removal of the contra-genocide websites due to political pressure from the Armenian community and its friends was unlawful as an impermissible reason to remove website references.

As the opinion summarized the complaint,

> Plaintiffs do not assert that they initially had a right to have contra-genocide references included in the Curriculum Guide. However, they argue that once those materials were added they could not re moved solely for political, rather than pedagogical, reasons, as they allege occurred in this case.
> (WL 1610178 (D. Mass). at 8.)

The opinion is quite exhaustive in its treatment of previous case law on the setting of education policy, the establishment of curriculum, the placing or removal of books in a public school library,

and other matters relating to public schools, especially below the university level. The bottom line is that the state boards of education and the school districts have virtually unfettered discretion in making these decisions.
The only exception, at least so far, is in the area of religion. Religious issues necessarily implicate the Establishment Clause of the First Amendment. As the cases on "evolution v. creationism" indicate, an attempt by school authorities to insert a religious viewpoint into the curriculum will run afoul of the Establishment Clause of the First Amendment.

The plaintiffs' claim that removing the references to contra-genocide websites due solely to political pressure got short shrift from the court.

"t least with regard to curriculum, even if the decision was based
only on political rather than educational considerations, the decision
was permissible."
(2009 WL 1610178 (D. Mass.) at 17.)

The sum and substance of the district court opinion is that 1) curriculum matters, apart from Establishment Clause issues, are "government speech" and thus immune from Free Speech claims; and 2) it was lawful to remove the contra-genocide websites in response to political pressure.
One facet of the history of the case has puzzled observers: why did Judge Wolf wait approximately four years to issue his opinion? The case was briefed and argued in 2005; the opinion was issued June 10, 2009. I suspect that he was waiting until the most recent of the "government speech" cases, Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009), came down. As the opinions in that case indicate, "government speech" is a fairly new concept. Perhaps Judge Wolf was waiting for further elucidation of "government speech" by the Supreme Court of the United States.

Another aspect of the case has not puzzled observers: the intensely political nature of the decisions to include and/or remove the contra-genocide materials. Although the Attorney General of Massachusetts represented the state defendants, a coalition of various interest groups as amici curiae carried much of the burden of the litigation. The Armenian Bar Association seems to have pulled the laboring oar. (Even though I am Chair of the Genocide Research Project Committee of ArmenBar, I personally had nothing to do with the litigation.)
Other Armenian organizations joined, as did the National Association for the Advancement of Colored People and other organizations obviously representing the ethnic groups most concerned with the topics on genocide and human rights mentioned in the Curriculum Guide

The plaintiffs in Griswold have filed notice of appeal to the United States Court of Appeals for the First Circuit. Probably we'll hear shortly whether that court accepts the appeal.

If Griswold were the only case to be discussed today, I would simply refer to it as the latest

"government speech" case, one that built upon prior education cases and Summum. However, a case on the West coast, in the Ninth Circuit, has added a new wrinkle.

The California case is Movsesian v. Victoria Verischerung AG, 2009 WL 2526676 (C.A. 9 (Cal.)). It was filed August 20, 2009. The plaintiffs, who filed as a class action, have indicated they intend to ask for a rehearing en banc.

The Movsesian case concerned insurance claims arising from the Armenian Genocide. It built upon an earlier case, American Insurance Association v. Garamendi, 539 U.S. 396 (2003). The earlier case arose from attempts to claim insurance benefits due to heirs of victims of the Holocaust. In order to expedite the settlement of these claims, President Clinton entered into executive agreements with foreign countries. The crux of the agreements, which constitute "treaties" in international law, was the creation of a special commission to resolve these issues, the International Commission on Holocaust Era Insurance Claims (ICHEIC). A year after the creation of ICHEIC, and almost forty years after World War II, the California legislature decided that the commission was progressing too slowly.

In response to demands for action on the state level, the California legislature enacted a statute directing the Commissioner of Insurance, Garamendi, to demand information regarding policies issued during the relevant period in Europe by any insurance company seeking to do business in California. A trade association of American insurance companies filed suit to prevent him from enforcing the act, known as the Holocaust Victims Insurance Relief Act (HVIRA).

The Supreme Court of the United States, in a five to four decision, held that the actions of the President taken pursuant to his power to conduct foreign affairs pre-empted the legislature's ability to regulate insurance claims. AIA v. Garamendi represented an extension of the pre-emption doctrine, partly because the Presidential and Congressional actions never specifically indicated an intent to preempt state laws. The Movsesian opinion summed up Garamendi thus:

> In Garamendi, the Supreme Court recognized for the first time that "presidential foreign policy" itself may carry the same preemptive force as a federal statute or treaty. Unlike in previous cases, the presidential foreign policy was not contained in a single executive agreement. Instead, the policy was "embod in several executive agreements, as well as in various letters and statements from executive branch officials at congressional hearings. In sum, the Court held that in the realm of foreign affairs, "he exercise of the federal executive authority means that state law must give way where...there is evidence of clear conflict between the policies adopted by the two."

(2009 WL 2526676 (C.A. 9 (Cal.)) at 3 and 4.)

After Garamendi came down in 2003, Congress sought to remedy the "conflict" situation. I have been unable to determine if these measures succeeded.
In 2003, I maintained in reports to the Armenian Bar Association that the Armenian Genocide situation was different. I knew that Senator Charles Poochigian of the California State Senate had introduced SB 1915 in 2000. The bill was codified at Cal. Civ. Proc. Code Sec. 354.4. The bill extended the statute of limitations for "Armenian Genocide" claims until December 31, 2010. The entire bill is set forth in the Movsesian opinion at pages 1 and 2. It was openly modeled after Secs. 354.5 and 354.6, which concerned Holocaust insurance claims and World War II slave labor claims. Both of these other bills have been declared unconstitutional as interfering with the federal government's power to conduct foreign affairs. (2009 WL 2526676 (C.a. 9 (Cal.) at 2.)

SB 1915 also formally recognized the Armenian Genocide, a position that rarely encounters opposition in California. The recognition appeared in Sec. 1 and read:

The Legislature recognizes that during the period from 1915 to
` 1923, many persons of Armenian ancestry residing in the
historic Armenian homeland then situated in the Ottoman
Empire were victims of massacre, torture, starvation, death
marches, and exile. This period is known as the Armenian
Genocide.
(2009 WL 2526676 (C.A. 9 (Cal.)) at 2.)

According to the Movsesian opinion, Vazken Movsesian and others filed a class action against the named foreign insurance companies for breach of contract and other claims in December, 2003. Judge Christine A. Snyder of the U.S. District Court for the Central District of California allowed the claims. The Ninth Circuit allowed the appeal by the defendants, all insurance companies. The appellants claimed that Sec. 354.4 of the California Civil Code was preempted by the Claims Agreement of 1922 and the War Claims Act of 1928 and that it was also preempted because "it conflicts with the Executive Branch's policy prohibiting legislative recognition of an 'Armenian Genocide.' " (2009 2526676 (C.A. 9 (Cal.)) at 3.)
Because the court held, two to one, that the federal government had a policy against recognition of the Armenian Genocide, the Ninth Circuit did not reach the Claims act issues. Caveat: even if the ruling on the foreign affairs power is overturned in an en banc rehearing, the federal statutory claims issues may survive to attack the statute another day.
The court's discussion of the history of Armenian Genocide "recognition" or "non-recognition" on the federal level is quite detailed. (2009 WL 2526676 (CA. 9 (Cal.)) at 4-6.) While neither the President nor Congress has, at any time, denied that there was an "Armenian Genocide" in the Ottoman Empire

between 1915 and 1923, it is true that at no time has Congress officially recognized the Armenian Genocide.

The Ninth Circuit claimed that Presidents have a similar history, as shown by the efforts of both President Clinton and President George W. Bush to stop Congressional resolutions affirming that there was an Armenian Genocide. The Presidents always claimed that such a resolution would offend the Republic of Turkey and that Turkey might retaliate against U.S. interests, even against American citizens travelling in Turkey and against the American military bases, such as Incirlik Air Force base near Adana. As the opinion noted, all of the U.S. Secretaries of State have formally opposed the Congressional resolutions that are filed every year, always on the grounds that a passage of the resolution would harm American relations with Turkey.

The Ninth Circuit cited Garamendi and another case in which the Supreme Court of the United States "struck down state statutes which undermined the President's diplomatic discretion." It added that "y providing explicit recognition to the 'Armenian Genocide,' Sec. 354.4 threatens to have the same deleterious effect." (2009 WL 2526676 (C.A. 9 (Cal.)) at 7.)

The opinion then noted that Presidents have spoken about the Armenian Genocide through Presidential speeches, but "not through legislation." (Ibid.) Then the court concluded,

> California has done what Congress declined to do: it has defied the President's foreign policy preferences, and has undermined the President's diplomatic power.
> (2009 WL 2526676 (C.A. 9 (Cal.)) at 7 and 8.)

Clearly, the focus of the Ninth Circuit's opinion is on Sec. 1 of the statute, the official recognition of the Armenian Genocide. Presumably, if Sec. 1 had been omitted from the California Civil Code, there might have been no alleged conflict with federal foreign policy.
One difficulty with the view that Presidential foreign policy preferences can be held to prevent state recognition of the Armenian Genocide is that many states have recognized it in one fashion or another. The opinion noted that the district court opinion said that thirty-nine other states have recognized the Armenian Genocide "and neither the federal government nor Turkey expressed any opposition to these state statutes." (2009 WL 2526676 (C.A. 9 (Cal.)) at 8.) But it found this alleged silence unpersuasive because there was nothing in the record to substantiate that statement and because what other states have done still might have contravened federal policy.

Most troubling is the court's claim that the federal power to regulate foreign affairs can preempt a state statute even if there is not an absolutely direct statement from the federal government about the foreign policy issue in question. The court concluded,

> In sum, Sec. 354.4 conflicts with the Executive Branch's clearly expressed foreign policy refusing to provide official legislative recognition to the "Armenian Genocide." The Executive Branch policy is entitled to preemptive weight, because the Executive has the authority to make this policy, and Congress has deferred to the Executive's will in this matter. Section 354.4 impermissibly impairs the President's ability to speak with one voice for the nation in the realm of foreign affairs, and undermines his diplomatic authority.
> (2009 2526676 (C.A. 9 (Cal.)) at 8.)

Of the Ninth Circuit panel, Judges Thompson and Nelson adopted the preceding analysis. Judge Pregerson, however, dissented. He pointed out that insurance regulation is exclusively a state concern, not a federal concern, and said he could "find no evidence of any express federal policy forbidding states from using the term 'Armenian Genocide'." (2009 WL 2526676 (CA. 9 (Cal.)) at 9.) In effect, the issue boils down to the requirements for preemption by the federal government. It is a question of federalism.

How does the Movsesian opinion, assuming it stands, affect the issues in Griswold? While it is admittedly a bit of a stretch, I have to wonder if the strong implied preemption analysis described by the Ninth Circuit would prevent Massachusetts from "finding" that there was an Armenian Genocide that could be taught in the public schools. I wonder if the various state statutes, including the one in Illinois, that refer to the Armenian Genocide in discussing curriculum subjects, might also violate the Presidential power to conduct foreign affairs.

If Turkey officially objected to these state statutes through diplomatic channels and the President relayed his concern to the states, would that constitute preemption?

Clearly, the Federal Republic of Germany would never object to Holocaust teaching. But what would happen if the United Kingdom objected to certain parts of the curriculum on the Great Hunger Period in Ireland or the Republic of Italy objected to a curriculum guide's characterization of Mussolini-era Italy, e.g., "All Italy was devoted to Il Duce"? It is one thing for Americans of an ethnic ancestry, whether Turkish, British, Italian, or whatever, to object to a curriculum guide. That would not implicate the Presidential power to conduct foreign affairs. However, an official objection from a foreign government might do so.

I will guess that the Ninth Circuit will grant the petition for an en banc rehearing, if for no other reason than to head off a direct appeal to the Supreme Court of the United States. Of the nine members of the United States Supreme Court who decided Garamendi, three members of the majority are gone. Souter, who wrote the opinion, has retired. So has O'Connor. Rehnquist has died. Of the original five-justice majority, only Breyer and Kennedy remain. I have no idea how Justices

Roberts, Alito, and Sotomayor would vote. On the other hand, the four-justice minority is intact. Justice Ginsburg, who wrote the dissenting opinion, remains on the court; so do Justices Stevens, Scalia, and Thomas, who joined in her dissent. All they need is one more vote to reverse Garamendi, at least on the rather different facts presented in Movsesian.

There are two points the Movsesian plaintiffs can present at the en banc rehearing. One is that President Reagan, on at least one occasion, referred to "the Armenian Genocide" in a public speech. The government of Turkey did not officially respond or take any action. The lease on Incirlik Air Base near Adana was not cancelled.

The other point is that the current President, Barack H. Obama, has taken an approach that is somewhat different from that of his predecessors. Having firmly come down on the side of recognizing an "Armenian Genocide" during his campaign, he then made some unusual statements when speaking to the Turkish Parliament in Ankara in April, 2009. His statement did not use the specific term "Armenian Genocide" in any part of his speech, but his words came as close to that as any President's have when officially addressing Turkey. The videotape of the presentation showed glum faces on the Turkish politicians and military officers present.

Two weeks later, in the annual presidential message on Armenian Martyrs Day, April 24, 2009, he did not say "Armenian Genocide" in English, but instead used the Armenian-language term, medz yeghern. This is the equivalent of "Shoah" in Hebrew, which refers specifically to the Jewish Holocuast of 1933 to 1945. Literally, medz yeghern means "big catastrophe" and has only one meaning in Armenian parlance today: the Armenian Genocide of 1915-1923 in the Ottoman Empire. So Obama did and did not specifically acknowledge "the Armenian Genocide."

It will be interesting to see if the Ninth Circuit takes note of the current status of Presidential proclamations and of the diplomatic efforts now underway concerning the Republics of Armenia and Turkey. If it does not reverse the panel, we can expect an appeal to the Supreme Court of the United States and more pressure upon both President Obama and Congress from both the Turkish and Armenian-American lobbies.

N.B. This presentation was part of an ongoing analysis of the cases and issues therein. I may change my views at any time. If you wish to quote from this text, please contact me first at 7lousin@jmls.edu. Thank you.