Summary

The Coast Guard wouldn't let a sail boat participate in a parade because it had environmental slogans pinned to the sails. This interview explains why the constitutional issues are difficult to resolve without more facts.

Last week, environmental law professor Rob Verchick interviewed me about a First Amendment controversy involving the Clearwater, a ship that the Coast Guard excluded from a maritime parade for displaying environmental slogan.(Actually, I think it's technically a "boat" rather than a "ship," but let's not get hung up on that.) The dialogue below is reposted from his Blue Tomorrow substack, and you can find the recording here.

Rob Verchick: Welcome to *Blue Tomorrow*. I'm Rob Verchick. Today we're going to be talking about an incident that happened during a celebration of America's 250th anniversary in New York Harbor. That included a tall-ship parade of about 40 ships. One of those ships was a sloop called the "Clearwater," and it entered the parade with banners on its sails. On one side, a banner read "Save the Clean Water Act." On the other side was a banner that said "Indigenous Rights, Racial Justice, climate solutions."

[Verchick first wrote about this incident in a post a week earlier.]

The sloop was approached by the Coast Guard and ordered to leave the area. The Coast Guard says that all participating vessels had agreed not to display political or politically charged messages. David Toman, the executive director of Clearwater's organization, says there was no ban on political messaging in the agreement. A Hudson-based news organization called the *Current* reviewed the agreement and "confirm[s] there were no restrictions on political messaging." But we don't know if there were other promises made. So that's a factual gap that we have.

Either way, the event raises some First Amendment issues on the nation's 250th anniversary. And to help us understand this better, I'm delighted to welcome Professor Dan Farber of Berkeley Law. He's one of the country's leading scholars of constitutional law and environmental law; and he writes for a wonderful blog you should read. It's called *Legal Planet*, and it's hosted by Berkeley Law and by UCLA School of Law. Dan, thanks so much for talking with me today at my "kitchen table."

Dan Farber: Well, it's great to be here, and thanks for the shout out for *Legal Planet*.

Verchick: Before we dive in into the law, what was your reaction when you heard about this incident?

Farber: My first reaction was that this was par for the course for the Trump administration. Now, that may be an unfair reaction depending on additional facts we don't know. But my first impulse was they've gone after a lot of stuff they consider to be woke, and they've tried to control what's said in public settings. So it it seemed to fit with that. My knee jerk reaction might turn out not to be what I would think after I know all the facts, but at least that was my initial thought.

Verchick: Well, there are things that we don't know about the factual situation. What facts do you think are especially important when you when you think about this case?

Farber: I think that probably most important question is what role was the government playing in deciding to get them out of the parade versus the parade organizers? I think to the extent that the government was the real source of the decision, that makes a constitutional challenge much more feasible. If it wasn't the government, you'd have to sort of show that the government was at least heavily involved, not just allowing it to go forward, but actually helping to organize it, which I think probably would be a lot harder to show.

But one thing people don't realize is that rights like the First Amendment only apply against the government. It's only when the government becomes involved in the censorship that you have a First Amendment case. So I think that's the single most important thing—what role did the government play?

Verchick: This is something that that the lawyers call state action, right? The First Amendment says the government can't suppress speech, except in some exceptional circumstances, and then the question becomes, who's doing the suppressing in this in this situation, right?

Farber: Exactly.

Verchick: So imagine we actually have some kind of an agreement with the private organizers, who I understand to be a nonprofit organization called Sail4th,

and then Sail4th had decided that that the agreement was being breached because there was a banner that wasn't allowed. If they had called the Coast Guard to come in and remove that sloop, would that have been the government suppressing speech?

Farber: So I think the answer is no. I think the real question is "Who was the moving force behind this?"

Verchick: Clearwater says it was told by one of the Coast Guard officials on the gunboat that their orders came "from above." We don't know if "from above" means within the leadership of the government or of the private organization.

Farber: Yeah. Although I don't think the Coast Guard would feel that they were below the organizer. It could matter whether it's just some superior officer in the Coast Guard or whether it was a political appointee outside [the Coast Guard.] I don't know that it matters for First Amendment purposes, but if it was not a Coast Guard officer, but somebody, say, in the White House or a civilian in the Department of Defense, I think that provides supporting evidence for the idea that this was the government objecting to the content. And that's censorship.

Verchick: What if the one "from above" were exercising some kind of discretion to decide whether or not the message on the banner actually violated the restriction.

I wrote a post on this last week, and I had readers saying, "Oh, that shouldn't be political at all because we already have a Clean Water Act. So saying, 'Save the Clean Water Act' shouldn't be understood as political." I kind of see how it could be understood as political, but I guess I can understand that there might be messages that you might think are political, and that I don't think are political.

Farber: Right, and it also I think it would be significant whether or not there was an agreement before the fact. Did the organizers initiate the action by contacting the Coast Guard and asking them for help? Because if they didn't, then it seems to me the Coast Guard did have discretion about whether to do this. And that makes it again more questionable about how they chose to exercise their discretion.

Verchick: They might have allowed another boat with another banner that said something like "God bless America" and the Coast Guard could have said, "Oh, that's okay. That's not political, right?

Farber: Right. Or “Make America Great Again,” for example.

Verchick: Yes, right.

Farber: It also seems odd to me that the organizers would not have first contacted the boat to say, “Hey, guys, you know, you’ve got to take that down,” and that they would immediately have gone to the Coast Guard for them to intervene. So that’s something else that would be helpful to know —what role did the parade organizers play in initiating the Coast Guard’s action?

I don’t really think it’s clear as a general matter that the government could say you can have certain kinds of signs in a parade, but not political signs. That is discriminating on the basis of subject matter. And even though that’s less obnoxious than discriminating on the basis of your viewpoint, the Supreme Court is still highly suspicious of those kinds of restrictions.

Verchick: Is there a way that the government might be able to say, despite all of the private participation in this, that this is a 250th birthday party for the country? It’s a part of a larger system of celebrations in the country, some of which are directly sponsored by the by the federal government, and that this, in fact, is is a kind of a parade in which the government should be understood as speaking.

Farber: Ah, that’s a nice argument. Well, if it were understood as the government speaking, that would be quite different. The government has the right to control its own messaging.

I think part of it is that a reasonable person would have to perceive it as the government speaking. And I don’t think that’s true of the audience in this case.

But I don’t know if I would make that argument on behalf of the government because there’s the danger that the court says, “Oh, so you had a lot of control over this. I don’t think it was government speech, but since you had so much control; it is state action.”

Verchick: Does this incident shed light on anything else going on that you’re following?

Farber: Well, I suppose on the environmental side, if the government was involved in making this decision, you know, the fact that this was considered to be potentially at all political does indicate something about how the government views

environmental matters as being not settled in the way we all thought they were.

But I’m thinking for the First Amendment perspective, it also feeds into concerns about the politicization of the military. One thing we really cannot afford is having the military take sides on political issues.

Verchick: That’s a good place to stop. Thanks so much, Dan, for joining us