IGNORE THE MAN BEHIND THE CURTAIN: ON THE GOVERNMENT SPEECH DOCTRINE AND WHAT IT LICENSES

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I. INTRODUCTION

While federal and state governments have long been communicating to various audiences in multiple ways in a variety of contexts, the United States Supreme Court has only recently invoked the government speech doctrine to protect certain state acts and policies from First Amendment challenge.[1] The contours of the doctrine are blurred—there are no clear criteria by which to determine when the government is speaking or what, if anything, the government must say to trigger the doctrine's protections. Not surprisingly, this lack of clarity has caused great confusion in the lower courts—judges seem not to know how or when to apply the doctrine.

Section II of this article discusses the uneven development of the government speech doctrine, focusing on the few cases in which the Court has invoked it to justify a holding. Section III discusses several cases in which the circuit courts have applied the doctrine when determining whether a challenged state license plate policy passes constitutional muster. The great disparity in reasoning and result in these cases illustrates that the government speech doc-

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[1] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rust v. Sullivan, 500 U.S. 173 (1991).

trine needs to be delimited and that the Court's pronouncements have thus far only served to add to the confusion.[2] The Court has created yet another exception in First Amendment jurisprudence that has the potential to greatly eviscerate the protections that are allegedly held quite dear.[3]

II. THE GOVERNMENT SPEECH DOCTRINE

Recently, the Court has invoked the government speech doctrine to justify holdings in a few different kinds of cases. The doctrine's lack of definition creates the potential not only for doctrinal confusion,[4] but for use of the doctrine in alarming ways.[5] Regrettably, the Court has helped promote the confusion that this doctrine has begun to create. Furthermore, the Court has thus far manifested neither the desire nor the willingness to guide the lower courts with respect to the circumstances under which the doctrine should be applied.

A. *The Background to the Government Speech Doctrine*

The government communicates to numerous audiences on a variety of issues.[6] Given the great disparity of opinion in this country, it seems likely that there is someone who disagrees with the government's position on almost every occasion that the government speaks and, further, that citizens hold a variety of opposing viewpoints on many of the issues that the government addresses.

Suppose that the Supreme Court were to hold that the Constitution requires the government to afford those disagreeing with its views the opportunity to respond whenever the government takes an official position on a subject. Such a ruling would pose potentially insurmountable difficulties, especially if the vast number of conflicting viewpoints had to be communicated in a way that

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[2] *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005); Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135-36 (2009); *Velazquez*, 531 U.S. at 542.

[3] *See, e.g.*, *Johanns*, 544 U.S. at 553; *Summum*, 129 S. Ct. at 1135-36; *Velazquez*, 531 U.S. at 542.

[4] *Cf. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been . . . of doubtful merit.").

[5] *Cf.* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 385 (6th Cir. 2006) (Martin, J., concurring in part and dissenting in part) (suggesting that some on the Sixth Circuit seem to believe that "the sleeping doctrine of 'government speech' has been awakened and now controls all First Amendment analysis").

[6] *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2011) ("Government inculcates values, defines justice, fairness, and liberty, and shapes behavior. It assures safety, protects the helpless and uninformed, and prevents injustice . . . . None of these undertakings, and none of the roles the undertakings require government to assume, could be successfully pursued without speech by government."); *see also* Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904 (2010) ("Because government must speak to govern effectively, it has engaged in expressive activity since its inception.").

was just as likely to reach the intended audience as was the government's announcement.[7]

On a related point, the government expends public funds when it speaks.[8] If any taxpayer objecting to the government's message had the right to prevent her taxes from being used to promote a message with which she disagreed,[9] the system would be difficult, if not impossible, to administer.[10] Instead, the government has great discretion to fund certain activities involving expression without funding other activities that offer a different point of view.[11]

The government does not create a public forum by speaking and so does not have an obligation to afford an opportunity for the expression of other viewpoints simply by virtue of its having chosen to express its own position.[12] Taxpayers can neither demand that their tax dollars not be used to fund expression with which they disagree nor demand that whenever the government speaks it must fund the expression of contrary views.[13] The government speech doctrine avoids numerous problems that might otherwise present themselves were that doctrine not recognized.[14]

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[7] *Cf.* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 145 (1981) (White, J., concurring in the judgment) (citing Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 93 (1977)) (discussing "the burden placed on First Amendment rights when the alternative channels of communication involve more cost, less autonomy, and reduced likelihood of reaching the intended audience").

[8] *See* Nathan Murphy, *Context, Not Content: Medium-Based Press Clause Restrictions on Government Speech in the Internet Age*, 2009 DEN. U. SPORTS & ENT. L.J. 26, 28 n.18 (2009) ("The government routinely spends money to promulgate a particular message to the public.").

[9] *Cf.* United States v. Lee, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

[10] *Cf.* Keller v. State Bar of Cal., 496 U.S. 1, 12-13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.").

[11] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) suggests that there may be limits to this discretion. *See id.* at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not ai[m] at the suppression of dangerous ideas.") (internal quotations omitted).

[12] Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum's Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315, 332 (2010) ("Government speech, however, is not subject to the Court's forum analysis").

[13] *Id.* at 338 ("[A] third party cannot shut down a government program by claiming viewpoint discrimination.").

[14] *Cf.* Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 949 (2010)

B. *The Birth of a Doctrine*

The Court makes sensible points when noting that individual taxpayers do not have a veto power over the use of their tax dollars,[15] and that the government does not create a public forum simple by virtue of its speaking.[16] That said, the government speech doctrine has been both confused and confusing. The doctrine has not only been unnecessary to decide the cases in which it has been invoked, but its invocation has muddled rather than clarified First Amendment doctrine. That point is perhaps best illustrated when one considers the case alleged to be the foundation of the doctrine.[17]

In *Rust v. Sullivan*, the Court considered the constitutionality of Congress's limitations on the kinds of advice that doctors receiving certain federal funding could give.[18] Congress set up clinics to facilitate family planning,[19] but precluded participants from discussing abortion or making referrals to abortion providers even upon specific request by the patient.[20] Someone requesting information about abortion would simply be told that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion,"[21] although an exception might be made in the case of a true emergency.[22]

The Court upheld the constitutionality of the program at issue, reasoning that it was permissible for Congress to limit funding to projects that it believed would serve the public interest: "The Government can, without violating the

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("[I]t is plausible to view the development of the 'government speech doctrine' in large part as an effort to relieve government of the suffocating demands of the prohibition on viewpoint discrimination.").

[15] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

[16] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983) ("In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.").

[17] *See* Andy G. Olree, *Identifying Government Speech,* 42 CONN. L. REV. 365, 374-75 (2009) ("According to . . . accepted wisdom, the government prevailed in *Rust* because the funded speech at issue, although conveyed by private parties, was government speech rather than private speech.").

[18] Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("Here Congress forbade the use of appropriated funds in programs where abortion is a method of family planning.").

[19] *Id.* at 178 ("In 1970, Congress enacted Title X of the Public Health Service Act (Act), 84 Stat. 1506, as amended, 42 U.S.C. §§ 300 to 300a-6, which provides federal funding for family-planning services.").

[20] *Id.* at 180.

[21] *Id.*

[22] *See id.* at 195 ("Section 59.8(a)(2) provides a specific exemption for emergency care and requires Title X recipients 'to refer the client immediately to an appropriate provider of emergency medical services.'") (citing 42 C.F.R. § 59.8(a)(2) (1989)).

Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[23] The Court refused to characterize this limitation as viewpoint discrimination, reasoning instead that the Government had "merely chosen to fund one activity to the exclusion of the other."[24] Indeed, the Court rejected the argument that Congress had imposed limitations on the recipients of federal funding, noting that it would be permissible for the individuals to provide abortion counseling and services as long as they did not do so while on the federal government's payroll.[25]

Certainly, medical professionals would feel constrained in what they might do or say while employed in a facility receiving the restricted funds. However, the Court reasoned that the fact that the "employees' freedom of expression is limited during the time that they actually work for the project" does not involve an impermissible burdening of First Amendment rights.[26] Rather, "this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[27]

Congress's limiting the kinds of discussions that a doctor might have with his patient would seem to be an undue limitation on the doctor-patient relationship.[28] But the Court rejected that description "because the Title X program regulations do not significantly impinge upon the doctor-patient relationship."[29] After all, the Court noted, the doctor is not required to "represent as his own any opinion that he does not in fact hold."[30] But such a response simply will not do because the patient expects and requires her doctor not only to refrain from misrepresenting his own medical views, but also to affirmatively present all of the relevant options so that she can make the best choice.[31]

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[23] *Id.* at 193.

[24] *Id.*

[25] *Id.* at 196 ("The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.") (citing 42 C.F.R. § 59.9 (1989)).

[26] *Id.* at 199.

[27] *Id.*

[28] *See id.* at 204 (Blackmun, J., dissenting) ("[T]he majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy.").

[29] *Id.* at 200.

[30] *Id.*

[31] *See id.* at 217 (Blackmun, J., dissenting) ("Although her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right

The Court's discussion of the attorney-client relationship in *Legal Services Corporation v. Velazquez*[32] provides a helpful contrast to the view presented in *Rust*. At issue in *Velazquez* was a statutory limitation on the cases that the Legal Services Corporation (LSC) would pursue. LSC, which was funded by Congress,[33] could not fund "representation in cases which 'involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.'"[34]

On its face, this funding scheme was similar to the funding scheme at issue in *Rust*.[35] Congress decided to fund representation where, for example, an individual sought to establish that she had been wrongly denied benefits under existing law,[36] but not to fund representation challenging the constitutionality of the program at issue.[37] The *Velazquez* Court considered *Rust* for guidance, but distinguished it by noting that *Rust* involved government speech,[38] whereas *Velazquez* involved government funding of private speech.[39]

The *Valazquez* rationale for ignoring *Rust* is surprising for a number of reasons. As the *Velazquez* Court itself noted, the *Rust* Court nowhere mentions government speech.[40] The government speech doctrine only became central to the holding in *Rust* through a re-characterization in subsequent case law.[41] Thus, in *Board of Regents of University of Wisconsin System v. Southworth*, the Court described *Rust* as involving a project where government funds were

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to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them.").

[32] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

[33] *Id.* at 536 ("The Act establishes the Legal Services Corporation (LSC) as a District of Columbia nonprofit corporation. LSC's mission is to distribute funds appropriated by Congress . . . .").

[34] *Id.* at 538.

[35] *See id.* at 553 (Scalia, J., dissenting) (noting the similarities in the two programs).

[36] *Id.* at 538 ("[A]n LSC grantee could represent a welfare claimant who argued that an agency made an erroneous factual determination or that an agency misread or misapplied a term contained in an existing welfare statute.").

[37] *See id.* (noting "the statutory provision which excludes LSC representation in cases which 'involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation'").

[38] *Id.* at 541 ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

[39] *Id.* at 542 ("[T]he LSC program was designed to facilitate private speech, not to promote a governmental message.").

[40] *Id.* at 541 ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech.").

[41] *Id.* ("[W]hen interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

"spent for speech and other expression to advocate and defend [the government's] own policies."[42] Yet, the same kind of description might have been made of *Maher v. Roe*, in which the Court upheld the constitutionality of Connecticut's decision to fund some of the expenses surrounding childbirth but not fund the expenses involved in nontherapeutic abortion.[43] Basically, the government expended funds in furtherance of the state's policy promoting childbirth over abortion. By making "childbirth a more attractive alternative," the state may have been expressing a judgment about the preferability of childbirth over abortion, but that did not make *Maher* a government speech case.[44] So, too, the Court might have offered the same description of *Harris v. McCrae*, where Congress promoted its own vision of public policy by funding certain medically necessary procedures but refusing to fund therapeutic abortions.[45] But the government's restricting the use of funds to express a majoritarian policy preference[46] did not transform *Harris* into a government speech case. Nonetheless, the *Southworth* Court at least implied that *Rust* was a government speech case when citing *Rust* for the proposition that when a state entity's speech is at issue, the legal analysis should be "altogether different."[47]

The *Southworth* Court was not the first Court to give *Rust* this government speech reading. In *Rosenberger v. Rector and Visitors of University of Virginia*, the Court discussed "the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling" as a program that was not designed to promote private speech "but instead used private speakers to transmit specific information pertaining to its own program."[48]

Certainly, the Court can offer an alternative explanation of a decision in subsequent case law. Thus, one might read *Rust* to suggest that the government may fund certain activities and not others and, in addition, that the government need not fund the presentation of alternative views when it hires individuals to speak on its behalf.[49]

Yet, the Court's subsequent re-characterization of *Rust* is unpersuasive for at least two reasons, especially when one considers the content of the govern-

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[42] Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

[43] *See* Maher v. Roe, 432 U.S. 464, 474 (1977).

[44] *Id.*

[45] Harris v. Mcrae, 448 U.S. 297, 316-17 (1980) ("Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions. . . .").

[46] *Cf. id.* at 332 (Brennan, J., dissenting) ("[T]he Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual.").

[47] *Southworth*, 529 U.S. at 235 (citing Rust v. Sullivan, 500 U.S. 173 (1991)).

[48] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[49] *See supra* text accompanying notes 21-25.

ment's message in *Rust*.[50] The government was not trying to advise patients about what they should do in their particular circumstances.[51] Instead, at most, the government was saying that unless there is an emergency, the government does not think abortion is the best alternative.[52] Best for whom? That was left unclear. Yet, it is not credible for the government to tell a particular patient (without knowing anything at all about that patient) that it would be best for *her* not to have an abortion.[53] Such a patient might rightly say, "But you know nothing about me, my family, my medical needs, etcetera."[54] Further, the government would be stating that it did not believe that an abortion was best for the patient even where the patient's fully informed medical professional would have recommended such a procedure.[55] The *Rust* Court's implicit description of what was at issue in the case is more accurate than the subsequent re-characterization—the government was simply refusing to fund a doctor telling a patient that she should seek an abortion, even in those non-emergency situations in which such a procedure was thought best by both the patient and her physician.[56]

Consider the patient who asks about abortion and the physician who believes that such a procedure would be preferable for the patient. The physician would not be allowed to recommend the procedure or even recommend someone who would discuss with the patient whether that would be a good alternative.[57] Instead, the patient would simply be told that abortion was not considered a suitable topic for discussion within this program.[58] Contrast this policy with the one at issue in *Velazquez*.[59] An LSC attorney could explain that the client's interests would be best furthered by challenging the constitutionality of the law at

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[50] Rust v. Sullivan, 500 U.S. 173, 193-94 (1991).

[51] *See id.* at 217 (Blackmun, J., dissenting) (noting that the "physician's words, in fact, are strictly controlled by the Government and wholly unrelated to [the patient's] particular medical situation . . . .").

[52] *Id.* at 195.

[53] *Cf.* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1272 (2010) ("Given the fact that the regulation was adopted by an administration that supported the antiabortion movement, a more accurate rendition of the government's message might be: 'The project considers abortion to be immoral and even sinful, and therefore considers the use of abortion inappropriate for any purpose at any stage of a woman's pregnancy—regardless of what effect the pregnancy has on the woman's psychological or physical health.'").

[54] *Cf. id.*

[55] *Cf. Rust*, 500 U.S. at 217 (Blackmun, J., dissenting) (noting that "many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them").

[56] *Id.* at 195.

[57] *Id.* at 180.

[58] *See supra* text accompanying note 21.

[59] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536 (2001).

issue and that for this reason, the client should go elsewhere for representation.[60] Indeed, the LSC attorneys were permitted to refer the client to someone who could represent them.[61]

For at least some individuals seeking help, the policy at issue in *Rust* would more clearly undermine their interests than would the policy at issue in *Velazquez*—in the former but not the latter, the consulted professional could not even discuss some of the person's options.[62] Further, where the government disfavored the best course of action, a referral to a professional who could help would be possible in *Velazquez* but not in *Rust*.[63]

One of the reasons the *Velazquez* Court cited for striking down the program at issue involved the welfare of the legal system as a whole: "Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys . . . ."[64] The Court worried that the limitation imposed on attorneys jeopardized the judicial system itself:

> By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source.[65]

It is at least noteworthy that the interests of the system, rather than the interest of the client, seemed to play such an important role in *Velazquez*, and that the interests of the patient alone were not enough to win the day in *Rust*.[66]

It is difficult to tell whether this fear that the judicial system might be compromised was a driving force in *Velazquez*. Perhaps the Court was noting the possible detrimental effects on the administration of justice, but was actually relying upon the distinction between government speech and private speech when upholding the program at issue in *Rust* but striking down the program at issue in *Velazquez*.[67] However, distinguishing between the two cases by appealing to the government speech doctrine is not persuasive for several reasons.

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[60] *Id.* at 551 (Scalia, J., dissenting) ("The lawyers may, however, and indeed *must* explain to the client why they cannot represent him.").

[61] *Id.* (Scalia, J., dissenting) ("They are also free to express their views of the legality of the welfare law to the client, and they may refer the client to another attorney who can accept the representation.").

[62] *See Rust*, 500 U.S. at 180; *Velazquez*, 531 U.S. at 551.

[63] *Velazquez,* 531 U.S. at 551.

[64] *Id.* at 544.

[65] *Id.* at 545.

[66] *See id.* at 542-49; *Rust*, 500 U.S. at 192-200.

[67] *See Velazquez* at 541 ("[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . ."); *id.* at 542 ("[T]he LSC program was designed to facilitate private speech, not to promote a governmental message.").

First, assuming for purposes here that *Rust* was rightly decided, the rationale expressly relied on by the *Rust* Court, namely that Congress can decide to fund certain projects but not others without offending constitutional guarantees, would seem dispositive in *Velazquez*.[68] Even if one understands *Rust* to be about government speech in addition to government funding, this understanding would not negate the *Rust* claim that the government can selectively fund certain projects,[69] which would appear to be all that was needed to uphold the constitutionality of the program at issue in *Velazquez*.[70]

Second, there is some irony in rejecting the implicit government speech claim in *Velazquez* but not in *Rust*. In the former, the government might be inferred to be expressing its view that its own statute is constitutional, but taking no position on whether a particular individual might wrongfully have been denied benefits.[71] Given Congress's duty to defend the Constitution,[72] one would expect the government to say and believe that its own laws passed constitutional muster.[73] However, one would not expect Congress to make a statement regarding the best interests of a particular client or patient in her particular circumstances, especially without knowing anything about the individual in question.[74] Therefore, it would be more plausible to read *Velazquez* as involving government speech (at least with respect to the constitutionality of the law), and read *Rust* as not about government speech but merely as about a governmental refusal to fund anything abortion-related.

At the very least, it is difficult to tell why *Rust* involves government speech and *Velazquez* does not. In both cases, professionals were paid with government funds to promote the interests of those consulting with them.[75] In both *Rust* and *Velazquez*, Congress conditioned the funding of certain programs on

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[68] *See* Gey, *supra* note 53, at 1279 ("Despite the logic of applying the Court's rules regarding government doctors to government lawyers, the Court rejected the government's effort to cloak itself in *Rust*'s government speech rationale.").

[69] *See Rust*, 500 U.S. at 200.

[70] *See Velazquez*, 531 U.S. at 536.

[71] *See id.* at 538 ("[A]n LSC grantee could represent a welfare claimant who argued that an agency made an erroneous factual determination or that an agency misread or misapplied a term contained in an existing welfare statute.").

[72] Salazar v. Buono, 130 S. Ct. 1803, 1817 (2010) ("Congress, the Executive, and the Judiciary all have a duty to support and defend the Constitution.").

[73] The Court presumes as a general matter that federal laws are constitutional. *See id.* at 1820 ("Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality.").

[74] *See supra* notes 53-55 and accompanying text.

[75] *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) ("[T]he majority's contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients.").

relevant actors refraining from engaging in certain practices.[76] The cases cannot be distinguished on those grounds, meaning that the *Rust-Velazquez* line of cases provides no clear criteria to determine when the First Amendment immunization of government speech has been triggered. Regrettably, the Court has not clarified this issue in the other government speech cases.[77]

C. *Government Speech and Advertising*

Consider the compelled advertising trilogy of cases. In *Glickman v. Wileman Bros. & Elliott, Inc.*, the Court upheld a system whereby fruit growers were subjected to an assessment that was to be used *inter alia* to promote the consumption of California produce generally.[78] The plaintiffs objected to their monies being so used, because they wished to distinguish their particular produce from California produce more generally.[79] The Court upheld the system at issue, notwithstanding that the funds contributed by the plaintiffs were used in a way that the plaintiffs perceived to be contrary to their own interests.[80]

The Court noted that "none of the generic advertising conveys any message with which respondents disagree,"[81] at least in the sense that the "central message of the generic advertising at issue in this case is that 'California Summer Fruits' are wholesome, delicious, and attractive to discerning shoppers."[82] While understanding the concerns of those challenging the assessment, namely, that it would have been preferable for the monies at issue to have promoted the challengers' own produce in particular,[83] the Court offered the consolation that this disagreement was not comparable to one in which "an objection rested on political or ideological disagreement with the content of the message."[84] Further, it was not as if consumers would believe that the plaintiffs themselves did not believe their own produce superior, because the organization promoting the

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[76] *See id.* at 553-54.

[77] *See, e.g., Keller v. State Bar of California,* 496 U.S. 1 (1990); *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005)).

[78] Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 460 (1997) ("A number of growers, handlers, and processors of California tree fruits (respondents) brought this proceeding to challenge the validity of various regulations contained in marketing orders promulgated by the Secretary of Agriculture. The orders impose assessments on respondents that cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches.").

[79] *See id.* at 468 n.11.

[80] *See id.* at 472, 476-77.

[81] *Id.* at 471.

[82] *Id.* at 462.

[83] *See id.* at 472 (noting "the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products . . . .").

[84] *Id.* at 472.

generic advertising had its own distinct name.[85] Finally, those who were compelled to contribute to the advertising budget were not simply independent fruit producers competing in the market—they were part of a combined enterprise and their individual autonomous acts were already limited in various ways.[86]

At issue in *United States v. United Foods, Inc.*[87] was a generic advertising campaign for mushrooms. This time, however, the advertising assessment was not part of a broader regulatory system.[88] For example, there were "no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions."[89] The Court was unconvinced that the commercial rather than ideological nature of the disputed language was dispositive,[90] noting that "those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts."[91] The Court held that "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity," citing *Abood* and *Keller* in support.[92] Yet, these cases, properly understood, support *Glickman* rather than *United Foods*.[93]

In *Abood v. Detroit Board of Education*, the plaintiff challenged the requirement that he belong to a public sector union, or, in the alternative, pay a service fee equivalent to what union dues would be.[94] The *Abood* Court noted that an

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[85] *See id.* at 471 ("Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or 'California Summer Fruits.'").

[86] *Id.* at 469 ("The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.").

[87] United States v. United Foods, Inc., 533 U.S. 405 (2001).

[88] *See id.* at 411-12 ("In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.").

[89] *Id.* at 412.

[90] *Id.* at 410 ("The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection . . . .").

[91] *Id.*

[92] *Id.* at 413 (citing Keller v. State Bar of Cal., 496 U.S. 1 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[93] *See infra* notes 94-121 and accompanying text (discussing these cases).

[94] *See Abood*, 431 U.S. at 211 ("The State of Michigan has enacted legislation authorizing a system for union representation of local governmental employees. A union and a local government employer are specifically permitted to agree to an "agency shop" arrangement, whereby every employee represented by a union—even though not a union member— must

"employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative,"[95] but explained that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[96] For example, having a single representative "avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment."[97] Further, it "frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations."[98] With respect to the individual employee, such a system "counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[99] The Court thus noted numerous reasons that the current system was justifiable.

Nonetheless, the fact that the system as a whole could be justified did not mean that all parts of it were equally defensible. The *Abood* Court validated the agreement "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment."[100] However, the union was precluded from "spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."[101] The union could only perform those political activities using monies of those who did not oppose the views expressed.[102] By distinguishing between workplace benefits and political views, the *Abood* Court emphasized the distinction between ideological positions on the one hand and commercial matters on the other.[103]

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pay to the union, as a condition of employment, a service fee equal in amount to union dues.").

[95] *Id.* at 222.

[96] *Id.*

[97] *Id.* at 220.

[98] *Id.* at 221.

[99] *Id.* at 222.

[100] *Id.* at 225-26.

[101] *Id.* at 234.

[102] *Id.* at 235-36 ("[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

[103] *See* Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 471 (1997), (noting that *Abood* "did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities . . . [but] merely recognized a First Amendment interest in not being compelled to contribute to an organiza-

Keller v. State Bar of California involved a challenge to the use of bar dues to finance ideological positions with which the dues-paying members were not in agreement.[104] The state supreme court rejected the challenge, because it believed the bar was a state agency, and hence afforded great discretion.[105] The focus of the United States Supreme Court was on the "scope of permissible dues-financed activities in which the State Bar may engage."[106] Ironically, the State Bar invoked the "'government speech' doctrine."[107] However, the Court explained that the "determination that respondent is a 'government agency,' and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question."[108] An important difference between the State Bar and other governmental agencies was that its "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors."[109] Precisely because of its special character, the State Bar was subject to the same rules as unions[110]—the Bar could "constitutionally fund activities germane to those goals [i.e., regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members."[111] However, the Bar could not use dues from dissenting individuals to "fund activities of an ideological nature which fall outside of those areas of activity."[112] Thus, *Keller* also distinguished among types of activities, refusing to force individuals to contribute to political causes with which they disagreed while requiring them to contribute to the promotion of professional activities in which they, like other members of the Bar, had an interest.

The *Glickman* Court understood the implications of *Keller*, explaining that

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tion whose expressive activities conflict with one's 'freedom of belief.'") (citing *Abood*, 431 U.S. at 235).

[104] Keller v. State Bar of California, 496 U.S. 1, 4 (1990). ("Petitioners, members of respondent State Bar of California, sued that body, claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution.").

[105] *Id.* ("The Supreme Court of California rejected this challenge on the grounds that the State Bar is a state agency and, as such, may use the dues for any purpose within its broad statutory authority. We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage.").

[106] *Id.*

[107] *Id.* at 10.

[108] *Id.* at 11.

[109] *Id.*

[110] *Id.* at 13 (holding that the State Bar is "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees").

[111] *Id.* at 14.

[112] *Id.*

"the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and . . . in any event, the assessments are not used to fund ideological activities."[113] In contrast, the *United Foods* Court ignored the distinction that the *Keller* Court had found so persuasive, despite citing *Keller* to support its conclusion.[114]

The difficulty here is that *Abood* and *Keller* support *Glickman's* distinguishing among types of speech, emphasizing that individuals may not be forced to pay assessments to support political messages with which they disagree but may be forced to pay assessments to support communications that will support their and others' interests, even if those interests could have been promoted more effectively if the individuals themselves had decided exactly how those monies would be used.[115] Surprisingly, the *United Foods* Court cited *Keller* and *Abood* for the proposition that individual mushroom growers could not be forced to pay an assessment for commercial speech that would promote the benefits of mushrooms (even if not the benefits of a particular grower's mushrooms when compared to those of other mushroom growers), which is a misapplication of both decisions.[116]

The *United Foods* Court understood that there was a potential objection to its holding that individual mushroom growers could not be forced to contribute to the contested advertising, namely that the speech being offered was "government speech."[117] However, because the argument was neither raised nor addressed in the lower courts,[118] some of the difficult issues that such an argument raised had not been explored, e.g., whether the government's involvement was merely "pro forma."[119] In addition, the Court might have been forced to consider whether the difference important in *Keller*, namely, that the "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members,"[120] was also important in *United Foods*. Of course, there would have been another important difference in *United Foods*, namely, that the funds were being used to promote common interests, which the *Keller* Court suggested would be permissible for the state to require.[121]

The Court was given an opportunity to clarify the jurisprudence in *Johanns*

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[113] Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 473 (1997).

[114] *See* United States v. United Foods, Inc., 533 U.S. 405, 413-14 (2001).

[115] *See Glickman*, 521 U.S. at 473; *Keller*, 496 U.S. 1; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-36 (1977).

[116] *See United Foods*, 533 U.S. at 413 (citing *Keller,* 496 U.S. 1; *Abood,* 431 U.S. 209).

[117] *Id.* at 416 ("The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply").

[118] *See id.* ("As the Government admits in a forthright manner, however, this argument was 'not raised or addressed' in the Court of Appeals.").

[119] *See id.* at 417.

[120] *Keller*, 496 U.S. at 11.

[121] *See supra* notes 110-112 and accompanying text.

v. Livestock Marketing Ass'n,[122] where the Court suggested that "the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny,"[123] as if the determination of whether this was government speech would settle matters. Yet, *Keller* had already made clear that even a finding of government speech would not immunize the practice, and *Glickman* had made clear that assessments might be upheld even if there was no finding of government speech. Thus an individual familiar with the jurisprudence might well have been surprised that the determination of whether the speech at issue was governmental would be dispositive.[124]

The *Johanns* Court suggested that in "all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself,"[125] citing *Keller* among other cases.[126] But the citation to *Keller* was not to the discussion of whether the Bar was a state entity. Rather, the citation was to the *Keller* discussion of the kind of speech that Bar members could not be forced to fund, e.g., lobbying against their will with respect to a proposal to preclude state and local employers from forcing their employees to take polygraph tests.[127]

At issue in *Johanns* was an advertising program promoting beef sales.[128] The respondents contested being forced to support generic messages concerning the desirability of eating beef when they wanted to assert the superiority of their own products when compared to other beef products on the market.[129] The Court quickly disposed of their challenge, suggesting that citizens "may challenge compelled support of private speech, but have no First Amendment right not to fund government speech."[130] However, *Keller* stands for the proposition that citizens can make such a challenge and may well be successful insofar as the forced speech is unrelated to particular purposes.[131] Presumably,

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[122] 544 U.S. 550 (2005).

[123] *Id.* at 553.

[124] *See* Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457 (1997); Keller v. State Bar of Cal., 496 U.S. 1 (1990).

[125] *Johanns*, 544 U.S. at 559.

[126] *See id.*

[127] *See* Keller v. State Bar of Cal., 496 U.S. 1, 15 (1990).

[128] 544 U.S. 550 (2005).

[129] *See id.* at 556 ("Respondents noted that the advertising promotes beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef").

[130] *Id.* at 562.

[131] *See Keller*, 496 U.S. at 16 ("Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.").

even the *Johanns* Court would not have upheld the use of the funds at issue to support a political candidate rather than to promote beef consumption[132] although the Court's making commercial and political speech subject to the same rules might make one wonder how this could be justified.[133]

The *Johanns* Court suggested that there could be no First Amendment challenge to government speech, even "when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object."[134] But that simply is not what *Keller* held, notwithstanding the *Johanns* Court's citing of *Keller* in support of its holding. *Keller* focused on the fact that the assessments were targeted, suggesting that this was one of the factors militating against use of the government speech doctrine.[135]

That said, the difficulty for the *Johanns* Court was not *Keller* but *United Foods*. *United Foods* rejected the importance of a distinction that all of the other cases had recognized, namely between political or ideological speech on the one hand and commercial speech on the other.[136] The speech at issue in *Glickman*, *United Foods*, and *Johanns* all promoted the generic benefits of a particular commodity, and one might have expected the Court to have upheld the speech at issue in all three of these cases.[137] However, instead of overruling *United Foods*, the *Johanns* Court mischaracterized *Keller* to modify a government speech doctrine that is growing more mysterious with each decision in which it is cited.[138]

One element of the doctrine requiring clarification involves the conditions under which one knows that the government is speaking. The *Johanns* Court noted that the "message set out in the beef promotions is from beginning to end

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[132] *Cf.* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011) ("We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment."). If Arizona cannot provide matching funds for political candidates, it presumably could not force individuals against their wills to contribute to a particular candidate's coffers.

[133] *See supra* notes 100-103 and accompanying text (discussing the Court's treating these different kinds of speech as both protected by the First Amendment in this context).

[134] *Johanns*, 544 U.S. at 562.

[135] *See Keller*, 496 U.S. at 11 (noting that the "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors").

[136] *See* United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) ("[S]peech need not be characterized as political before it receives First Amendment protection.") (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)).

[137] *Cf.* Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 Buff. L. Rev. 847, 913 (2011) (noting that "commentators have accused the Court of thoroughgoing inconsistency in its disposition of the *Glickman-United Foods-Johanns* trilogy").

[138] *See supra* notes 134-135 and accompanying text (discussing the *Johanns* Court's mischaracterization of *Keller*),

the message established by the Federal Government."[139] The Court had no difficulty in characterizing the speech at issue as governmental, "because Congress and the Secretary [of Agriculture] have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well)."[140]

It might seem surprising that there would be difficulty in knowing whether or not this was government speech, especially when this was all pursuant to statute.[141] But the speech at issue in *Glickman*[142] and *United Foods*[143] was also issued pursuant to a federal statute, so one cannot distinguish the speech at issue in *Johanns* on that basis.[144] Further, the advertising at issue in *Johanns* was credited to "America's Beef Producers,"[145] which no more clearly indicated that the government was speaking than did the advertising attributed to "California Summer Fruits."[146] Indeed, Justice Ginsburg concurring in the judgment in *Johanns* resisted "ranking the promotional messages . . . not attributed to the Government, as government speech,"[147] as did Justice Souter in dissent,[148] who worried that without such a requirement *United Foods* would be a "dead letter."[149] Yet, arguably *United Foods* was not in accord with the past precedent, and one of the concerns caused by *United Foods* and left untouched by *Johanns* is the degree to which one should treat commercial and political speech as equivalent.[150]

Some would agree with the position suggested by Justices Souter and Ginsberg that there be a requirement that the government expressly identify its speech in order for such speech to count as governmental speech,[151] and per-

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[139] *Johanns*, 544 U.S. at 560.

[140] *Id.* at 561.

[141] *See id.* at 553 ("The Beef Promotion and Research Act of 1985 . . . announces a federal policy of promoting the marketing and consumption of "beef and beef products," using funds raised by an assessment on cattle sales and importation.").

[142] Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 461 (1997) ("Congress enacted the Agricultural Marketing Agreement Act of 1937 . . . in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities.").

[143] *See* United States v. United Foods, Inc., 533 U.S. 405, 408 (2001) ("The statute in question . . . authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals.").

[144] *See supra* notes 137-140 and accompanying text.

[145] *Johanns*, 544 U.S. at 564.

[146] *Glickman*, 521 U.S. at 471.

[147] *Johanns*, 544 U.S. at 569 (Ginsburg, J., concurring).

[148] *Id.* at 571 (Souter, J., dissenting) ("[A] compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.").

[149] *Id.* at 571 (Souter, J., dissenting).

[150] See supra notes 89-91 (discussing the *United Foods* Court's refusal to distinguish among types of speech).

[151] *See, e.g.*, Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L.

haps, that the message be clear and distinct.[152] Perhaps that is so, although it may well remove some flexibility from the government. It might mean, for example, that the government could not both promote beef sales via the advertisements supported by a seemingly private group called "Beef Producers," and also recommend dietary changes whereby more fruits and vegetable would be eaten as recommended by the Secretary of Health and Human Services.[153]

Arguably, public health would be promoted if, for example, the government did not surreptitiously send messages promoting beef consumption while officially sending conflicting messages recommending the reduction in beef consumption — the public might be less confused if it did not receive such mixed messages.[154] Yet, the government is not required to express consistent messages, and the consumer would be even more confused if the conflicting messages were all identified as coming from the government.[155] Furthermore, institutional capture of government speech is possible,[156] which might mean that the message sent to the public would be colored or controlled by a particu-

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REV. 695, 718 (2011) ("There is, however, a well-recognized flaw in this supposed political solution: government speech doctrine does not require the government to identify itself when speaking"); Norton & Citron, *supra* note 6, at 902 ("The Court's current approach thus fails to recognize that government expression's value springs primarily from its capacity to inform the public of its government's principles and priorities. The public can assess government's positions *only* when the public can tell that the government is speaking. The Court's failure to condition the government speech defense on the message's transparent identification as governmental is especially mystifying because the costs of such a requirement are so small when compared to its considerable benefits in ensuring that government remains politically accountable for its expressive choices").

[152] *See* Gey, *supra* note 53, at 1302 ("Only at the point at which the city announces a fully articulated and legal message should the government speech doctrine apply").

[153] *See, e.g*, Alan Bjerga Knight, *New Eating Guidelines More Stringent; Health: Calls For More Exercise, Whole Grains Make Food Pyramid Obsolete*, LONG BEACH PRESS TELE. (CA), Jan. 13, 2005, at A15 *available at* 2005 WLNR 794174 ("The new report is 'scientifically based, and it's also based on common sense,' said Health and Human Services Secretary Tommy Thompson. It's available online at www.healthierus.gov/dietaryguidelines. The revisions are the federal government's five-year planned update of Americans' nutrition and exercise needs. The report supersedes the well-known food pyramid, which was introduced 12 years ago, and is intended to help Americans make wise health and exercise decisions. The guidelines will also be used to regulate federal school lunch and other nutrition programs.").

[154] See Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 B.Y.U. L. REV. 2117, 2139 (2010) (suggesting that confusion is not surprising when mixed messages are sent).

[155] See Timothy D. Lytton, *Signs of Change or Clash of Symbols? FDA Regulation of Nutrient Profile Labeling*, 20 HEALTH MATRIX 93, 105 (2010) (discussing how inconsistent messages can lead to confusion).

[156] *See* Smith, *supra* note 14, at 964.

lar group.[157]

If the government issues multiple, messages, the political accountability check might not be very efficacious, because individuals might not be sufficiently angry about disfavored messages, so long as their favored message was represented as well[158] Moveover, even those citizens who were angry might not know where to direct that anger, given the variety of government actors that might be sending the messages.[159] In addition, those who are sufficiently powerful or wealthy to influence the government's message might well be able to deflect or counter the efforts of those seeking to hold the message senders accountable. Finally, the political accountability check would not provide much solace to those who do not share the political majority's view — that the government was taking a particular majoritarian position on a controversial topic might be viewed as adding insult to injury.[160]

The government speech doctrine immunizes speech, so it makes sense to require that the doctrine can only be invoked when certain conditions have been met.[161] Nonetheless, one should not assume that requiring the government to identify itself as the speaker would necessarily lead to more consistent,

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[157] *Cf.* Marian Burros, *Eating Well: Are Cattlemen Now Guarding The Henhouse?* N.Y. TIMES, May 8, 1991 at C1, *available at* 1991 WLNR 3103616 ("On April 24, after three years of study, research, consultations and discussions with consumers, the Agriculture Department sent its Eating Right Pyramid to the printer. This new chart was to have replaced the food wheel used since the 1950's to provide information about a healthy diet. The next day Agriculture Secretary Edward R. Madigan announced that he was indefinitely delaying the chart's publication . . . . But other Federal officials and health professionals, outraged by the Secretary's decision, said the pyramid was withdrawn because meat and dairy producers objected to what they felt was the pyramid's negative depiction of their products.").

[158] Some commentators do not seem to appreciate that this check may not prove particularly effective. *See* Norton & Citron, *supra* note 6, at 902 (discussing the "considerable benefits in ensuring that government remains politically accountable for its expressive choices").

[159] *Cf.* Michele E. Gilman, *Presidents, Preemption, and the States,* 26 CONST. COMMENT. 339, 379 (2010) ("[I]t is questionable whether the President is politically accountable for agency decisions because most governmental decisions are not on the radar screen of voters.").

[160] See Yehonatan Givati, Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 103 (2011) (noting that the "majoritarianism implicit in catering to the median voter may be insufficiently sensitive to minority interests").

[161] *See* Ursula Ramsey, Case Note, *Constitutional Law—First Amendment—Government Speech and the Display of Permanent Monuments in Public Parks*: Pleasant Grove City v. Summum, *129 S. Ct. 1125 (2009)*, 77 TENN. L. REV. 685, 698 (2010) ("[I]n the government speech context, the Court has granted the government sweeping immunity from First Amendment attacks.").

thoughtful, or careful pronouncements.[162] Nor would it necessarily lead to the government being held more accountable for its statements.[163] The justification for requiring the government to self-identify when seeking the protections of the government speech doctrine must lie elsewhere.

D. *Government Employee Speech*

Within two different strands of cases, the Court has manifested an unwillingness to employ the government speech doctrine in the context of regulating attorneys.[164] That reluctance was overcome[165] in *Garcetti v. Ceballos*.[166] At issue in *Garcetti* was whether a government-employed attorney, Richard Ceballos, could be disciplined for speech made pursuant to his official duties.[167] Ceballos held a supervisory position over other attorneys in the Los Angeles County District Attorney's Office,[168] and a defense attorney asked him to review a particular case.[169] (Apparently, it was not uncommon for a defense attorney to make such a request of someone in the District Attorney's office.)[170] Ceballos believed that there were serious misrepresentations in a particular affidavit that was used to obtain a search warrant,[171] and he informed his supervisors about his reservations.[172] In addition, he wrote a memo suggesting that the case be dismissed.[173] Ceballos's superior, Sundstedt, decided to proceed with

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[162] *See supra* notes 154-160 and accompanying text (discussing the possibility that the government would send conflicting messages).

[163] *But cf.* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1031 (2005) ("Transparency plays an essential role in enabling the accountability, and hence legitimacy, of government communications.").

[164] *See supra* notes 32-76 and 102-37 and accompanying text (discussing *Velazquez* and *Keller* respectively).

[165] *See* Gey, *supra* note 53, at 1286 ("So we are left with a puzzle. Government subsidies for private speakers sometimes constitute government speech (*Rust*), except when the Court chooses to treat those accepting the government subsidies as private speakers (*Velazquez*), or when the government-funded speaker is participating in a legal medium of expression that limits government speech that affects the way courts do their business (*Velazquez*), except when the Court decides that imposing limits on government-funded speakers in the legal medium of expression is just fine (*Garcetti*)").

[166] 547 U.S. 410 (2006).

[167] *See id.* at 413 ("The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.").

[168] *See id.*

[169] *See id.*

[170] *Id.* at 414 ("According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.").

[171] *Id.*

[172] *Id.*

[173] *Id.*

the case.[174] The defense called Ceballos as a witness to testify about his reservations about the basis for the warrant[175] although the trial court ultimately rejected the challenge to the warrant[176] because there were independent grounds upon which its issuance might have been based.[177]

Ceballos was subsequently reassigned to a different position and courthouse, as well as denied a promotion.[178] He then sued, alleging that he had been subjected to retaliatory employment actions.[179]

At issue before the Court was whether the contents of the memo written by Ceballos were protected by the First Amendment.[180] The Court began its analysis by noting that "public employees do not surrender all their First Amendment rights by reason of their employment"[181] and that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[182] The rights of public employees to speak as private citizens was reaffirmed—as "long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[183] Nonetheless, when public employees "speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions."[184] The Court emphasized the difference between public employees speaking as private citizens and public employees speaking in their official capacity, reasoning that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[185]

There are various interests at stake when public employees speak, for example, the employers "have heightened interests in controlling speech made by an employee in his or her professional capacity,"[186] and supervisors "must ensure that their employees' official communications are accurate, demonstrate sound

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[174] *Id.*

[175] *Id.* at 414-15.

[176] *Id.* at 415.

[177] *Id.* at 442 (Souter, J., dissenting) ("After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.").

[178] *Id.* at 415.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 417.

[182] *Id.*

[183] *Id.* at 419.

[184] *Id.*

[185] *Id.* at 421.

[186] *Id.* at 422.

judgment, and promote the employer's mission."[187] The Court noted that if "Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."[188]

Garcetti is of interest in this article insofar as the Court is implicitly adopting a position expressly imputed to it in Justice Souter's dissent, namely, the Court might have been accepting the theory that "any statement made within the scope of public employment is (or should be treated as) the government's own speech."[189] However, the Court did not need to invoke the government speech doctrine to decide the issue before it. If, indeed, Ceballos was punished for inflammatory remarks that impaired the efficiency of the workplace, then the case should have been decided in light of *Connick v. Myers*[190] or, perhaps, under the *Pickering* balancing test,[191] which was discussed and used in *Connick*.[192] Indeed, *Garcetti* undermines *Connick* in a number of ways.

At issue in *Connick* were the actions of Sheila Myers, who "was employed as an Assistant District Attorney in New Orleans."[193] Myers was informed that she "would be transferred to prosecute cases in a different section of the criminal court," a move that she strongly opposed.[194] She spoke to one of her colleagues "expressing her reluctance to accept the transfer" among other matters.[195] He suggested to her that "her concerns were not shared by others in the office."[196] Myers decided to find out how her colleagues felt by composing a questionnaire "soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[197]

Connick terminated Myers's employment, justifying his action by noting "her refusal to accept the transfer."[198] "She was also told that "her distribution of the questionnaire was considered an act of insubordination."[199] In particular, Connick "objected to the question which inquired whether employees 'had con-

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[187] *Id.* at 422-23.

[188] *Id.* at 423.

[189] *Id.* at 436-37 (Souter, J., dissenting). *See also* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (including *Garcetti* among the "decisions relying on the recently minted government speech doctrine to uphold government action").

[190] 461 U.S. 138 (1983).

[191] *Garcetti*, 547 U.S. at 434 (Souter, J., dissenting) ("Two reasons in particular make me think an adjustment using the basic *Pickering* balancing scheme is perfectly feasible here.").

[192] *See Connick*, 461 U.S. at 150-52.

[193] *Id.* at 140.

[194] *Id.*

[195] *Id.* at 141.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

fidence in and would rely on the word' of various superiors in the office, and to a question concerning pressure to work in political campaigns . . . ."[200] Myers argued that she was wrongfully terminated for exercising her right to free speech.[201]

The Court construed the questionnaire as speech by a public employee.[202] However, most of the speech was not viewed as involving "matters of public concern"[203] but, instead, as involving "matters only of personal interest."[204] The accuracy of this characterization is questionable. First, Connick testified that the "question concerning pressure to work in political campaigns . . . would be damaging if discovered by the press."[205] Presumably, if that issue would be damaging when reported by the press, it was a matter of public interest. Second, as Justice Brennan pointed out in dissent, "speech about 'the manner in which government is operated or should be operated' is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment."[206]

The *Connick* Court admitted that a little of the speech involved matters of public concern, namely, the question asking whether the assistant district attorneys felt "pressured to work in political campaigns."[207] Although there is some irony in the Court's implying that the speech of public concern was practically de minimis.[208] Connick, who had fired Myers, had expressly worried about the public relations difficulties that might occur if the press became aware of the issue involving pressure to be part of political campaigns[209] so the matter of public concern may have played a greater role in Myers being fired than the Court's description would imply.[210] Nonetheless, the Court noted that "[w]hen close working relationships are essential to fulfilling public responsibilities, a

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[200] *Id.*

[201] *Id.*

[202] *See id.* at 147.

[203] *Id.* at 147.

[204] *Id.*

[205] *Id.* at 141.

[206] *Id.* at 156 (Brennan, J., dissenting) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[207] *See id.* at 149 ("One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys 'ever feel pressured to work in political campaigns on behalf of office supported candidates.'").

[208] *See id.* at 154; *see also id.* at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices . . . .").

[209] *Id.* at 141.

[210] *See id.* at 149 ("Because one of the questions in Myers' survey touched upon a matter of public concern, *and contributed to her discharge* we must determine whether Connick was justified in discharging Myers.") (emphasis added).

wide degree of deference to the employer's judgment is appropriate . . ."[211] and, further, that an employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[212] Thus, even if some of the speech involved a matter of public concern and there were no concrete evidence that such harm had already taken place, adverse employment action might be taken if it seemed reasonable to believe that working relationships might suffer.[213]

Was the matter at issue in *Garcetti* a matter of public concern? That depends upon what was said in the memo. If, for example, the memo was inflammatory and cast false aspersions upon individuals working with the district attorney's office, then it might not have been a matter of public interest.[214] Even if it were a matter of public interest, the analysis could still have been made in light of *Connick*.[215] But that means that the Court did not need to adopt the government speech doctrine, even implicitly, to resolve the issue presented in *Garcetti*. Nonetheless, *Garcetti* suggests that the kind of analysis employed in *Connick* is no longer necessary.[216]

In the future, there may well be occasions on which it is difficult to tell whether an individual is speaking as a citizen rather than as a government employee.[217] In any event, as Justice Souter points out in his *Garcetti* dissent:

> [P]rivate and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[218]

The Court has created the potential for disaster by unnecessarily making use of the government speech in a way that not only seemed to undermine past precedent but also offered immunity to state officials for a variety of actions

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[211] *Id.* at 151-52.

[212] *Id.* at 152.

[213] *See id.* at 151 ("We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities.").

[214] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (noting that the memo "led to a heated meeting with employees from the sheriff's department.").

[215] *See Connick*, 461 U.S. at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

[216] *See Garcetti*, 547 U.S. at 421 (stating that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . .").

[217] *See id.* at 427 (Stevens, J., dissenting) ("The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong.").

[218] *Id.* at 428.

that they might take with respect to individuals whom they were supervising.[219] Certainly, public employees who might be tempted to expose threats to health and safety might be less likely to voice their concerns if their jobs hung in the balance, detriment to the public notwithstanding.[220]

E. *Buildings in Public Parks*

The most recent case in which the Court cited the government speech doctrine was *Pleasant Grove City v. Summum*, in which the Court rejected a challenge to a city's refusal to accept a monument for permanent installation in a public park. The case seemed to involve a difficult issue because a public park was involved, and parks are traditional public fora.[221]

The Court rightly noted that "although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies."[222] The Court worried about some of the implications of a contrary holding, for example, city officials might have to "brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments."[223] The Court rightly suggested that "it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression."[224]

The issue presented is easier to understand when a little background is provided. "Summum is a religious organization . . . headquartered in Salt Lake City, Utah."[225] The organization offered to donate a monument of the Seven Aphorisms, which according to Summum doctrine were inscribed on the original tablets given to Moses at Mount Sinai.[226] Their proposed donation was

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[219] *See generally* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009) (discussing some of the ramifications of the Court's government speech doctrine in the context of public employment).

[220] *See id.*

[221] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009) ("[A] park is a traditional public forum.").

[222] *Id.*

[223] *See id.* at 1138 (quoting Summum v. Pleasant Grove City, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting from the court's denial of en banc rehearing)).

[224] *Id.* at 1137.

[225] *See id.* at 1129.

[226] *See id.* at 1129 n.1; *see also* Gey, *supra* note 53, at 1299-1300 ("[W]hen one religious group places sectarian religious objects in public, other religious groups that have different perspectives will wish to express their own contrasting views. This was the case in *Summum*. Summum is a religious group based in the same state in which the dispute over the Ten Commandments monument arose. Summum is a derivative of Gnostic Christianity and is a religion with very specific views about the central feature of this case—the Ten Commandments. According to the Summum theology, before receiving the Ten Commandments from

rejected.[227] The organization challenged the rejection because Pioneer Park already contained several permanent displays, including a Ten Commandments monument, and the Summum monument would be similar in size and nature to the Ten Commandments monument.[228]

If indeed the park were a public forum even with respect to the acceptance of permanent monuments, then one would expect that the Seven Aphorisms monument would be accepted because the Ten Commandments monument had already been accepted.[229] But because the park was not a public forum for purposes of the acceptance and installation of permanent structures, Summum's Free Speech challenge was without merit.[230]

Arkansas Educational Television Commission v. Forbes is instructive with respect to understanding the applicable constitutional limitations on nonpublic fora. In *Forbes*, a candidate for the United States House of Representatives was told that he could not participate in a political debate televised by a state-owned television network.[231] The *Forbes* Court held that the debate was not a public forum.[232] However, that did not end the analysis—the exclusion would be consistent with the First Amendment as long as the speaker's exclusion was not "based on the speaker's viewpoint" and "reasonable in light of the purpose of the [forum]."[233] Because the jury found that the exclusion was not viewpoint-based[234] and because the exclusion was reasonable in that Forbes lacked widespread public support, the Court held that his exclusion did not violate constitutional guarantees.[235]

The *Forbes* Court explained that "[w]here the property is not a traditional

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God, Moses received the Seven Aphorisms. These aphorisms provided similar, but far more abstract guidance than the Ten Commandments. Because Moses believed that the Israelites were not yet ready to receive the Seven Aphorisms, he destroyed the original tablets and returned to Mount Sinai where he received the Ten Commandments. Nevertheless, according to the Summum religion, the Seven Aphorisms continue to exist as the higher level of theological understanding, in comparison with the lower level of understanding represented by the Ten Commandments.") (emphasis in original) (citations omitted).

227 *See Summum*, 129 S.Ct. at 1129-30.

228 *See id.*

229 *See id.* at 1126 (explaining that the Ten Commandments monument was already in the park).

230 *See id.* at 1138 ("[T]he City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the *Free Speech Clause* . . . .").

231 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669-71 (1998). ("A state-owned public television broadcaster sponsored a candidate debate from which it excluded an independent candidate with little popular support.").

232 *See id.* at 675 ("[P]ublic broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine . . . .").

233 *Id.* at 682.

234 *Id.*

235 *Id.* at 683.

public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all."[236] Once the *Summum* Court held that the park was not a public forum, at least for purposes of the installation of a permanent monument, the park was either a nonpublic forum or not a forum at all.[237] In either case, the rejection would be upheld as long as it was reasonable and not viewpoint-based.[238]

After showing why the rejection did not violate constitutional guarantees, the Court continued its analysis, addressing a related but different issue, namely, what is the appropriate constitutional analysis for those permanent structures that are displayed on public property.[239] The *Summum* Court recognized that "[p]ermanent monuments displayed on public property typically represent government speech."[240] After all, such monuments are installed on public property and may well require the use of public funds for their maintenance.[241]

Having established that monuments displayed on public property represent government speech, the Court explained its rejection of the view that "a monument can convey only one 'message.'"[242] The Court illustrated that monuments can convey more than one meaning by asking rhetorically, "What, for example, is 'the message' of the Greco-Roman mosaic of the word 'Imagine' that was donated to New York City's Central Park in memory of John Lennon?"[243]

It might seem surprising that the Court would even bother to note that a monument can mean different things to different people,[244] especially when the Court had already disposed of the pertinent question by holding that the park was not a public forum for purposes of accepting permanent monuments.[245] But much of the *Summum* opinion is meant to address an issue not before the Court, namely, that even if the city's rejection of the Summum monument did

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[236] *Id.* at 678.

[237] *Cf. Summum*, 129 S. Ct. at 1138.

[238] *Cf.* id. at 1134 (discussing "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint").

[239] *Id.* at 1131-32.

[240] *Id.* at 1132; *see also* Mary Jean Dolan, *Why Monuments Are Government Speech: The Hard Case of* Pleasant Grove City v. Summum, 58 CATH. U. L. REV. 7, 8 (2008) ("When a municipality accepts and installs a donated monument in a public park, that monument should be recognized as the government's own speech, regardless of who originally conceived or funded the project.").

[241] *See* Dolan, *supra* note 240.

[242] *Summum*, 129 S. Ct. at 1135.

[243] *Id.*

[244] *See* Gey *supra* note 53, at 1301 (describing the *Summum* Court's "sophomoric discussion on how different people's points of view often produce different perceptions of expressive artifacts, such as monuments . . . .").

[245] *See Summum*, 129 S. Ct. at 1132.

not violate Free Speech guarantees, it added support to or established the claim that the city was violating constitutional guarantees by accepting a Ten Commandments monument but not another religious monument.[246] Basically, the *Summum* Court seemed to be offering a glimpse of what it would say were there an as-applied Establishment Clause challenge to the Ten Commandments monument in Pioneer Park.[247]

Perhaps such an envisioned challenge might be thought to be without merit, given *Van Orden v. Perry* in which the Court upheld against Establishment Clause challenge the constitutionality of a similar monument.[248] As Justice Scalia noted in his concurrence, nothing in the *Van Orden* opinion "suggested that the outcome turned on a finding that the monument was only 'private' speech.[249] But the point in the hypothesized case would be that here, unlike what was at issue in *Van Orden*, a different religious monument had been offered for donation and rejected.[250] What should a reasonable observer think when a Ten Commandments monument has been accepted and displayed but a Seven Aphorisms monument is rejected?

Much of the opinion is designed to suggest that the reasonable observer would not know what to think.[251] After all, monuments "may in fact be interpreted by different observers in a variety of ways."[252] The intended and perceived message of a city "may not coincide with the thinking of the monument's donor or creator."[253] Further, the "'message' conveyed by a monument may change over time,"[254] for example, because of "the subsequent addition of other monuments in the same vicinity,"[255] or because events not subject to the

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[246] *See id.* at 1134.

[247] *See id.*

[248] *See id.* at 1139-40 (Scalia, J., concurring) ("In *Van Orden v. Perry,* 545 U.S. 677 (2005), this Court upheld against Establishment Clause challenge a virtually identical Ten Commandments monument, donated by the very same organization (the Fraternal Order of Eagles), which was displayed on the grounds surrounding the Texas State Capitol.") (parallel citation omitted).

[249] *Id.* at 1140.

[250] See Dolan, *supra* note 240, at 49-51 ("Pleasant Grove's continued display of the Ten Commandments—in juxtaposition with its refusal to display the monument offered by a small religion—arguably sends a message of exclusion.").

[251] *Cf.* Gey, *supra* note 53, at 1263 ("Even more problematic is the Court's most recent government speech case, *Pleasant Grove City, Utah v. Summum*, in which the government asserts that it is indeed saying something but will not reveal the precise details of the message.").

[252] *Summum*, 129 S. Ct. at 1135.

[253] *Id.* at 1136.

[254] *Id. See also* Gey, *supra* note 53, at 1301-02 ("This discussion was apparently intended to demonstrate the obvious propositions that monuments may convey different messages to different people, and that these messages may change with time.").

[255] *Summum*, 129 S. Ct. at 1136.

control of the state might change the meaning conveyed by a monument.[256] Perhaps because a monument might convey so many possible messages both at one particular point in time and across time, the Court rejected a requirement that government entities accepting a monument "go through a formal process of adopting a resolution publicly embracing 'the message' that the monument conveys."[257]

Much of *Summum* does not focus on the challenge at issue but instead on why, in Justice Scalia's words, cities with Ten Commandments monuments in their parks "can safely exhale."[258] These cities need not fear that the current Court will find that "they are complicit in an establishment of religion," even if it turns out that some reasonable people interpret such a monument as an endorsement of religion.[259]

III. The License Plate Cases

While the *Summum* Court explained that in most instances permanent monuments on government lands involve government speech, the Court candidly admitted that in some instances "it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech . . . ."[260] A case in point is whether a license plate is government speech or a forum for private speech.

A. *Is the Speech on a License Plate Government, Private or Both?*

Several circuits have addressed whether the speech on a license plate is governmental, private, or both.[261] The circuits have reached no consensus, at least

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[256] *See* Dolan, *supra* note 240, at 34-35 ("Pleasant Grove City retains that ownership right regardless of its lack of involvement in designing the monument. Imagine, for example, a city determines that one prominent symbol on an existing monument is now widely viewed as a sign for a satanic cult or warring gang: that city likely would exercise its editorial control by modifying the statue, if possible, or by removing it").

[257] *Summum*, 129 S. Ct. at 1134.

[258] *Id.* at 1140 (Scalia J., concurring); *see also* Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 Me. L. Rev. 23, 69 (2010) ("Justice Scalia preemptively announced that *Summum* could not win a future Establishment Clause challenge, warning litigants and encouraging cities that there was no Establishment Clause violation in Pioneer Park because it was 'virtually identical' to the display in Austin, Texas.").

[259] *See Summum*, 129 S. Ct. at 1141 (Souter, J., concurring) ("I agree with the Court that the Ten Commandments monument is government speech, that is, an expression of a government's position on the moral and *religious* issues raised by the subject of the monument." (emphasis added)).

[260] *Id.* at 1132.

[261] *See*, e.g., Lewis v. Wilson, 253 F.3d 1077, 1078-79 (8th Cir. 2001); Perry v. McDonald, 280 F.3d 159, 168 (2d Cir. 2001); Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 617 (4th Cir. 2002).

in part, because the Supreme Court has been so unhelpful in indicating how to tell when the government is speaking.[262] Consider, for example, *Lewis v. Wilson* in which the Eighth Circuit addressed the constitutionality of a refusal by the Department of Revenue to reissue the license plate "ARYAN-1."[263] The State claimed that the plate was a nonpublic forum, but the Eight Circuit expressed "skepticism about characterizing a license plate as a nonpublic forum, because it occurs to us that a personalized plate is not so very different from a bumper sticker that expresses a social or political message."[264] The Eighth Circuit's comparison of a license plate with a bumper sticker in this context conflates the kind of content that might be posted with the kind of forum at issue.[265]

While the bumper is a place where political messages might be posted, the bumper does not constitute a public forum if only because it is privately owned. Thus, one potentially important difference between a license plate and a bumper is that the state owns the former and not the latter. License plates and bumpers also differ in that a license plate is rather limited in the kinds of views that it can accommodate,[266] whereas a the kinds of messages that one could post on a bumper sticker are less restricted. Indeed, a driver who wishes to express her views has an attractive alternative to using her license plate; she can mount a bumper sticker on her car to communicate the very message that she had been prevented from putting on the plate.

The Eighth Circuit in *Lewis* did not decide whether a license plate is a public rather than a nonpublic forum, reasoning that it did not need to "determine precisely what kind of forum, if any, a personalized license plate is because the statute at issue is unconstitutional whatever kind of forum a license plate might be."[267] The court reasoned that for Ms. Lewis to prevail, she only needed to show "there was nothing in the ordinance to prevent the DOR [Department of Revenue] from denying her the plate because of her viewpoint."[268] The *Lewis* court has offered an overly robust reading of nonpublic forum doctrine. Although the United State Supreme Court has suggested that access to a nonpublic forum cannot be denied based on viewpoint,[269] the Court has upheld restrictions on access to nonpublic forums despite the *possibility* that the restrictions would permit a denial of access based on viewpoint. Indeed, in *Cornelius v.*

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[262] *See*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

[263] Lewis v. Wilson, 253 F.3d 1077, 1078-79 (8th Cir. 2001).

[264] *Id.* at 1079.

[265] *Id.*

[266] *See, e.g.* Perry v. McDonald 280 F.3d 159, 167 (2d Cir. 2001) ("[E]xpressive activity on Vermont's vanity plates is subject to numerous restrictions, including limitations on the number of letters that may appear on a vanity plate and on how many numbers may be used in combination with letters.").

[267] *Lewis*, 253 F.3d at 1079.

[268] *Id.* at 1080.

[269] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

NAACP Legal Defense and Educational Fund, Inc., where the standard was explained, the Court noted that on remand the respondents could pursue "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view."[270] However, the Court would not have afforded respondents such an opportunity on remand had the impossibility of viewpoint discrimination been a precondition for upholding a limitation on access to a nonpublic forum *Cornelius* suggests that Ms. Lewis should have been required to do more than show the mere possibility of viewpoint discrimination.[271] *Cornelius* suggests that when a nonpublic forum is involved, the plaintiff must show either that the denial was not reasonable or that she in fact had been denied because of her viewpoint.[272]

Most of the *Lewis* opinion was written as if the license plate was a kind of public forum. For example, the *Lewis* court likened the case at hand to a case in which "permission was required to have a parade."[273] One might contrast that view with the view expressed in *Perry v. McDonald* in which the Second Circuit examined a refusal by the Vermont Department of Motor Vehicles to issue the vanity license plate "SHTHPNS."[274] The court held that "Vermont has not intended to designate, and has not designated, its vanity plates as a public forum."[275] Because a "governmental restriction on speech in a nonpublic forum 'need only be reasonable in light of the purpose of the forum . . . and reflect a legitimate government concern,'"[276] and because the court believed it reasonable to prohibit a license plate standing for "Shit happens,"[277] the court upheld the refusal.[278]

It is simply unclear whether the license plates should be considered nonpublic fora because the possible messages that can be displayed are allegedly so limited in number.[279] There are a variety of messages that can be communicated on a license plate that range from "ARYAN-1"[280] to "SHTHPNS"[281] to "EZ LAY."[282] Presumably, individuals have sufficient ingenuity to combine letters and numerals to communicate other messages as well. In any event, states

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[270] *Id.* at 812-13.

[271] *Id.* at 806.

[272] *Id.* ("[T]he distinctions drawn [must be] reasonable in light of the purpose served by the forum and [must be] viewpoint neutral.").

[273] *Lewis*, 253 F.3d at 1080 (citing Cox v. Louisiana, 379 U.S. 536, 556 (1965)).

[274] Perry v. McDonald, 280 F.3d 159, 163-64 (2d Cir. 2001).

[275] *Id.* at 168.

[276] *Id.* at 169 (quoting Gen. Media Commc'ns, Inc. v. Cohen, 131 F.3d 273, 282 (2d Cir. 1997)).

[277] *Id.* at 170.

[278] *Id.*

[279] *Id.* at 167.

[280] *See* Lewis v. Wilson, 253 F.3d 1077, 1078 (8th Cir. 2001).

[281] *See Perry*, 280 F.3d at 163.

[282] *See* Katz v. Dep't of Motor Vehicles, 108 Cal. Rptr. 424, 425 (Cal. Ct. App. 1973).

permitting specialty plates significantly increase the kinds of messages that might be communicated, both because the plates might include logos[283] and because the restrictions on the numbers of letters are not so severe.[284]

In *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of Virginia Department of Motor Vehicles*, the Fourth Circuit addressed whether license plates are government speech rather than private speech, well aware that that "the government can speak for itself,"[285] and that this "authority to 'speak' necessarily carries with it the authority to select from among various viewpoints those that the government will express as its own."[286] The Fourth Circuit understood the implications of designating something as government speech—"even ordinarily impermissible viewpoint-based distinctions drawn by the government may be sustained where the government itself speaks or where it uses private speakers to transmit its message."[287] Yet, as the court explained, the Supreme Court has never articulated clear standards "for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so."[288] The Fourth Circuit noted that the circuits have tried to devise standards to determine when the government speaks that include the following factors:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker;" and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.[289]

After applying these factors, the court concluded that the "special plates constitute private speech,"[290] and thus that the state violated the private entity's speech rights by precluding that entity from having the Confederate flag on its plates.[291]

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[283] *See* Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 622 (4th Cir. 2002) (addressing whether a logo including the Confederate flag could be prohibited).

[284] *See* Ariz. Life Coal. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008) (discussing the ability of "organizations to obtain specialty license plates with their logo and motto").

[285] *Sons of Confederate Veterans, Inc.*, 288 F.3d at 616 (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)).

[286] *Id.* at 617 (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

[287] *Id.* at 618.

[288] *Id.*

[289] *Id.*

[290] *Id.* at 621.

[291] *Id.* at 626 ("[W]e conclude that the logo restriction in Va.Code Ann. § 46.2-746.22 is an instance of viewpoint discrimination that does not survive strict scrutiny review and accordingly is impermissible.").

In his opinion respecting the denial of a rehearing en banc, Judge Luttig explained his view that both the government and a private individual are communicating via a license plate.[292] Even in such a case of "hybrid speech,"[293] it would be difficult for the government to limit speech based on viewpoint:

> [W]here the government has voluntarily opened up for private expression property that the private individual is actually required by the government to display publicly; the private speech component of the particular communication is significant (whether or not it is significant in comparison to the government's like speech component in that communication); and the government's interest in its speech component is less than compelling, the government will be forbidden from engaging in viewpoint discrimination among the various private speakers who avail themselves of the government's offer.[294]

Judge Luttig's hybrid speech analysis would seem to impose the same burden on the government that would have been imposed had only private speech been at issue; the speech can be prohibited only if the government's interest is compelling.[295] Two different points might be made about the hybrid approach. First, one needs some analysis of what counts as a compelling interest — would the state's interest in not being associated with a racist organization be compelling? Courts have upheld the refusal to permit such speech when viewed as government speech, but not when the court thought private speech was at issue, notwithstanding the possibility that someone might wrongly attribute the speech in part to the government.[296] Of course, a different state might

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[292] *Sons of Confederate Veterans, Inc.*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) ("[T]he speech that appears on the so-called 'special' or 'vanity' license plate could prove to be the quintessential example of speech that is both private and governmental . . . .").

[293] *Id.* (Luttig, J., respecting the denial of rehearing en banc).

[294] *Id.* at 247 (Luttig, J., respecting the denial of rehearing en banc). Some commentators have suggested using a less demanding standard for hybrid speech. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008) (suggesting that intermediate scrutiny should be used for mixed speech).

[295] *Sons of Confederate Veterans, Inc.*, 305 F.3d at 247. Judge Luttig might have distinguished the tests by suggesting that in a case of hybrid speech, the government limitation need not be as narrowly tailored as in a case of the government trying to prohibit private speech in a public forum. *Cf.* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1995) ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.").

[296] *Compare* Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093-94 (8th Cir. 2000) (upholding a denial of the Klan's underwriting of a public broadcast radio station because public acknowledgment would involve government speech) *with* Cuffley v. Mickes, 208 F.3d 702, 711-12 (8th Cir. 2000) (striking down a state refusal

embrace as its own speech a message that some would perceive to be racist.[297] Second, if the speech is hybrid, one might expect that the state would be permitted to prohibit those expressions with which it was unwilling to be associated.[298] But this would give the state license to prohibit much disfavored speech, which would make the government speech doctrine undermine the First Amendment in two distinct ways. Not only would the government's speech not be subject to Free Speech guarantees, but the government could preclude the expression of views running counter to its own, as long as the government could reasonably claim that someone might attribute those views to the government.[299]

The Fourth Circuit applied a hybrid approach in *Planned Parenthood of S.C., Inc. v. Rose.*[300] At issue was South Carolina's willingness to authorize a specialty license plate with the words "Choose Life" when a comparable message with a pro-choice message was not available.[301] The *Rose* court noted that a "regulation can discriminate based on viewpoint without affirmatively suppressing a certain viewpoint. Discrimination can occur if the regulation promotes one viewpoint above others, and this is precisely what has happened here."[302] Because the state was permitting the expression of one viewpoint but denying the expression of a contrary viewpoint, the state was engaging in viewpoint discrimination.[303] South Carolina could have evaded the limitation on its favoring one viewpoint over another by expressly adopting the viewpoint in question as government speech. For example, the state could "abolish the Choose Life license plate Act that results in mixed speech and adopt 'Choose Life' as its state motto."[304] If the state were to do so, "the State's identity as speaker would be readily apparent and the State would be accountable to the public for its support of a particular position."[305] One of the lessons of *Johanns* is that the state can adopt speech as its own without making the public aware of

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to permit the Ku Klux Klan to be part of a state Adopt-a-Highway program as viewpoint discrimination).

297 *See* N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1566 (11th Cir. 1990) (upholding the flying of the Confederate flag above the state dome as government speech).

298 *See* Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1349 (2004) ("The First Amendment should thus be understood to permit government to refuse to utter speech with which it does not want to be associated, mirroring private speakers' right to be free from governments' efforts to compel speech with which they disagree.").

299 *See id.*

300 Planned Parenthood of S. C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) ("[B]oth the State and the individual vehicle owner are speaking.").

301 *Id.* at 787.

302 *Id.* at 795 (citation omitted).

303 *Id.*

304 *Id.* at 799.

305 *Id.*

that adoption, but *Rose* predates *Johanns* so the court was not forced to address whether a case such as *Johanns* would have required a different analysis.[306]

B. *Specialty Plates as Government Speech*

In a case decided post-*Johanns*,[307] the Sixth Circuit adopted a different approach to the issue of whether specialty license plates involve government speech.[308] In *American Civil Liberties Union of Tenn. v. Bredesen*,[309] the court addressed the "constitutionality of Tennessee's statute making available the purchase of automobile license plates with a 'Choose Life' inscription, but not making available the purchase of automobile license plates with a 'pro-choice' or pro-abortion rights message."[310] The court reasoned that the "Government can express public policy views by enlisting private volunteers to disseminate its message, and there is no principle under which the First Amendment can be read to prohibit government from doing so because the views are particularly controversial or politically divisive."[311] After all, *Rust* involved the government making use of private individuals to promote its own position on a controversial matter, and the Court did not require the government to permit other individuals to offer pro-abortion views.[312]

Unlike the implicit view offered by the Fourth Circuit, the Sixth Circuit saw no reason to limit a state to one expression via its state motto, instead suggesting that Tennessee could "use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges."[313] Further, the Sixth Circuit read *Johanns* to undermine the four-part test used in *Rose*[314]—"when 'the government sets the overall message to be communicated and approves every word that is disseminated,' it is government speech."[315] Because Tennessee approved every word of "Choose Life," the Sixth Circuit

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[306] *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006) ("[T]he Fourth Circuit opinions in *Rose* are in tension with the intervening case of *Johanns*. *Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes. *Rose* relied instead on a pre-*Johanns* four-factor test of the Fourth Circuit's own devising.").

[307] *Johanns* was decided in 2005. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

[308] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2006).

[309] *Id.*

[310] *Id.* at 371-72.

[311] *Id.* at 372.

[312] *Id.* at 378 (discussing *Rust*); *Id.* at 387-90 (Martin, J., concurring in part and dissenting in part) (distinguishing what was at issue in *Rust* from what was at issue in *Bredesen*).

[313] *Bredesen*, 441 F.3d at 376.

[314] *See id.* at 380 (suggesting that while the Fourth Circuit's four-factor test was indeterminate, the "*Johanns* standard, by contrast, classifies the 'Choose Life' message as government speech.").

[315] *Id.* at 376 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005)).

read *Johanns* to require that the speech be considered governmental speech.[316]

In his concurrence and dissent, Judge Martin argued that *Johanns* was not controlling,[317] because "*Johanns* is a case that addresses *compelled* subsidies—that is, the government forced someone to give it money to pay for speech."[318] Judge Martin contrasted his own position with that of the majority, who interpreted "*Johanns* to mean that the sleeping doctrine of 'government speech' has been awakened and now controls all First Amendment analysis."[319]

The majority and dissent in *Bredesen* did not disagree about whether the state could adopt "Choose Life" as its own message, but whether the state had done so in its specialty plate program.[320] Judge Martin argued that it was not credible that the state was adopting each specialty plate message as its own speech.[321] After all, "the state ha[d] permitted approximately 150 private organizations to create specialty license plates . . . ."[322] When one considers the sheer number of organizations plus "the manner in which the state operate[d] its license plate program," one realizes that the "forum was created to facilitate private speech."[323] Should one continue to have doubts after looking at those factors, one could also consider that the state itself advertised the program as reflecting "'*drivers*' special interests, such as schools, wildlife preservation, parks, the arts and children's hospitals.'"[324] Because the state was facilitating the expression of private individuals' interests rather than trying to present its own views, the particular program at issue was better understood as a kind of forum for the expression of private views than as a podium from which the state was expressing its own views.[325]

The Sixth Circuit likened the "Choose Life" message to the issue in *Wooley v. Maynard*, in which New Hampshire had required vehicle owners to have the

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316 *See id.* at 375 ("*Johanns* stands for the proposition that when the government determines the overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.").

317 *Id.* at 385 (Martin, J., concurring in part and dissenting in part) ("I part ways with the majority because it I do not agree that *Johanns v. Livestock Mktg. Ass'n* is controlling . . . .") (citation omitted).

318 *Id.* (emphasis in original).

319 *Id.*

320 *Id.* at 381 (stating disagreement with the majority because "the state created the specialty license plate program to facilitate private speech . . . *not* to promote a governmental message.").

321 *Id.*

322 *Id.* at 382.

323 *Id.*

324 *Id.* at 284 (emphasis in original) (quoting Press Release, *available at http://tennessee.gov/safety/newsreleases/newplate.htm* (last visited Mar. 10, 2006).

325 *See id.* (explaining that Tennessee was "not promoting its own message, but rather" created a forum for the views of private speakers).

state motto "Live Free or Die" on their license plates.[326] However, Tennessee does not have "Choose Life" as its state motto but, instead, "Agriculture and Commerce."[327] Further, the *Maynard* Court was not especially clear about why New Hampshire was constitutionally precluded from requiring that "noncommercial vehicles bear license plates embossed with the state motto, 'Live Free or Die.'"[328] The Court noted that the "New Hampshire statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty,"[329] and reasoned that the state's interest in communicating its message could not "outweigh an individual's First Amendment right to avoid becoming the courier for such message."[330] One cannot tell whether the constitutional worry was that individuals were required to convey the state's message against their will, whether or not others would impute that message to the messenger, or whether, instead, the Court was worried that the messenger would be wrongly thought to agree with the message. Then-Justice Rehnquist understood the difficulty to be the latter.[331]

The Sixth Circuit seemed to agree with Justice Rehnquist's analysis, stating that "New Hampshire could not constitutionally prosecute vehicle owners for covering up the motto on their license plates, because by doing so the State would be unconstitutionally forcing automobile owners to adhere to an ideological point of view they disagreed with."[332] However, the *Bredesen* court noted, the Supreme Court never suggested that the "State's message could not be so disseminated by those who did not object to the State's motto, or even hint that the State could not put the message on state-issued license plates."[333]

The Sixth Circuit was correct that the same constitutional issues would not have been implicated in *Wooley* if the driver had wanted to provide a mobile billboard for the state's message, but was incorrect in thinking that such a point was dispositive with respect to whether Tennessee was speaking or, instead, had created a forum when approving the "Choose Life" plate. When one considers that some of the approved messages included support of schools like the University of Arkansas, Florida State University, the University of Kentucky, Penn State University, the University of Mississippi, and Virginia Tech,[334] it might seem surprising that Tennessee was issuing a message rather than creat-

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[326] *Id.* at 377 (majority opinion) (citing Wooley v. Maynard, 430 U.S. 705 (1977)).

[327] *See* RANDY MCNALLY & CRAIG FITZHUGH, TENNESSEE GENERAL ASSEMBLY 2010-2011 FACT BOOK 16 (2010) *available at* http://www.capitol.tn.gov/joint/staff/budget-analysis/docs/FactBk1011.pdf.

[328] *Wooley*, 430 U.S. at 707.

[329] *Id.* at 715.

[330] *Id.* at 717.

[331] *Id.* at 719 (Rehnquist, J., dissenting) ("The Court holds that the required display of the motto is an unconstitutional 'required affirmation of belief.'").

[332] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 377 (6th Cir. 2005).

[333] *Id.* at 378.

[334] *Id.* at 383 n.5 (Martin, J., concurring in part and dissenting in part).

ing a forum.[335] If the state were issuing a message, one would have expected it to have supported the universities within the state in particular rather than support out-of-state universities as well. In any event, the sheer number of permitted messages, coupled with the state trying to facilitate the expression of drivers' interests, suggested that the state had provided a forum rather than engaged in government speech.

C. *A Rejection of Specialty Plates as Government Speech*

The *Bredesen* decision, which concluded that specialty plates constitute government speech, has not fared well in the other circuits. For example, in *Arizona Life Coalition v. Stanton*,[336] the Ninth Circuit not only concluded that "Choose Life" on a specialty plate "would constitute private" rather than government speech,[337] but also concluded that the four-factor test used in the circuits was both compatible with and supported by *Johanns*.[338] Holding that Arizona had created a limited purpose public forum for nonprofits whose "only substantive restriction is that the license plate cannot promote a specific product for sale, or a specific religion, faith, or antireligious belief."[339] The Stanton Court struck down the refusal to permit the "Choose Life" plate.

The Seventh Circuit also addressed the constitutionality of refusing to issue a "Choose Life" license plate in *Choose Life Illinois, Inc. v. White*.[340] The *White* Court described the Sixth Circuit's reasoning as "flawed,"[341] believing that the four-factor test was appropriate, but that the test could be "distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?"[342] Applying that test, the court held the government speech doctrine inapplicable,[343] but also held that because license plates "are not by nature compatible with anything more than an extremely limited amount of expressive activity. . . . [S]pecialty license plates are a forum of the nonpublic variety, which means that we review [the] exclusion from that forum for viewpoint

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[335] *Cf.* Corbin, *supra* note 294, at 665 ("[T]he sheer number of plates offered, the multitude of plates on subjects unrelated to any state concern (e.g., 'Porsche Club' plates), and the existence of conflicting messages (e.g., states that offer 'Choose Life' and 'Planned Parenthood' plates) make it difficult to divine any intended government policy stance.").

[336] 515 F.3d 956 (9th Cir. 2008).

[337] *Id.* at 968.

[338] *Id.* at 965 (adopting the "Fourth Circuit's four-factor test—supported by the Supreme Court's decision in *Johanns*—to determine whether messages conveyed through Arizona's special organization plate program constitute government or private speech.").

[339] *Id.* at 972.

[340] Choose Life Ill., Inc. v. White, 547 F.3d 853 (7th Cir. 2008).

[341] *Id.* at 863.

[342] *Id.* at 863.

[343] *Id.* at 864.

neutrality and reasonableness."[344]

The *White* court held that Illinois had made a "content-based but viewpoint-neutral restriction,"[345] which "excluded the entire subject of abortion from its specialty-plate program."[346] The court upheld this content-based restriction, reasoning that "[t]o the extent that messages on specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion."[347]

Yet, the Seventh Circuit's analysis is not persuasive. The specialty plates program would seem to permit a wide variety of messages.[348] Further, the driver's associating herself with a particular group might be taken as shorthand for a much longer message, so it was not as if someone wishing to communicate her views faced overly severe restrictions.[349] A separate issue would be whether the court would uphold the creation of a limited public forum that precluded discussion of abortion. However, it seems doubtful that such a restriction would be viewed as reasonable in light of the forum's purpose,[350] assuming that enough individuals were interested in getting the plates."[351]

The Eighth Circuit also examined whether a "Choose Life" specialty license plate could be denied in *Roach v. Stouffer*.[352] The court considered the government speech doctrine as articulated in *Johanns* and *Summum*,[353] suggesting that *Johanns* stood for the proposition that "the more control the government has

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[344] *Id.* at 865.

[345] *Id.*

[346] *Id.*

[347] *Id.* at 866; *Cf.* Corbin, *supra* note 294, at 646-47 ("A reasonable person is unlikely to attribute the message displayed on specialty license plates solely to private speakers or solely to the government.").

[348] *White*, 547 F.3d at 856 ("Like most other states, Illinois offers a broad selection of specialty plates.").

[349] *See id.* (explaining that simple specialty plates can express complex messages, such as opposition to violence (dove or peace symbol)).

[350] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819,829 (1995) ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum'") (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804–806 (1985)); *See also* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 972 (9th Cir. 2008) ("We also hold that the Commission acted unreasonably by denying Life Coalition's application for reasons not statutorily based or related to the purpose of the limited public forum.").

[351] *See White*, 547 F.3d at 856 ("Although the statute specifies a default minimum of 10,000 applications, the Secretary often required far less (approximately 800 applications) before issuing a new legislatively approved specialty plate.") In any event, it seems that sufficient interest has been established. *See id.* at 857 ("CLI collected more than 25,000 signatures from prospective purchasers.").

[352] Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009).

[353] *Id.* at 863-65.

over the content of the speech, the more likely it is to be government speech"[354] and that *Summum* was in accord with that point "because the government " 'effectively controlled' the messages sent by the monuments . . . by exercising 'final approval authority' over their selection."[355] The Eighth Circuit followed the example set by the Seventh Circuit both in rejecting the Sixth Circuit's analysis[356] and in boiling the analysis "down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party."[357] The *Roach* Court concluded that "under all the circumstances a reasonable and fully informed observer would recognize the message on the 'Choose Life' specialty plate as the message of a private party, not the state."[358]

The court expressly declined in a footnote to "conduct a forum analysis at this point to determine whether license plates are traditional public forums, designated public forums, or nonpublic forums,"[359] citing the previous Eighth Circuit decision in *Lewis* with approval.[360] Yet, that would mean that prophylactic measures, would have to be adopted by the state even with respect to regulating how persons can use nonpublic fora.[361]

The United States Supreme Court has recognized that "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards" and that such property may be reserved "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[362] In *Perry Education Association v. Perry Local Educators' Association*, the Court recognized a school's interschool mail system as such a forum,[363] and upheld its use by the union officially representing the teachers and not by the union seeking to become their representative.[364] But the Court nowhere required or even discussed the kinds of

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[354] *Id.* at 864.

[355] *Id.* at 864-65 (quoting Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009)) (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560-61 (2005)).

[356] *Id.* at 867.

[357] *Id.*

[358] *Id.* at 868.

[359] *Id.* at 868 n.4 (offering the 7th Circuit analysis in *White*, 547 F.3d at 864-65, as an example where such an analysis was performed).

[360] *See id.* at 868-69 n.4. (citing *Lewis*, 253 F.3d at 1079).

[361] *See supra* notes 273-275 and accompanying text (discussing the overly robust reading of First Amendment limitations on public fora offered in *Lewis*).

[362] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[363] *Id.*

[364] *Id.* at 51 ("Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes.").

prophylactic regulations that would have to exist to ensure that the nonrepresentative union was not being discriminated against on the basis of viewpoint.[365]

The Eighth Circuit implied that the "Choose Life" plates were not permitted because of a disagreement with the viewpoint expressed therein,[366] so it may well be that the court was correct that constitutional guarantees had been violated.[367] Nonetheless, the court was incorrect that as a general matter it would be unnecessary to decide the kind of forum at issue and also incorrect that even nonpublic fora require the prophylactic regulations described.[368] With the exception of the Sixth Circuit, the circuits generally agree that specialty plates should not be construed as government speech.[369] That agreement seems correct, although the disagreement about the kind of forum implicated by such plates indicates that there is still much doctrinal confusion about how to determine what kind of forum is at issue in a particular case, even if one brackets the difficulties surrounding the government speech doctrine.[370] But the government speech doctrine is especially open-ended with respect to the conditions under which it can be invoked. To their credit, the circuits have attempted to put some limitations on when that doctrine can be invoked, which is more than can be said for the Supreme Court.

IV. CONCLUSION

The Court's discussion of the government speech doctrine has been a disas-

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[365] *See Id.* at 49 (noting that the school board did not intend to "discourage one viewpoint and advance another", but not discussing any policy or regulation to prevent the potential for future viewpoint discrimination); *Cf.* Roach v. Stouffer, 560 F.3d 860, 868 n.4 (holding that a statute was unconstitutional because it "failed to provide standards or guidelines to prevent viewpoint discrimination").

[366] *See Roach*, 560 F.3d at 863 ("Choose Life submitted an application to the DOR for a "Choose Life" specialty license plate and fully complied with the requirements listed in section 301.3150. Missouri State Senators Joan Bray and Rita Heard Days, both of whom describe themselves as "pro-choice" and both of whom are members of the Joint Committee, submitted a letter to the Chair of the Joint Committee opposing the "Choose Life" specialty plates. Accordingly, the Joint Committee denied the application.").

[367] *See id.* at 870 (stating that the section of the Missouri law giving the "Joint Committee unbridled discretion to determine who may speak based on the viewpoint of the speaker" is unconstitutional).

[368] *See id.* at 868 n.4.

[369] *See id.* at 867 ("Notwithstanding the Sixth Circuit's conclusion to the contrary, we now join the Fourth, Seventh, and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate.").

[370] *See Id* at 864-67 (analyzing and comparing the methods that the *Johanns, Summum, Rose, Sons of Confederate Veterans, Bredesen, White, and Lewis* courts used to determine the kind of forum at issue).

ter, not because it involves something unimportant or wrongheaded, but because the Court has invoked the doctrine when it was neither needed nor even appropriate, perhaps in an attempt to immunize state action from constitutional review.[371] Use of the government speech doctrine was unnecessary to decide each and every case in which the Court invoke the doctrine. Instead, the Court either retroactively applied the doctrine in subsequent case law (*Rush*), ignored it when it seemed controlling (*Velazquez*), or inaccurately described the doctrine in light of previous case law applying the doctrine (*Johanns*). The Court has not indicated the conditions under which it can be invoked, which is disturbing given that it immunizes speech from Free Speech Clause challenges. Further, given the Court's unwillingness to ascribe a single message to government speech (*Summum*), the Court has undercut the Establishment Clause limitations that might apply when the government claims to speak on its own behalf.

It is simply unclear what imitations should apply to ensure that states and courts do not abuse the government speech doctrine. While some would insist that the government expressly state when it is speaking in order to trigger the doctrine, it is unclear how such a requirement would be justified as a constitutional matter. Further, such a requirement might simply invite the government to claim much expression as its own, resulting in the immunization of a great deal of speech. Finally, such a requirement does not address some of the reasons that the invocation of the doctrine is so disheartening. The unnecessary use of the doctrine without any accompanying limitation invites its future invocation at the wrong time and in the wrong circumstances

The government must speak, and it would be unwise and unworkable were the government required to provide a forum for alternative views whenever it spoke. Yet, the "recently minted government speech doctrine"[372] has not been invoked to serve reasonable and legitimate ends; rather, it has been used unnecessarily in ways that create the potential for much harm in the future. The Court has transformed a reasonable, little-used doctrine into a weapon for use by the state and the courts at their convenience, a sleight of hand ill-suited to promote either the First Amendment or good public policy. The Court must rein in the use of this doctrine before its potential to cause great harm is actualized.

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[371] *See* Gey, *supra* note 54, at 1314 ("[T]he government speech doctrine is not, in the end, about the government's speech at all. As the Court has applied it, the government speech doctrine is about using the government's speech as an excuse to circumvent other constitutional rules."); *see also* Blocher, *supra* note 151, at 715 ("The point cannot be overstressed: the function, and often the purpose, of government speech doctrine is to disfavor private speakers as a result of their viewpoints.").

[372] Pleasant Grove City v. Summum, 129 U.S. 1125, 1139 (2009) (Stevens, J., concurring).