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. 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 in order for the doctrine’s protections to be triggered. Not surprisingly, this lack of clarity has caused great confusion in the lower courts—judges seem not to know how or when the doctrine should be applied.

Section II of this article discusses the uneven development of the government speech doctrine, focusing on the few cases in which it has been invoked by the Court to justify its holding. Section III discusses several cases in which the circuit courts have tried to apply the doctrine when deciding which kinds of state license plate policies pass constitutional muster. The great disparity in reasoning and result in these cases help illustrate both that the government speech doctrine needs to be delimited and that the Court’s pronouncements have thus far only served to add to the confusion. At this point, the Court seems to have created yet another exception in First Amendment jurisprudence that has the potential to greatly eviscerate the protections that are allegedly held quite dear.
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 but for use of the doctrine in alarming ways. Regrettably, the Court has helped promote the confusion that this doctrine has already begun to create, and 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. 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 chooses to speak and, further, that citizens hold a variety of opposing viewpoints on many of the issues that the Government chooses to address.

Suppose that the Supreme Court were to hold that the Constitution requires the government to afford those disagreeing with its views an 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

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1 Cf. Pleasant Grove City v. 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.”).

2 Cf. American Civil Liberties Union of Tennessee v. Bredesen, 441 F.3d 370, 385 (6th Cir. 2006) (Martin, J., concurring in part and dissenting in part) (suggesting that some on the 6th Circuit seem to believe that “the sleeping doctrine of ‘government speech’ has been awakened and now controls all First Amendment analysis”).

3 See Helen Norton & Danielle Keats Citron, Government Speech 2.0, 87 Den. U. L. Rev. 899, 904 (2010) (“Because government must speak to govern effectively, it has engaged in expressive activity since its inception.”); 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.”).
way that was just as likely to reach the intended audience as was the government’s announcement.⁴

A different but related point might also be made. The government expends public funds when it speaks. 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,⁵ the system would be difficult if not impossible to administer.⁶ Instead, the government has great discretion to fund certain activities implicating expression without funding other activities that offer a different point of view.⁷

The government does not create a public forum by virtue of its 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.⁸ 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. The government speech

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⁵ Cf. U.S. 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.”).
⁶ Cf. Keller v. State Bar of California, 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.”).
⁷ National 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.’”) (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983)).
⁸ 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.”).
doctrine avoids numerous problems that might otherwise present themselves were that doctrine not recognized.9

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 dollars10 and that the government does not create a public forum11 simply by virtue of its speaking. That said, however, the government speech doctrine has been both confused and confusing, at least in part, because the doctrine has not only been unnecessary to decide the cases in which it has been invoked but its invocation has confused rather than clarified First Amendment doctrine. That point is perhaps best illustrated when one considers the case that has sometimes been claimed to be the foundation of the doctrine.12

In Rust v. Sullivan,13 the Court considered the constitutionality of Congress’s limitations on the kinds of advice that could be given by doctors receiving certain federal funding.14 Congress had set up clinics to facilitate family planning,15 but had precluded participants from discussing abortion or making referrals to abortion providers even upon specific request by the patient.16 Someone requesting information about abortion would simply be told that “the project does not

9 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) (“it 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”).
10 Johanns v. Livestock Marketing 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.”).
11 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.”).
12 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.”).
14 Id. at 191 (“Here Congress forbade the use of appropriated funds in programs where abortion is a method of family planning.”).
15 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.”).
16 Id. at 180.
consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion,” although an exception might be made in the case of a true emergency.

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 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.” 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.” Indeed, the Court rejected 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.

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” should not be attributed to Congress’s burdening the First Amendment. Rather,

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17 Id.
18 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.” 42 CFR § 59.8(a)(2) (1989).”).
19 Id. at 193
20 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. 42 CFR § 59.9 (1989).”)
21 Id. at 199.
“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.”

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

The Court’s discussion of the doctor-patient relationship is helpfully contrasted with its discussion of the attorney-client relationship in Legal Services Corporation v. Velazquez. 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, was precluded from funding

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23 Id.
24 See id. at 204 (Blackmun, J., dissenting) (“the 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”).
25 Id. at 200.
26 Id.
27 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 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.
29 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.”).
“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.’”\textsuperscript{30}

On its face, this funding scheme was similar to the funding scheme at issue in Rust.\textsuperscript{31} Congress had decided that it wanted to fund representation where, for example, an individual sought to establish that she had wrongly been denied benefits under existing law,\textsuperscript{32} but did not want to fund representation challenging the constitutionality of the program at issue.\textsuperscript{33} The Velazquez Court considered Rust for guidance, but distinguished it by noting that Rust involved government speech,\textsuperscript{34} whereas Velasquez involved government funding of private speech.\textsuperscript{35}

There are a number of reasons that this rationale for ignoring Rust is surprising. First, as the Velazquez Court itself noted, the Rust Court nowhere mentions government speech,\textsuperscript{36} and it was only a recharacterization in the subsequent caselaw that offered the interpretation of Rust that made the government speech doctrine central to the holding.\textsuperscript{37} Thus, in Board of Regents of University of Wisconsin System v. Southworth,\textsuperscript{38} the Court described Rust as involving a project where government funds were “spent for speech and other expression to advocate and defend [the government’s] own policies.”\textsuperscript{39} Yet, the same kind of description might have been

\textsuperscript{30} Id. at 538.
\textsuperscript{31} See id. at 553 (Scalia J. dissenting) (noting the similarities in the two programs).
\textsuperscript{32} Id. at 538 (“an 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”).
\textsuperscript{33} 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.’”).
\textsuperscript{34} 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.”).
\textsuperscript{35} Id. at 542 (“the LSC program was designed to facilitate private speech, not to promote a governmental message”).
\textsuperscript{36} 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.”).
\textsuperscript{37} Id. (“when interpreting the holding in later cases, however, we have explained Rust on this understanding.”)
\textsuperscript{38} 529 U.S. 217 (2000).
\textsuperscript{39} Id. at 229.
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 a nontherapeutic abortion. Basically, funds were expended in furtherance of the state’s policy promoting childbirth over abortion. By making “childbirth a more attractive alternative,” the state might have been inferred to be expressing a judgment about the preferability of childbirth over abortion, but that did not make *Maher* a government speech case. 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. But the government’s restricting the use of funds to express a majoritarian policy preference was not thought to 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.”

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

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41 See id. at 466.  
42 Id. at 474.  
43 448 U.S. 297 (1980).  
44 Id. at 316-17. (“Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions”).  
45 Cf. id. at 332 (Brennan, J., dissenting) (“the 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”).  
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.”

Certainly, it might be thought, the Court is not precluded from offering an alternative explanation of a decision in subsequent caselaw. Thus, one might read Rust to suggest that the government is permitted to fund certain activities and not others and, in addition, to suggest that when the government hires individuals to speak for it there is no requirement that the government also fund the presentation of alternate views.

Yet, there are at least two reasons that the Court’s recharacterization of Rust does not seem persuasive. First, it is helpful to consider the content of the government’s message in Rust. Certainly, the government was not trying to advise patients about what they should do in their particular circumstances. Instead, at most, the government might be presumed to be saying that unless there is an emergency, the government does not think abortion the best alternative. Best for whom? That was left unclear. Yet, it might well not be viewed as credible for the government to be saying to a particular patient (without knowing anything at all about that patient) that it would be best for her not to have an abortion. Such a patient might rightly say, “But you know nothing about me, my family, my medical needs, etcetera.” Further, the government would be stating that it did not believe that an abortion was best for the patient even where the fully

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48 Id. at 833.
49 Id.
50 See notes 19-23 and accompanying text supra.
51 *See* Rust, 500 U.S. 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 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.”.
informed medical professional would have recommended such a procedure.\footnote{Cf. \textit{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”).}{53} The \textit{Rust} Court’s implicit description of what was at issue in the case is more accurate than the subsequent recharacterization—the government was simply refusing to fund anyone’s 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.

Consider the patient who asks about abortion and the physician who believes that such a procedure would be preferable for the patient. Such a 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. Instead, the patient would simply be told that abortion was not considered a suitable topic for discussion within this program.\footnote{\textit{See} note 17 and accompanying text \textit{supra}.}{54} Contrast this policy with the one at issue in \textit{Velazquez}. An LSC attorney could explain that the client’s interests would be furthered best by challenging the constitutionality of the law at issue and that for this reason the client should go elsewhere for representation.\footnote{\textit{Velazquez}, 531 U.S. at 551 (Scalia, J., dissenting) (“The lawyers may, however, and indeed \textit{must} explain to the client why they cannot represent him.”).}{55} Indeed, the LSC attorneys were permitted to refer the client to someone who could represent them.\footnote{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.”).}{56}

For at least some individuals seeking help, the policy at issue in \textit{Rust} would more clearly undermine their interests than would the policy at issue in \textit{Velazquez}— in the former but not the latter, the consulted professional could not even discuss some of the person’s options. Further, for the person for whom the best course of action was disfavored by the government, a referral to a professional who could help would be possible in \textit{Velazquez} but not in \textit{Rust}.\footnote{\textit{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”).}
One of the reasons cited by the Velazquez Court 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.”57 The Court worried that the judicial system itself was jeopardized by the limitation imposed on attorneys. “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.”58 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.

It is difficult to tell whether this fear that the judiciary would be impeded in its proper work was a driving force in Velazquez. Perhaps the Court was noting that difference but was really 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.59 However, distinguishing between the two cases by appealing to the government speech doctrine is not persuasive for a few reasons.

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

57 Id. at 544.
58 Id. at 545.
59 See id. at 541 (“viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker”) and id. at 542 (“the LSC program was designed to facilitate private speech, not to promote a governmental message”).
without offending constitutional guarantees, would seem dispositive in *Velazquez*. Even if one understands *Rust* to be about government speech in addition to government funding, that would not negate the *Rust* claim that the government can selectively fund certain projects, which would appear to be all that was needed to uphold the constitutionality of the program at issue in *Velazquez*.

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. Given Congress’s duty to defend the Constitution, one would expect the government to say and believe that its own laws passed constitutional muster. However, one would not expect Congress to make a statement about what would best promote the interests of a particular client or patient in her particular circumstances, especially without knowing anything about the individual in question. So, 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 being paid with government funds to promote the

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60 See Gey, supra note 52, 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.”).
61 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”).
62 The Court presumes as a general matter that federal laws are constitutional. Cf. id. at 1820 (“Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality.”).
63 See notes 51-53 and accompanying text supra.
interests of those consulting with them. In both Rust and Velazquez, Congress conditioned the funding of certain programs on those receiving the funds not performing certain practices. The cases cannot be distinguished on those grounds. But this means 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 cleared up this issue in the other government speech cases.

C. Government Speech and Advertising

Consider the compelled advertising trilogy of cases. In Glickman v. Wileman Brothers & Elliott, Incorporated, 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. The plaintiffs objected to their monies being so used, because they wished to distinguish their produce in particular from California produce more generally. The Court upheld the system at issue, notwithstanding that the funds contributed by the plaintiffs were being used in a way perceived to be contrary to the plaintiffs’ own interests.

The Court noted that “none of the generic advertising conveys any message with which respondents disagree,” at least in the sense in that the “central message of the generic advertising at issue in this case is that ‘California Summer Fruits’ are wholesome, delicious, and

\[64\] Velazquez 531 U.S. at 554 (Scalia, J., dissenting) (“the 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”).


\[66\] Id. at 460 (“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.”)

\[67\] Id. at 471.
attractive to discerning shoppers.” 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, 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.” Further, it is not as if consumers would believe that the plaintiffs themselves did not believe their own produce superior, because the organization promoting the generic advertising had its own distinct name. Finally, those who were compelled to contribute to the advertising budget were not simply independent fruit producers competing in the market—they instead were part of a combined enterprise and their individual autonomous acts were already limited in various ways.

At issue in United States v. United Foods, Incorporated was a generic advertising campaign for mushrooms. This time, however, the advertising assessment was not part of a broader regulatory system. 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.” The Court was unconvinced that the commercial rather than ideological nature of the disputed language was

68 Id. at 462.
69 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”).
70 Id. at 472.
71 See id. at 471 (“Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or ‘California Summer Fruits.’”).
72 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.”).
74 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.”).
75 Id. at 412.
dispositive,\textsuperscript{76} 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.”\textsuperscript{77} 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 \textit{Abood} and \textit{Keller} in support.\textsuperscript{78} Yet, these cases, properly understood, support \textit{Glickman} rather than \textit{United Foods}.\textsuperscript{79}

In \textit{Abood v. Detroit Board of Education},\textsuperscript{80} 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.\textsuperscript{81} The \textit{Abood} Court noted that an “employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative,”\textsuperscript{82} 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.”\textsuperscript{83} For example, having a single representative “avoids the confusion that would result from attempting to enforce two or more agreements specifying

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\item \textsuperscript{76} Id. at 410 (“The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection.”).
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id. at 413 (citing \textit{Abood v. Detroit Bd. of Ed.}, 431 U.S. 209 (1977); \textit{Keller v. State Bar of Cal.}, 496 U.S. 1 (1990))
\item \textsuperscript{79} See notes 80-101 and accompanying text \textit{infra} (discussing these cases).
\item \textsuperscript{80} 431 U.S. 209 (1977).
\item \textsuperscript{81} See \textit{id.} at 211
\item 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 pay to the union, as a condition of employment, a service fee equal in amount to union dues.
\item \textsuperscript{82} Id. at 222.
\item \textsuperscript{83} Id.
different terms and conditions of employment.”

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.”

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.”

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.”

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.”

The union could only perform those political activities using monies of those who did not oppose the views expressed.

By distinguishing between workplace benefits and political views, the Abood Court was emphasizing the distinction between ideological positions on the one hand and commercial matters on the other.

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84 Id. at 220.
85 Id. at 221.
86 Id. at 222.
87 Id. at 225-26.
88 Id. at 234.
89 Id. at 235-36 (“the 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”).
90 See Glickman, 521 U.S. at 471 (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 organization whose expressive activities conflict with one’s ‘freedom of belief.’”) (citing Abood, 431 U.S. at 235).
Keller v. State Bar of California\(^91\) involved a challenge to the use of bar dues to finance ideological positions with which the dues-paying members were not in agreement.\(^92\) The state supreme court rejected the challenge, because it believed the bar a state agency and hence afforded great discretion.\(^93\) The focus of the United States Supreme Court was on the "scope of permissible dues-financed activities in which the State Bar may engage."\(^94\) Ironically, the State Bar invoked the "'government speech' doctrine."\(^95\) 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."\(^96\) 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."\(^97\) Precisely because of its special character, the State Bar was subject to the same rules as unions\(^98\) —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."\(^99\) However, the Bar could not use dues from dissenting

\(^{91}\) 496 U.S. 1 (1990).
\(^{92}\) Id. at 4 ("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.").
\(^{93}\) Id.
\(^{94}\) Id. at 10.
\(^{95}\) Id. at 11.
\(^{96}\) Id.
\(^{97}\) 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").
\(^{98}\) Id. at 14.
individuals to “fund activities of an ideological nature which fall outside of those areas of activity.”[^100] Thus, Keller also distinguished among types of activities, refusing to force individuals to contribute to political causes with which they disagreed but 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 for the case before it, explaining that “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.”[^101] In contrast, the United Foods Court ignored the distinction that the Keller Court had found so persuasive, while at the same time citing Keller in support.

The difficulty pointed to 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. 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.

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,

[^100]: Id.
[^101]: Glickman, 521 U.S. at 473.
namely, that the speech being offered was “government speech.””\textsuperscript{102} However, because the argument was neither raised nor addressed below,\textsuperscript{103} 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.””\textsuperscript{104} In addition, the Court might have been forced to consider whether the difference important in \textit{Keller}, namely, that the “principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members,”\textsuperscript{105} was also important in \textit{United Foods}. Of course, there would have been another important difference in \textit{United Foods}, namely, that the funds were being used to promote common interests, which the \textit{Keller} Court suggested would be permissible for the state to require.\textsuperscript{106}

The Court was given an opportunity to clarify the jurisprudence in \textit{Johanns v. Livestock Marketing Association},\textsuperscript{107} 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,”\textsuperscript{108} as if the determination of whether this was government speech would settle matters. Yet, \textit{Keller} had already made clear that even a finding of government speech would not immunize the practice, and \textit{Glickman} had made clear that assessments might be upheld even if there was no claim that government speech was offered, so 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.

\textsuperscript{102} \textit{United Foods}, 533 U.S. at 416 (“The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply.”).
\textsuperscript{103} See id. (“As the Government admits in a forthright manner, however, this argument was ‘not raised or addressed’ in the Court of Appeals.”).
\textsuperscript{104} See id. at 417.
\textsuperscript{105} \textit{Keller}, 496 U.S. at 11.
\textsuperscript{106} See notes 98-100 and accompanying text \textit{supra}.
\textsuperscript{107} \textit{544 U.S.} 550 (2005).
\textsuperscript{108} Id. at 553.
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,” citing **Keller** among other cases. But the citation to **Keller** was not to the discussion of whether the Bar was a state entity but rather to the kind of speech that Bar members could not be forced to fund—lobbying against their will with respect to a proposal to precluded state and local employers from forcing their employees to take polygraph tests, a proposal to prohibit the possession of armor-piercing ammunition, etcetera.

At issue in **Johanns** was an advertising program promoting beef sales, and 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. 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.” But **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. Presumably, even the **Johanns** Court would not have upheld the use of funds at issue to support a political candidate rather than to promote beef consumption, although the Court’s

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109 Id. at 559.
110 See id.
111 See **Keller**, 496 U.S. at 15.
112 See **Johanns**, 544 U.S. 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.”).
113 Id. at 562.
114 C.f. **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.
making commercial and political speech subject to the same rules might make one wonder how this could be justified.\textsuperscript{115}

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.”\textsuperscript{116} But that simply is not what Keller held, Johanns Court citing it in support notwithstanding. Keller had 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.

That said, the difficulty for the Johanns Court was not Keller but United Foods, because United Foods had 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. 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 all of these. But 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.

One of the elements of the doctrine that has to be explained involves the conditions under which one knows that the government is speaking. The Court noted the “message set out in the beef promotions is from beginning to end the message established by the Federal Government.”\textsuperscript{117} 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

\textsuperscript{115} See notes 76-78 and accompanying text supra (discussing the Court’s treating these different kinds of speech as both protected by the First Amendment in this context).
\textsuperscript{116} Johanns, 544 U.S. at 562.
\textsuperscript{117} Id. at 560.
remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well),” the Court had no difficulty in characterizing the speech at issue as governmental.

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. But the speech at issue in Glickman and United Foods was also pursuant to a federal statute, so the Johanns program was not distinguishable on that basis. Further, the advertising at issue in Johanns was credited to “America’s Beef Producers,” which no more clearly indicated that the government was speaking than did the advertising attributed to “California Summer Fruits.” Indeed, Justice Ginsburg concurring in the judgment resisted “ranking the promotional messages … not attributed to the Government, as government speech,” as did Justice Souter in dissent, who worried that without such a requirement United Foods would be a “dead letter.” Yet, arguably United Foods was not in accord with the past precedent anyway, and one of the concerns caused by United Foods and left untouched by Johanns is the degree to which commercial and political speech should be treated as equivalent.

118 Id. at 561.
119 See id. at 553 (“The Beef Promotion and Research Act of 1985 (Beef Act or Act), 99 Stat. 1597, 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. 7 U.S.C. § 2901(b).”)
120 Glickman, 521 U.S. at 461 (“Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq., in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. § 602(1).”)
121 See United Foods, 533 U.S. at 408 (“The statute in question, enacted by Congress in 1990, is the Mushroom Promotion, Research, and Consumer Information Act, 104 Stat. 3854, 7 U.S.C. § 6101 et seq. The Act authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals.”).
122 Johanns, 544 U.S. at 564.
123 Glickman, 521 U.S. at 471.
124 Johanns, 544 U.S. at 569 (Ginsburg, concurring in the judgment).
125 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”).
126 Id. at 571 (Souter, J., dissenting).
One further point might be made. 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\textsuperscript{127} and, perhaps, that the message be clear and distinct.\textsuperscript{128} 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.\textsuperscript{129}

Certainly, it might be argued that public health would be promoted if, for example, the government did not surreptitiously send some messages promoting beef consumption while officially sending other messages recommending the reduction in beef consumption—the public might be less confused if it did not receive such mixed messages. Yet, there is no requirement that the government express consistent messages, and the consumer would be even more...

\textsuperscript{127} See, for example, Norton & Citron, \textit{supra} note 3, 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.;

Joseph Blocher, \textit{Viewpoint Neutrality and Government Speech}, 52 \textit{B.C. L. 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.”).

\textsuperscript{128} See Gey, \textit{supra} note 52, at 1302 (“Only at the point at which the city announces a fully articulated and legal message should the government speech doctrine apply.”).

\textsuperscript{129} See, for example, Alan Bjerga Knight, \textit{New Eating Guidelines More Stringent; Health: Calls For More Exercise, Whole Grains Make Food Pyramid Obsolete}, \textit{Long Beach Press Tele.}, (CA) at A15, 1/13/05, 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.
confused if the conflicting messages were all identified as from the government. Further, it should be noted that institutional capture of government speech is possible, which might mean that the message sent to the public would be colored or controlled by a particular group.

If there are many messages, the political accountability check might not be very efficacious because individuals might not be very angry as long as their favored message was represented as well. Further, given the variety of government actors that might be sending messages, even those who were angry might not know where to direct that anger. Further, those 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 argument 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.

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. Nonetheless, one should not assume that requiring the government to identify itself as the speaker would necessarily lead

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130  See Smith, supra note 9, at 964.

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.

132  Some commentators do not seem to appreciate that this check may not prove particularly effective. See Norton & Citron, supra note 3, at 902 (discussing the “considerable benefits in ensuring that government remains politically accountable for its expressive choices”).
133  Cf. Michele E. Gilman, Presidents, Preemption, and the States, 26 Const. Comment. 339, 379 (2010) (“it is questionable whether the President is politically accountable for agency decisions because most governmental decisions are not on the radar screen of voters”).
to more consistent, thoughtful, or careful pronouncements. Nor would it necessarily lead to the
government being held more accountable for its statements. 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. That reluctance was
overcome in Garcetti v. Ceballos. At issue in Garcetti was whether a government-employed
attorney, Richard Ceballos, could be disciplined for speech made pursuant to his official
duties.

Ceballos was in a supervisory position over other attorneys in the Los Angeles County
District Attorney’s Office, and he was asked by a defense attorney to review a particular
case. (Apparently, it was not uncommon for a defense attorney to make such a request of
someone in the District Attorney’s office.)

("Transparency plays an essential role in enabling the accountability, and hence legitimacy, of government
communications.").
135 See notes 28-64 and 91-100 and accompanying text supra (discussing Velazquez and Keller respectively).
136 See Gey, supra note 52, 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).
138 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.”).
139 See id.
140 See id.
141 Id. at 414 (“According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to
investigate aspects of pending cases.”)
Ceballos believed that there were serious misrepresentations in a particular affidavit that was used to obtain a search warrant, and he informed his supervisors about his reservations. In addition, he wrote a memo suggesting that the case be dismissed.

Ceballos’s superior, Sundstedt, decided to proceed with the case. Ceballos was called as a witness by the defense to testify about his reservations about the basis for the warrant, although the trial court ultimately rejected the challenge to the warrant, because there were independent grounds upon which its issuance might have been based.

After later being reassigned to a different position and courthouse, and being denied a promotion, Ceballos claimed that he had been subjected to retaliatory employment actions, a charge that was denied. At issue before the Court was whether the contents of the memo written by Ceballos were protected by the First Amendment.

The Court began its analysis by noting that “public employees do not surrender all their First Amendment rights by reason of their employment,” and that “the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.” 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

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142 Id.
143 Id.
144 Id.
145 Id.
146 Id. at 414-15
147 Id. at 415
148 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.”).
149 Id. at 415
150 Id.
151 Id.
152 Id. at 417.
153 Id.
effectively.”  Nonetheless, it must be remembered that when public employees “speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.” 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.”

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,” and supervisors “must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.” The Court noted that if “Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.”

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.” Yet, the Court did not need to invoke the government speech doctrine to decide the issue before it. If, indeed, Ceballos was being punished for inflammatory remarks that impaired the efficiency of the workplace, then the case should

154 Id. at 419.
155 Id.
156 Id. at 421.
157 Id. at 422.
158 Id. at 422-23.
159 Id. at 423.
160 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”).
have been decided in light of Connick v. Myers\textsuperscript{161} or, perhaps, under the Pickering balancing test,\textsuperscript{162} which was discussed and used in Connick.\textsuperscript{163} 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 United States Attorney in New Orleans.\textsuperscript{164} Myers was informed that she was going to be transferred to try cases in a different section of the criminal court,\textsuperscript{165} a move that she strongly opposed.\textsuperscript{166} She spoke to one of her colleagues, expressing her reluctance to transfer among other matters.\textsuperscript{167} He suggested to her that some of her concerns were not shared by others in the office.\textsuperscript{168} She 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.”\textsuperscript{169}

Connick terminated Myers’s employment, justifying his action by noting her refusal to accept the transfer.\textsuperscript{170} She was also told that her distribution of the questionnaire was “considered an act of insubordination.”\textsuperscript{171} In particular, Connick objected to “the question which inquired whether employees ‘had confidence in and would rely on the word’ of various superiors in the

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\textsuperscript{161}461 U.S. 138 (1983).
\textsuperscript{162} 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.”).
\textsuperscript{163} See Connick, 461 U.S. at 150-52.
\textsuperscript{164} Id. at 140.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 141.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} See id.
\textsuperscript{171} See id.
office, and to a question concerning pressure to work in political campaigns." 172 Myers argued that she had been wrongfully terminated for exercising her right to free speech. 173

The Court construed the questionnaire as speech by a public employee. However, most of the speech was not viewed as involving “matters of public concern” 174 but, instead, as “matters of only personal interest.” 175 The accuracy of such a characterization was questionable. First, Connick had testified that the “question concerning pressure to work in political campaigns … would be damaging if discovered by the press.” 176 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.” 177

The Connick Court admitted that a little of the speech involved matters of public concern, namely, whether the assistant district attorneys felt pressured to work in political campaigns, 178 although there is some irony in the Court’s implying that the speech of public concern was practically de minimis. 179 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, 180 so the matter of public concern may have played a greater role

172 Id.
173 Id.
174 Id. at 147.
175 Id.
176 Id. at 141.
177 Id. at 156 (Brennan, J., dissenting) (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)).
178 See id. at 149.
179 See 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.”). See also 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.'”).
180 See id. at 141.
in Myers being fired than the Court’s description would imply. Nonetheless, the Court noted that when “close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate” 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.” Thus, even if some of the speech involved a matter of public concern, adverse employment action might be taken if it seemed reasonable to believe that working relationships might suffer, even if there was no concrete evidence that such harm had already taken place.

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. Even if it was, the analysis could still have been made in light of Connick. 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.

In 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. In any event, as Justice Souter points out in his Garcetti dissent, “private and public interests in addressing official wrongdoing

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181 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).
182 Id. at 151-52.
183 Id. at 152.
184 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.”).
185 Cf. Garcetti, 547 U.S. at 423 (noting that the memo “led to a heated meeting with employees from the sheriff's department”).
186 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.”).
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.” 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 that they might take with respect to individuals whom they were supervising. 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.

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.

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.” 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

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187 Id. at 428 (Souter, J., dissenting).
190 See id. at 1129 (“a park is a traditional public forum”).
191 Id.
monuments.” 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.”

The issue presented is easier to understand when a little background is provided. Summum is a religious organization headquartered in Salt Lake City, Utah. 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. Their proposed donation was rejected. 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.

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. 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.

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192 See id. at 1138 (quoting Summum v. Pleasant Grove City, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc).  
193 Id. at 1137.  
194 See id. at 1129.  
195 See id. at 1129 n.1 See also Gey, supra note 52, at 1299-1300  
196 See Summum, 129 S. Ct. at 1129.  
197 See id. at 1129-30.
Arkansas Educational Television Commission v. Forbes\textsuperscript{198} 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 would not be permitted to participate in a political debate televised by a state-owned television network.\textsuperscript{199} The Forbes Court held that the debate was not a public forum.\textsuperscript{200} 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”\textsuperscript{201} and “reasonable in light of the purpose.”\textsuperscript{202} Because the jury found that the exclusion was not viewpoint-based\textsuperscript{203} and because the exclusion was reasonable in that Forbes lacked widespread public support,\textsuperscript{204} the Court held that his exclusion did not violate constitutional guarantees.

The Forbes Court explained that where the “property is not a traditional 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.”\textsuperscript{205} Once the Summum Court held that the park was not a public forum at least for purposes of the installation of a permanent monument, that meant that the park was either a nonpublic forum or not a forum at all, in which case the rejection would be upheld as long as it was reasonable and not viewpoint-based.\textsuperscript{206}

\textsuperscript{198} 523 U.S. 666 (1998).
\textsuperscript{199} Id. at 669 (“A state-owned public television broadcaster sponsored a candidate debate from which it excluded an independent candidate with little popular support.”).
\textsuperscript{200} See id. at 675 (“public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine”).
\textsuperscript{201} Id. at 682.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 683.
\textsuperscript{205} Forbes, 523 U.S. at 678.
\textsuperscript{206} Cf. Summum, 129 S. Ct. 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”).
Even after showing why the rejection did not violate constitutional guarantees, the Court nonetheless 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. The Summum Court recognized that “[p]ermanent monuments displayed on public property typically represent government speech.”\footnote{Id. at 1132. $\textit{See also}$ Mary Jean Dolan, \textit{Why Monuments Are Government Speech: The Hard Case of Pleasant Grove City v. Summum}, 58 \textit{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.”).} After all, such monuments are installed on public property and may well require the use of public funds for their maintenance.\footnote{See Dolan, supra note 207, at 8 (“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.”).}

Once establishing 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.’”\footnote{Summum, 129 S. Ct. at 1135.} The Court illustrated that monuments can convey more than one meaning by discussing “‘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.”\footnote{Id.} It might seem surprising that the Court would even bother to note that a monument can mean different things to different people,\footnote{See Gey supra note 52, 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”).} especially when its holding that the park was not a public forum for purposes of accepting permanent monuments had already disposed of the issue before it. 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 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. 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.

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. 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. 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. What should a reasonable observer think when a Ten Commandments monument has been accepted and displayed and a Seven Aphorisms monument is then rejected?

Much of the opinion is designed to suggest that the reasonable observer would not know what to think. After all, monuments “may in fact be interpreted by different observers in a variety of ways.” The intended and perceived message of a city “may not coincide with the thinking of the monument's donor or creator.” Further, the “‘message’ conveyed by a

212 545 U.S. 677 (2005).
213 See Summum, 129 S. Ct. 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.”).
214 Id. at 1140 (Scalia, J., concurring).
215 See Dolan, supra note 207, 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.”).
216 Cf. Gey, supra note 52, 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.”).
217 Summum, 129 S. Ct. at 1135.
218 Id. at 1136.
monument may change over time,”219 for example, because of “the subsequent addition of other monuments in the same vicinity.”220 Or, events not subject to the control of the state might change the meaning conveyed by a monument.221 It is perhaps because a monument might convey so many possible messages both at one particular point in time and across time that 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.”222

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.”223 They need not fear that the current Court will find that “they are complicit in an establishment of religion,”224 even if it turns out that some reasonable people interpret such a monument as an endorsement of religion.225

III. The License Plate Cases

219 Id. See also Gey, supra note 52, 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.”).
220 Summum, 129 S. Ct. at 1136.
221 See Dolan, supra note 207, 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.”).
222 Summum, 129 S. Ct. at 1134.
223 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.”).
224 Summum, 129 S. Ct. at 1140. (Scalia J., concurring).
225 But cf. id. at 1141 (Souter, J., concurring in the judgment) (“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).
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.”226 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 been forced to address whether the speech on license plates is governmental, private, or both. They have reached no consensus, at least in part, because the Court has been so unhelpful in indicating how to tell when the government is speaking.

Consider, for example, Lewis v. Wilson227 in which the 8th Circuit addressed the constitutionality of a refusal by the Department of Revenue to reissue a license plate “ARYAN-1.”228 The state claimed that the plate was a nonpublic forum, although the court 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.”229

Yet, the 8th Circuit’s comparing a plate with a bumper sticker in this context seems to conflate the kinds of messages that might be posted with the kind of forum that is at issue. While the bumper is a place where political messages might be posted, it does not constitute a public forum if only because it is privately owned, and a potentially important difference between the license plate and the bumper is that the state owns the former and not the latter. Another possibly important difference is that the license plate is rather limited in the kinds of views that it can

226 Id. at 1132.
227 253 F.3d 1077 (8th Cir. 2001).
228 See id. at 1078-79.
229 Id. at 1079.
accommodate, whereas the bumper sticker is much less restricted with respect to the kinds of messages that might be posted there. Indeed, a driver who wishes to express her views has an attractive alternative to using her license plate, namely, 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 8th Circuit did not decide whether the license plate was 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.” 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.”

Yet, the Lewis court has offered an overly robust reading of nonpublic forum doctrine. While the United States Supreme Court has suggested that access to a nonpublic forum cannot be denied based on viewpoint, the Court has not required that the state make it impossible for access to be denied based on viewpoint before restrictions on access to a nonpublic forum will be upheld. Indeed, in Cornelius v. NAACP Legal Defense and Educational Fund, Incorporated where the standard was explained, the Court noted that the respondents on remand could pursue “whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view.” But such an opportunity on remand would never have been discussed if a condition for upholding a limitation on access to a nonpublic forum was that the

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230 See, for example, Perry v. McDonald 280 F.3d 159, 167 (2nd Cir. 2001) (“expressive 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”).
231 Lewis, 253 F.3d at 1079.
232 Id. at 1080.
235 Id. at 813.
state had already made it impossible for viewpoint discrimination to take place. Cornelius suggests that Ms. Lewis had to do more than show the mere possibility of viewpoint discrimination. 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.236

Most of the Lewis opinion was written as if the license plate was a kind of public forum. For example, the court likened the case before it to one in which “permission was required to have a parade.”237 One might contrast that view with the one expressed in Perry v. McDonald238 in which the Second Circuit examined a refusal by the Vermont Department of Motor Vehicles to issue the vanity license plate “SHTHPNS.” The court held that “Vermont has not intended to designate, and has not designated, its vanity plates as a public forum.”239 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,’”240 and because the court believed it reasonable to prohibit a license plate standing for “Shit happens,”241 the court upheld the refusal.

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. There are a variety of messages that can be communicated that range from “ARYAN-1”242 to “SHTHPNS”243 to “EZ LAY.”244 Presumably, individuals have sufficient ingenuity to combine

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236 See id. at 806 (“the distinctions drawn [must be] reasonable in light of the purpose served by the forum and [must be] viewpoint neutral”).
237 Lewis, 253 F.3d at 1080 (citing Cox v. State of Louisiana, 379 U.S. 536 (1965)).
238 280 F.3d 159 (2nd Cir. 2001).
239 Id. at 168.
240 Id. at 169 (citing General Media Communications, Inc. v. Cohen, 131 F.3d 273, 282 (2nd Cir. 1997)).
241 Lewis, 253 F.3d at 170.
242 See notes 227-37 and accompanying text supra (discussing Lewis).
243 See notes 238-41 and accompanying text supra (discussing Perry).
letters and numerals to communicate other messages as well. In any event, states permitting specialty plates significantly increase the kinds of messages that might be communicated, both because the plates might include logos\textsuperscript{245} and because the restrictions on the numbers of letters are not so severe.\textsuperscript{246}

In \textit{Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commission of Virginia Dept. of Motor Vehicles},\textsuperscript{247} the 4\textsuperscript{th} Circuit addressed whether license plates are government speech rather than private speech, well aware that that “the government can speak for itself,”\textsuperscript{248} 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.”\textsuperscript{249} The SCV court 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.”\textsuperscript{250} 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.”\textsuperscript{251} The court noted that the circuits have tried to devise standards to determine when the government speaks, including the following factors:

\begin{itemize}
  \item (1) the central “purpose” of the program in which the speech in question occurs;
\end{itemize}

\begin{footnotes}
\item[\textsuperscript{244}] See \textit{Katz v. Dept. of Motor Vehicles}, 108 Cal.Rptr. 424 (Cal. App. 1973) (upholding denial of plate bearing letters “EZ LAY.”)
\item[\textsuperscript{245}] See \textit{Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commission of Virginia Dept. of Motor Vehicles}, 288 F.3d 610 (4\textsuperscript{th} Cir. 2002) (addressing whether a logo including the Confederate flag could be prohibited).
\item[\textsuperscript{246}] See \textit{Arizona Life Coalition v. Stanton}, 515 F.3d 956 (9\textsuperscript{th} Cir. 2008) (addressing whether the plate “Choose Life” could be prohibited).
\item[\textsuperscript{247}] 288 F.3d 610 (4\textsuperscript{th} Cir. 2002).
\item[\textsuperscript{248}] Id. at 616 (citing \textit{Southworth}, 529 U.S. at 229).
\item[\textsuperscript{249}] Id. at 617 (citing \textit{Rust}, 500 U.S. at 194).
\item[\textsuperscript{250}] Id. at 618.
\item[\textsuperscript{251}] Id.
\end{footnotes}
(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.”

After applying these factors, the SCV court concluded that the “special plates constitute private speech,” and thus that the private entity’s speech rights had been violated by having been precluded from having the Confederate flag on their plates.

In his opinion respecting the denial of a rehearing en banc, Judge Luttig explained his view that both the government and the private individual are communicating via their license plate.

Even in such a case of “hybrid speech,” 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

\[\text{id. at 621.}\]
\[\text{See id. at 626 -27 ("we conclude that the logo restriction in Va.Code Ann. § 46.2-746.22 is an instance of viewpoint discrimination that does not survive strict scrutiny review and accordingly is impermissible").}\]
\[\text{Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Dept. of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("the speech that appears on the so-called ‘special’ or ‘vanity’ license plate could prove to be the quintessential example of speech that is both private and governmental").}\]
\[\text{id. at 245 (Luttig, J., respecting the denial of rehearing en banc).}\]
engaging in viewpoint discrimination among the various private speakers who avail themselves of the government's offer.\textsuperscript{257}

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, namely, the speech can be prohibited only if the government’s interest is compelling.\textsuperscript{258} Two different points might be made about the hybrid approach. First, one would need some analysis of what counted as a compelling interest—would the state’s interest in not being associated with a racist organization be compelling? The refusal to permit such speech has been upheld when the speech would have been viewed as government speech but not when the court thought private speech at issue, notwithstanding the possibility that someone might wrongly attribute the speech to the government as well.\textsuperscript{259} Of course, a different state might embrace as its own speech a message that some would perceive to be racist.\textsuperscript{260}

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.\textsuperscript{261} But this would give the state license to prohibit much disfavored speech, which would make the government speech doctrine

\textsuperscript{257} 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 be used for mixed speech).\textsuperscript{258} Judge Luttig might have distinguished the tests by suggesting that in a hybrid speech case, the government limitation did not have to be as narrowly tailored as it would have to have been had the government been trying to prohibit private speech in a public forum. Cf. Cornelius, 473 U.S. at 800 (“speakers 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”).\textsuperscript{259} Compare Knights of the Ku Klux Klan v. Curators of the University of Missouri, 203 F.3d 1085 (8th Cir. 2000) (upholding denial of underwriting of public broadcast radio station by the Klan because public acknowledgment would involve government speech) with Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) (striking down state refusal to permit the Ku Klux Klan to be part of a state Adopt-a-Highway program as viewpoint discrimination).\textsuperscript{260} See N.A.A.C.P. v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (upholding the flying of the confederate flag above the state dome as government speech)\textsuperscript{261} 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.”).
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 the government’s, as long as the government could reasonably claim that someone might attribute those views to the government.

The 4th Circuit applied a hybrid approach in Planned Parenthood of South Carolina Inc. v. Rose. 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. 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.” 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.

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.” 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.” Of course, one of the lessons of Johanns is that the state can adopt speech as its own

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262 Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (“both the State and the individual vehicle owner are speaking”).
263 361 F.3d 786 (4th Cir. 2004).
264 See id. at 787.
265 Id. at 795 (citing Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828 (1995)).
266 Id. at 799.
267 Id.
without making the public aware of that adoption, but Rose predates Johanns so the court was not forced to address whether the latter decision required a different analysis.268

B. Specialty Plate as Government Speech

In a case decided post-Johanns,269 the 6th Circuit adopted a different approach to the issue of whether specialty license plates involve government speech. In American Civil Liberties Union of Tennessee v. Bredesen,270 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.”271 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.”272 After all, Rust involved the government making use of private individuals to promote its own position on a controversial matter, and there was no requirement that the government permit other individuals to offer pro-abortion views.273

Unlike the implicit view offered by the 4th Circuit, the 6th 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,

268 See American Civil Liberties Union of Tennessee 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”).
270 441 F.3d 370 (6th Cir. 2006).
271 Id. at 371-72.
272 Id. at 372
273 The Bredesen court discussed Rust. See id. at 378. In his concurring and dissenting opinion, Judge Martin distinguishes what was at issue in Rust from what was at issue in Bredesen. See id. at 387-90 ((Martin, J., concurring in part and dissenting in part)}
activities, and colleges.” Further, the 6th Circuit read *Johanns* to replace the 4-part test used in *Rose* — “when ‘the government sets the overall message to be communicated and approves every word that is disseminated,’ it is government speech.” Because Tennessee approved every word of “Choose Life,” the 6th Circuit read *Johanns* to require that the speech be considered governmental speech.

In his concurrence and dissent, Judge Martin argued that *Johanns* was not controlling, because “*Johanns* is a case that addresses compelled subsidies—that is, the government forced someone to give it money to pay for speech.” 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.”

The majority and dissent in *Bredesen* were not disagreeing about whether the state could adopt “Choose Life” as its own message, but whether the state had done so in its specialty plate program. Judge Martin argued that it was not credible to believe that the state was adopting each specialty plate message as its own speech. After all, “the state has permitted approximately 150 private organizations to create specialty license plates.” When one considers the sheer number of organizations plus “the manner in which the state operates its license plate program,” one realizes that the “forum was created to facilitate private speech.” Should there be any

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274 *Id.* at 376.
275 *See id.* at 380 (suggesting that while the 4th Circuit’s 4-factor test was indeterminate, the “*Johanns* standard, by contrast, classifies the “Choose Life” message as government speech”).
276 *Id.* at 376 (citing *Johanns*, 544 U.S. at 562).
277 *See id.* at 375.
278 *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, 544 U.S. 550 (2005) is controlling”).
279 *Id.* (Martin, J., concurring in part and dissenting in part).
280 *Id.* (Martin, J., concurring in part and dissenting in part).
281 *Id.* at 382 (Martin, J., concurring in part and dissenting in part).
282 *Id.* (Martin, J., concurring in part and dissenting in part).
283 *Id.* (Martin, J., concurring in part and dissenting in part) (emphasis in the case when quoting from the Governor’s office press release).
remaining doubt 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.”284 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.

The Sixth Circuit likened the “Choose Life” message to what had been at issue in _Wooley v. Maynard_, 285 in which New Hampshire had required vehicle owners to have the state motto “Live Free or Die” on their license plates.286 However, Tennessee does not have “Choose Life” as its state motto but, instead, “Agriculture and Commerce.”287 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.’”288 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,”289 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.”290

One cannot tell whether the constitutional worry was that individuals were being 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

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284 _Id._ (Martin, J., concurring in part and dissenting in part).
286 See _Bredesen_, 441 F.3d at 377.
288 _Wooley_, 430 U.S. at 707.
289 _Id._ at 715.
290 _Id._ at 717.
thought to agree with the message. Then-Justice Rehnquist understood the difficulty to be the latter.\footnote{\textit{See id.} at 719 (Rehnquist, J., dissenting) (“The Court holds that the required display of the motto is an unconstitutional ‘required affirmation of belief.’”).}

The Sixth Circuit seemed to agree with Justice Rehnquist’s analysis, suggesting 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.”\footnote{Bredesen, 441 F.3d at 377.} However, the \textit{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.”\footnote{\textit{Id.} at 378.}

The Sixth Circuit was correct that the same constitutional issues would not have been implicated in \textit{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, Clemson University, Florida State University, the University of Kentucky, Mississippi State University, Penn State University, Purdue University, the University of Florida, the University of Mississippi, and Virginia Tech,\footnote{See \textit{id.} at 383 n.5 (Martin, J., concurring in part and dissenting in part).} it might seem surprising that Tennessee was issuing a message rather than creating a forum.\footnote{Cf. Corbin, \textit{supra} note 257, at 665 (“the 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”).} If the state were issuing a message, one would have expected it to have extolled the universities within the state in
particular rather than extol out-of-state universities as well. In any event, the sheer number of permitted messages coupled with the state’s trying to facilitate the expression of the drivers’ interests militated in favor of the state’s having provided a forum rather than having engaged in speech.

C. A Rejection of the Plate as Government Speech Approach

The Bredesen decision with respect to whether specialty plates constitute government speech has not fared well in the other circuits. For example, in Arizona Life Coalition v. Stanton, the Ninth Circuit not only concluded that “Choose Life” on a specialty plate would constitute private rather than government speech, but also concluded that the 4-factor test used in the circuits was both compatible with and supported by Johanns. 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,” 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, Incorporated v. White. The White court described the 6th Circuit reasoning as “flawed,” believing that the 4-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

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296 515 F.3d 956 (9th Cir. 2008).
297 See id. at 968.
298 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”).
299 Id. at 972.
300 547 F.3d 853 (7th Cir. 2008).
301 Id. at 863.
party?” Applying that test, the court held the government speech doctrine inapplicable, but also held that because license plates “are not by nature compatible with anything more than an extremely limited amount of expressive activity,” specialty license plates should be viewed as a forum “of the nonpublic variety, which means that we review [the] exclusion from that forum for viewpoint neutrality and reasonableness.”

The White court held that Illinois had made a “content-based but viewpoint-neutral restriction,” which “excluded the entire subject of abortion from its specialty-plate program.” The court upheld that content-based restriction, reasoning that to 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.”

Yet, the Seventh Circuit’s analysis was not persuasive. The specialty plates program would seem to permit a wide variety of messages. 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. 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

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302 Id.
303 Id. at 864.
304 Id. at 865.
305 Id.
306 Id.
307 Id.
308 Id. at 866. Cf. Corbin, supra note 257, 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.”).
309 White, 547 F.3d at 856 (“Like most other states, Illinois offers a broad selection of specialty plates.”).
reasonable in light of the forum’s purpose,\footnote{See Rosenberger, 515 U.S. at 829 ("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.’") (citing Cornelius, 473 U.S. at 804–806). See also Stanton, 515 F.3d at 972 ("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.").} assuming that enough individuals were interested in getting the plates.\footnote{A plate would not be approved unless it could be shown that the requisite number of people would purchase the plate. 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 would seem that sufficient interest has been established. See id. at 857 ("CLI collected more than 25,000 signatures from prospective purchasers.").}

The Eighth Circuit also examined whether a “Choose Life” specialty license plate could be denied in \textit{Roach v. Stouffer}.\footnote{560 F.3d 860 (8th Cir. 2009).} The court considered the government speech doctrine as articulated in \textit{Johanns} and \textit{Summum},\footnote{Id. at 864.} suggesting that \textit{Johanns} stood for the proposition that the “more control the government has over the content of the speech, the more likely it is to be government speech,”\footnote{Id. at 864-65 (quoting \textit{Summum}, 129 S. Ct. at 1134) (citing \textit{Johanns}, 544 U.S. at 560-61).} and that \textit{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.”\footnote{Id. at 867.} The 8th Circuit followed the example set by the Seventh Circuit both in rejecting the 6th Circuit’s analysis\footnote{Id. at 867.} 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.”\footnote{Id. at 868.} The \textit{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.”\footnote{Id. at 868.}
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,” citing the previous 8th Circuit decision in Lewis with approval. Yet, that would mean that prophylactic measures would have to be adopted by the state even with respect to regulating how nonpublic fora are used.

The United States Supreme Court has recognized that public “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.” In Perry Education Association v. Perry Local Educators' Association, the Court recognized a school’s interschool mail system as such a forum, and upheld its use by the union officially representing the teachers and not by the union seeking to become their representative. But the Court nowhere required or even discussed the kinds of prophylactic regulations that would have to be in place to make sure that the nonrepresentative union was not being discriminated against on the basis of viewpoint.

The Eighth Circuit implied that the “Choose Life” plates had not been permitted because of a disagreement with that viewpoint, so it may well be that the court was correct that

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319 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).
320 See id. at 868 n.4 (citing Lewis, 253 F.3d at 1079).
321 See notes 233-36 and accompanying text supra (discussing the overly robust reading of First Amendment limitations on public fora offered in Lewis).
323 See id. at 46.
324 See 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.”).
325 See Roach, 560 F.3d at 863.
constitutional guarantees had been violated. 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.

With the exception of the 6th Circuit, the circuits seem to be in general agreement that
specialty plates should not be construed as government speech. That conclusion 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.
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 Court.

III. Conclusion

The Court’s discussion of the government speech doctrine has been a disaster, not because it
involves something unimportant or wrongheaded, but because the doctrine has been invoked
when it was neither needed nor even appropriate, perhaps in an attempt to immunize state action
from constitutional review.327 In none of the cases involving the government speech doctrine was
the invocation of that doctrine necessary to decide the case. Instead, the doctrine was

327 See Gey, supra note 52, 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 127, at 715 (“The point cannot be
over-stressed: the function, and often the purpose, of government speech doctrine is to disfavor private speakers as a
result of their viewpoints.”).
retroactively applied in the subsequent caselaw (Rush), ignored when it would have seemed to be controlling (Velazquez), or inaccurately described even in light of the few previous cases invoking it (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 challenge. 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 be applicable when the government claims to be speaking on its own behalf.

It is simply unclear what kind of limitations should be imposed to assure that the government speech doctrine is not abused. While some would insist that the government expressly state that 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, namely, the doctrine has been invoked unnecessarily and without any accompanying limitation, almost inviting its invocation at the wrong time and in the wrong circumstances in the future.

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”

\[328\] government speech doctrine 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 to be used by the state and the courts at their convenience, a sleight of hand ill-suited to promote either the

\[328\] See Summum, 129 S. Ct. at 1139 (Stevens, J., concurring).
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.