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WHY SHOULD THE FIRST AMENDMENT PROTECT GOVERNMENT SPEECH WHEN THE GOVERNMENT HAS NOTHING TO SAY?

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It is an uncontroversial fact of political life that the government sometimes must communicate with the public. For several years, however, the Supreme Court has used this uncontroversial fact as a justification for developing a First Amendment doctrine of government speech. This new doctrine does more than simply recognize the government’s authority to speak out on matters of public policy; as envisioned by the Supreme Court, the doctrine also allows the government to silence or coerce the speech of those in the private sector who wish to speak out against the government. In much the same way that private speakers have long been given a First Amendment right to fend off government control of their speech, the government now has been afforded a First Amendment “right” to free speech as well. The question is whether this new "right" is necessary. Both the facts and theory of the Court’s new government speech cases suggest that the answer to this question is no. For the most part, the cases in which the Court has resorted to its new government speech doctrine involve situations in which the government’s ability to communicate with the public would not have been inhibited in any way if such a doctrine did not exist. The Court has even relied on its new government speech doctrine in several cases in which the government either was communicating ambiguously or not at all. It is a mystery why the government should be allowed to employ a First Amendment “right” to government speech against private speakers when the government has nothing to say. This Article addresses the Court’s new government speech doctrine. After reviewing the cases in which the Court develops this doctrine, the Article concludes that these cases do not support the Court’s increasingly expansive conception of government speech. These cases indicate instead that all of the legitimate purposes of government speech would be served just as effectively by a much more truncated conception of the government speech doctrine than by the broader version being developed by the Court. The Article concludes by proposing, in the alternative, that the government speech doctrine could be eliminated entirely without harming a single one of the government’s legitimate objectives. It may be, in other words, that from a First Amendment perspective, the best government speech doctrine is no doctrine at all.

In several recent decisions the United States Supreme Court has greatly enhanced the concept of government speech. Indeed, the concept of government speech seems to have become a First Amendment category unto itself, in the sense that it is used to fend off other First Amendment claims by private speakers and government employees. The concept has cropped up in several different contexts, including the regulation of speech by government
employees, the regulation of speech by individuals or private entities receiving government subsidies, compulsory speech connected to mandatory student fee regimes at public universities, government-coordinated cooperative advertising regimes, and, most recently, government-sponsored religious speech. The concept of government speech has also become the focus of several recent lower court cases, including a spate of cases involving government-issued license plates bearing the anti-abortion inscription "Choose Life."

The same premise underlies all these decisions: A majority of the Court seems to believe that in some situations the government has a legitimate interest in contributing its views on a particular subject to the marketplace of ideas, and in those situations private speakers should have no First Amendment claim that would inhibit the government in expressing its views. It is unclear how the government's interest in expressing itself fits into the Court's constitutional doctrine. The Court resists calling government speech a First Amendment right of the government. In its most recent government speech opinion, the Court concludes that a government action that can be viewed as a form of government speech "is not

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1 See Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that a government lawyer could be sanctioned for refusing to carry out his supervisor's instructions in presenting a case to the court).
3 See Board of Regents of Univ. of Wis. System v. Southworth, 529 U. S. 217 (2000) (discussing government speech in the context of holding that a public university does not have to allow students to opt out of a mandatory student fee that is used to finance expression by various student groups); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819 (1995) (discussing government speech in the context of holding that a student activity fee must be distributed on a content and viewpoint neutral basis to all student groups).
4 See Johanns v. Livestock Marketing Assn., 544 U. S. 550 (2005) (holding that a mandatory fee to subsidize speech is not a compelled subsidy in violation of the First Amendment if the speech being subsidized is the government's own).
5 See Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1129 (2009) (holding that a city could place in its park a monument bearing the religious inscriptions of one faith, while denying the members of another faith the ability to place in the park their own monument with its own religious inscriptions).
6 See Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009) (holding that the state of Missouri was obligated to issue a "Choose Life" tag); Arizona Life Coalition, Inc. v. Stanton, 550 F.3d 956 (9th Cir. 2008) (holding that the state of Arizona was obligated to issue a "Choose Life" tag); Choose Life v. White, 547 F.3d 853 (7th Cir. 2008) (holding that the Constitution does not prohibit the state of Illinois from refusing to issue a "Choose Life" tag). These cases are discussed in section II.E., infra.
subject to the Free Speech Clause." There are dissenting voices on the Court who doubt whether "the recently minted government speech doctrine" exists at all -- and if it does exist, whether it is a worthwhile development. These dissenting voices are, however, in a distinct minority on a Court whose majority is willing to apply the government speech doctrine in a growing range of different circumstances.

As a doctrinal matter, despite the Court's protestations to the contrary, it is plausible to view the Court's perspective on the government speech doctrine both as a right of government, and also view that right as arising out of the First Amendment. Government speech claims always arise in the context of First Amendment disputes with private speakers, and in these cases the private speakers lose their First Amendment claim not because the Court views the private speakers' expressive claims as weak, but rather because the Court views the government's competing expressive interests as stronger. Hence, while the Court has not phrased the government speech doctrine in this way, the Court implicitly seems to view the government is having a First Amendment "right" to speak.

Regardless of how the Court ultimately decides to fit the government speech doctrine into its doctrinal matrix, there are several problems with the way in which the Court has implemented the doctrine. For example, it is not clear that squelching the speech of government employees or government-subsidized workers is necessary to protect the

8 Id. at 1139 (Stevens, J., concurring).
9 The competition between government speech and private speech -- with the result that when the government is awarded the "right" to speak, the government may suppress competing private speech -- is what distinguishes the Court's new government speech cases from the version of government speech that was the focus of scholarly attention several decades ago. In the earlier debate over government speech, the questions mostly related to whether the government had the authority "to prescribe and to instill basic values in politics, nationalism, and other matters of opinion." Steve Shiffrin, Government Speech, UCLA L. Rev. 565, 568 (1980). Although these questions remain compelling today, the more immediate issue given the Court's recent decisions is
government's right to speak on its own behalf about particular issues. Also, it is not at all clear that a government subsidy can logically be construed as "speech." The larger problem with the Court's theory of government speech, however, is that in many cases in which the Court has implemented its theory of government speech the government is not really saying anything. Even more problematic is the Court's most recent government speech case, *Pleasant Grove City, Utah v. Summum*,\(^\text{10}\) in which the government asserts that it is indeed saying something, but will not reveal the precise details of the message. In *Summum*, the Court enhances the speech category of First Amendment law to the point that the government can evade First Amendment restrictions without engaging in the communicative behavior that supposedly justified the evasion in the first place.

This article casts a skeptical eye across the entire category of government speech. Although the Court's initial premise -- that at times the government has clear authority to speak out matters of public concern -- is unexceptionable, it is not at all clear why this has anything to do with the First Amendment. It is not clear, for example, why the government should have affirmative First Amendment right to speak, since the structural function of the First Amendment is to limit government power. Nor is it clear why the government should have a "government speech" First Amendment defense against private speech with which the government does not agree, since the Court has denied the government a defense against First Amendment violations in a range of other instances -- including cases of potential incitement -- in which the government seems to have a much more compelling case to silence its opponents.

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\(^\text{10}\) 129 S.Ct. 1129 (2009).
In short, the Court has not yet made the case for why the periodic need to have government speak should justify the government in silencing private speakers who seek to express contrary views on the same subject. More importantly, it makes little sense to give the government a First Amendment right to speak if the government has nothing to say or refuses to announce its message. If one applies the requirement that the Government must have an actual message before being granted a First Amendment right to government speech, then the category of government speech should have a significantly smaller impact on First Amendment law than it has had in the Court's recent cases.

This article will review the Court's government speech cases, starting in the first section with the early cases that provided the framework for the category. These cases mostly deal with government efforts to squelch the screech of government employees or private persons who receive government subsidies. The problem in these cases is not so much that the government has nothing to say, but rather that there is no real reason why the government needs to stifle the screech of the private persons in order to get across the official government message. The second section will then turn to government speech cases in which it is substantially less clear that the government is actually saying anything. These cases mostly deal with government programs to collect money from citizens to operate some expressive program or forum. This section will also address *Summum*, the Court's most recent effort at explaining the government speech model.

The root of the critique below is that the Court's creation and expansion of a government speech category furthers a trend that is evident in a range of other free speech cases. That trend involves the creation of a whole series of First Amendment subcategories to avoid the thrust of the Court's primary First Amendment category, which deals with political
speech, and which provides speakers with virtually absolute protection against government regulation of unsanctioned expression. The real point of these government speech cases may be something altogether different than the rationale expressed by the Court to justify its rulings. The real point of these cases may not be, as the Court innocuously suggests, to facilitate government speech. Rather, the point may be to give the government another tool with which to silence its critics.

I. THE PRECURSORS OF THE GOVERNMENT’S RIGHT TO SPEAK

Although the First Amendment category of government speech is a creation of the Court during the last few decades, the government has proposed something akin to a right of government speech several times during the last century, only to be rejected by the Court on First Amendment grounds. For example, the earliest public forum cases were argued by the government on the basis of a sort of government speech claim, in the sense that the government asserted that it should not have to allow certain types of speakers to express themselves on the government's property (which could perhaps suggest the government's endorsement of their views). In his days as a Justice of the Massachusetts Supreme Judicial Court, Oliver Wendell Holmes accepted this claim, ruling in a case involving attempts by the city of Boston to exclude speakers from the Boston Common, "for the Legislature absolutely or conditionally to forbid public speaking in a highway or a public park is no more of an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."11

Ultimately the United States Supreme Court rejected the notion that the government's right not to speak encompassed the right to foreclose private speech on its property, holding that public parks and sidewalks were considered quintessential areas of public discourse, and

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11 See Davis v. Massachusetts, 39 N.E. 113 (1895), aff’d 167 U.S. 43 (1897).
that the government could not prohibit speech within those areas based on the content or viewpoint of speech. Although these disputes over the use of government property were considered settled a long time ago, the modern Court has revived them through the use of the government speech doctrine, subdividing government-owned public forums into truly public areas and other areas that are controlled exclusively by the government for the communication of its own messages (to the exclusion of messages with which the government disagrees). Thus, part of what was once quintessentially an area of public speech is now quintessentially an area of public censorship, thanks to the creation of a category of government speech.

Another, more subtle historical variation on the theme of government speech concerns the Pledge of Allegiance. In 1942, Congress passed a statute adopting an official Pledge of Allegiance. Many public schools around the country followed the lead of the national government by requiring students to recite the Pledge at the beginning of every school day. In essence, therefore, the situation involved the combination of official government speech (the authorized Pledge) and the use of private individuals (the students) as the expressive agents acting on behalf of the government. At first glance, it may seem odd to view the Pledge through the prism of government speech. But upon closer consideration, the Pledge is actually a relatively pure example of government speech. The Pledge is a government-sanctioned statement to the world about matters of patriotism and national solidarity in the face of adversity. It is an official government statement containing some basic assertions about itself.
and its citizens. The anomaly, of course, is that the Pledge is an example of government speech that the government itself could never express directly. Rather, the Pledge is a government-authored statement of principles whose words could only be spoken in a meaningful way by individual citizens. And since the Pledge was originally conceived as a government assertion of uniformity and solidarity, any dissent from the Pledge would undercut the central meaning of the government's message. So what started out as an instance of expression about the government's views on the matter of national solidarity became, in effect, a loyalty oath.

The problem, as the Court would conclude after considering the issue several times, is the use of private citizens to communicate the government's message. Although from the government's perspective loyalty oaths appear to be perfectly acceptable methods of communicating collective values, this is not at all true from the perspective of the individual who is being coerced to parrot the government's point of view. Viewing loyalty oaths such as the Pledge as examples of government speech illustrate some of the difficulties of this new category of First Amendment law. The central difficulty is that in many situations when the government expresses itself, it is not truly divorced from the citizens who are affected by that expression. One of the most compelling rationales for creating the new category of


"national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity," "that the Flag is the symbol of the Nation's power," and that the flag represents "absolute safety for free institutions against foreign aggression." West Virginia State Bd of Educ. v. Barnette, 319 U.S. 624, 626 n.2 (1943).

17 The Supreme Court ruled on five different occasions that mandatory flag salutes were constitutional. See Leoles v. Landers, 302 U.S. 656 (1937) (dismissing the appeal of an unsuccessful flag salute challenge due to the lack of a substantial federal question); Hering v. State Board of Education, 303 U.S. 624 (1938) (same); Gabrielli v. Knickerbocker, 306 U.S. 621 (1939) (same); Johnson v. Deerfield, 306 U.S. 621 (1939) (summarily affirming lower court decision rejecting constitutional challenge to a flag salute mandate); Minersville District v. Gobitis, 310 U.S. 586 (1940) (rejecting on the merits a constitutional challenge to a flag salute mandate). The Court reversed itself and held that there is a constitutional right not to salute the flag in West Virginia v. Barnette, 319 U.S. 624.
government speech is to enhance the marketplace of ideas with the government's own contributions.\(^\text{18}\) The reality, however, is that in many instances the government's speech will actually shut down the marketplace of ideas by silencing private expression that is opposed to the government's position on some major public issue. To put this point in another way, in a democratic political culture there is often no clear demarcation between government speech and private speech. As the volume of government speech increases to the point that it begins to squeeze out private speech, government speech loses its legitimacy as an exercise in democratic political discourse.

The difficulties in determining when government speech ends and private speech begins can be illustrated by a third case the court treaty as a derivative of its Pledge decision. In *Wooley v. Maynard*,\(^\text{19}\) two Jehovah's Witness residents of New Hampshire objected to the inscription "Live Free or Die" on their state's license plates.\(^\text{20}\) They covered up the inscription on the license plates on their cars, and were arrested and charged with defacing those plates, a misdemeanor under New Hampshire law.\(^\text{21}\) The state of New Hampshire cited government speech as one of its interests in forcing people to carry the state's inscription on their personal license plates: "The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism."\(^\text{22}\) Although the Court recognized government speech as a legitimate interest, it did not create a separate First Amendment

\(^{18}\) Although the Court has been notably silent about defining its rationale for developing the new category of government speech, commentators have been especially fond of the rationale that the government should be encouraged to contribute to the marketplace of ideas and public debate generally. See, e.g., David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637, 1662 (2006); Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 11 (2000) ("[G]overnment speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer."). For further discussion of the suggested purposes for government speech doctrine, see infra note 41.

\(^{19}\) 430 U.S. 705 (1977).

\(^{20}\) *Id.* at 707.

\(^{21}\) *Id.* at 708.
category for such speech, and cautioned that "such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." The Court is not willing to overrule Woolly, but the Court long ago abandoned the proposition that the government has no speech interest sufficient to outweigh individuals' First Amendment rights.

II. THE FIVE MANIFESTATIONS OF THE COURT'S NEW RIGHT OF GOVERNMENT SPEECH

In the three cases discussed in the previous section one can see the themes that informed the Court's initial treatment of government speech claims in the days before the Court gave such claims heightened importance. Although even in these early cases the Court often recognized the government's authority to communicate its views to the public, three themes in these early cases could substantially restrict government speech that inhibits the speech of private speakers.

The first theme is that although private individuals have a right not to be associated with views with which they disagree, which is evident from the holdings in Barnette and Wooley, the government does not have a similar right to avoid associating with antigovernment protesters, which is evident from the fact that private speakers have a right to refuse to repeat the government's message as embodied in things such as the Pledge of Allegiance, and also from the fact that anti-government protesters can enter government-owned public forums and verbally attack the government’s positions with impunity.

A second theme is that the government does not have unfettered power to leverage its role as the sole provider of certain government services (such as public education or

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22 Id. at 717.
23 Id.
24 See supra notes 15-23 and accompanying text.
25 Id.
automobile registration) to enhance the scope, volume, or effectiveness of the views it seeks to communicate with the public. On the other hand, the effectiveness of the second theme is limited significantly by the fact that although the Court does not give the government unfettered power to use his role as service provider to enhance its message, it certainly gives the government substantial power to do so. By adopting a sort of opt-out system in cases such as *Barnette* and *Wooley*, in which those who do not want to hear the government's message must affirmatively opt out of doing so, the Court essentially puts on the citizens themselves the onus of keeping the government in check. Since most citizens will choose not to opt out of the government communication scheme, the government will, in fact, managed to leverage its service provider role in ways that artificially enhance its message.

A third theme (which is implicit in all three of the early cases discussed above) is that the government cannot monopolize the marketplace of ideas through its communications. According to this theme, if government speech has the effect of freezing out of the marketplace private counter-speech, then the right of private speakers trumps the government's right to communicate its perspective in the manner it prefers.

During the last two decades, the Court has either abandoned or significantly diluted each of these three themes. In recent cases, the Court has given the government as speaker rights there are in many ways coextensive with the rights that private speakers enjoy under the First Amendment. This has occurred without any serious discussion on the Court about why the government needs enhanced rights of government speech to conduct its official business. This is especially disturbing since one of the signal features of the Court's most recent government speech cases is that when the government is given the right to speak it is

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26 See *supra* notes 11-13 at accompanying text.
simultaneously given the right to silence private speakers who disagree with the government.\textsuperscript{27} This is true despite the fact that in most of the recent cases in which the Court cites the government speech category to justify some official expressive activity, the government could accomplish its purposes without resorting to the right of government speech, and also without silencing private counter-speech.

For all the highly abstract conceptual problems raised by the Court's creation of a First Amendment category protecting government speech, there is a much more important practical problem with these cases. In every one of the five manifestations of government speech that the Court has currently addressed, the government either has nothing at all to say, or wants to say something that it is not allowed to say, or wants to say something that no conceivable conception of a democratic political process would allow it to say, or speaks in such a garbled way that no one can figure out what it is saying. It may be that the Court's new category of government speech is undercut even before an assessment is made of that new category’s effect on the marketplace of ideas, by virtue of the fact that the Court is providing the government the right to speak in situations in which the government has nothing legitimate to say.

In short, each of these features of the Court's recent cases raises the question whether the creation of a category of government speech was necessary. These features also raise the question whether this new category of First Amendment law actually serves to enhance the marketplace of ideas by facilitating the government's ability to contribute to that marketplace, or rather inhibits the development of a vibrant marketplace of ideas by allowing the government to channel discussions within the marketplace in a direction that the government

\textsuperscript{27} For examples of this phenomenon, see the discussions of Rust v. Sullivan, infra notes infra notes 28-46
favors. And when all is said and done, the most basic question remains: Why should the Court give the government a constitutional right to speak if it has nothing of consequence to say?

A. Manifestation One: Garbled Government Speech as a Justification for Gagging Government Contractors

A prime example of the Court granting the government the right to speak in garbled or illegitimate terms can be found in the Court's first modern government speech case, *Rust v. Sullivan.* In *Rust,* the Court upheld Bush Administration regulations implementing the Public Health Service Act. The Act made federal funds available to private organizations that provided family planning services. The regulations were designed to ensure that no federal funds available under the Act were used to in any way facilitate abortion as a family-planning device. The regulations were draconian. Under these regulations, recipients of federal funds could not provide counseling concerning abortion, refer a patient to another agency that could provide counseling concerning abortion, directly or indirectly encourage the use of abortion, or advocate, lobby, or provide speakers to promote abortion as a method of family planning. The regulations even prohibited federally funded health-care providers from referring a pregnant woman to an abortion provider, even upon that woman's specific request. At the organizational level, the regulations required federally funded organizations to be "physically and financially separate" from affiliated organizations if they engaged in any of the activities regarding abortion that were prohibited by the regulations.

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and accompanying text, and *Summum, infra* notes *infra* notes 107-24 and accompanying text.

28 500 U.S. 173 (1991) (upholding regulations implementing the Public Health Service Act, which allowed the government to restrict speech pertaining to abortion by recipients of funding under the Act).

29 *Id.* at 178.

30 *Id.* at 179-80.

31 *Id.* at 180.

32 *Id.*
Organizations and doctors that provided family-planning services or received federal funds sued to enjoin the regulations. Their First Amendment claims were straightforward and obvious. In a nutshell, doctors and other health professionals were being told by the federal government to withhold from their patients accurate and highly relevant information concerning their patients’ health -- even if the patients specifically asked for that information. The government's reason for imposing the ban was simple ideology -- as indicated by the regulations’ suggested response to a patient seeking information about abortion: "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."

The First Amendment question in *Rust*, therefore, was whether the government may use its ideological opposition to a valid (and, indeed, constitutionally protected) medical procedure to suppress a doctor's pertinent medical advice about that procedure to a willing patient. According to the Court in *Rust*, the answer to that question is "yes" and the explanation for that answer is that the funding program involves government speech. The Court analogized government programs funding speech to other government programs funding nonexpressive activity. In other words, the Court viewed the *Rust* program as indistinguishable from programs challenged in other cases involving limitations on the use of Medicaid funds for

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33 *Id.*

34 Although the Court's discretion of the government speech issue in *Rust* is rather cryptic, subsequent cases have clearly identified *Rust* as having been based almost exclusively on the concept of government speech. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("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.").
abortion services.\textsuperscript{35} "In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."\textsuperscript{36}

At times in \textit{Rust} the Court behaves as if there is no First Amendment interest here at all; the Court seems to suggest that the case involves a simple business transaction, in which the government is purchasing a bundle of services that exclude abortion counseling. "[H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."\textsuperscript{37} Since the program is designed to pursue a particular result, employees of groups receiving funds under the program are likewise obligated to follow the guidelines detailing the government objectives. "Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral."\textsuperscript{38} Again, the Court approaches the issue as if it were a standard business transaction; by analogy, if the government hired an independent contractor to cut the checks for a $1000 stimulus tax rebate, the employees of the independent contractor would have no authority to add an extra zero to the amount of every check. The question is whether this analogy is apt.

The problem with the Court's approach is that \textit{Rust} involved a program that was not truly akin to a standard business transaction by the government. The \textit{Rust} program was different because it involved a complicated mixture of constitutional rights (including not only abortion rights, but also the First Amendment right of doctors and patients to communicate freely) and speech about those rights. The central theme of this article is that the Court has

\textsuperscript{35} \textit{Rust}, 500 U.S. at 192-93 (discussing \textit{Maher v. Roe}, 432 U.S. 464 (1977) and \textit{Harris v. McRae}, 448 U.S. 297 (1980), in which the Court upheld welfare programs in which Medicaid patients received subsidies for childbirth but not for abortion).

\textsuperscript{36} \textit{Id.} at 193.

\textsuperscript{37} \textit{Id.} at 196.
exaggerated the importance of the concept of government speech in large part because the Court has never paid much attention to what the government is allegedly saying in the government speech cases considered by the Court. If one addresses the government speech cases with closer attention to what message (if any) the government is actually attempting to communicate, then the concept of government speech begins to look significantly less attractive as a way of addressing the problems presented by those cases.

Consider Rust using this approach. If Rust indeed involves government speech, then the government should be trying to communicate a particular message. But what might that message be? One possibility might be distilled from the regulations’ suggested response by federally-funded doctors to patients requesting information about abortion: "the project does not consider abortion an appropriate method of family planning." But this antiseptic proposition is not an accurate description of the message that the government is trying to communicate. In the program at issue in Rust, women were being denied information about a procedure that the federal government at the time considered immoral. The message being communicated by the program is actually much more aggressive than the Court acknowledges. 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."

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38 Id. at 198.
39 Id. at 180.
If the government wanted to communicate its real message, then simply ordering the silence of health-care workers dealing with patients would not be sufficient to communicate that message. Some much more aggressive form of communication than mere silence would be necessary to communicate this message -- perhaps in the form of statements read by doctors to patients, or literature handed out to the patients before or after their appointments. The problem with this approach, from the government's perspective, is that it would likely scare off or anger many patients and be ineffective with others. It would likely seem to many patients that their own moral decisions were being made for them by the government, a response that would likely engender in many patients disenchantment and even disobedience. This is undoubtedly why the government chose to accomplish its purpose (reducing the number of abortions in the United States) in a furtive way by denying patients information about the procedure through the silence of health-care workers.

But the silence of health-care workers, to the extent that it communicated any message at all, communicated one of two different messages than the one the government was trying to communicate in its program. One message communicated to the patients by the doctors' silence might be: "the government, and those of us who work for the government, do not trust you to make the correct moral decision with regard to your potential pregnancy; therefore, we have chosen to deny you information about certain options." This is not a particularly palatable message, nor is it likely to be a particularly persuasive message to the patients that the government is trying to convince. On the other hand, the government's other possible message is even less attractive. The other possible message communicated to the patients by the doctors' silence might be: "we health professionals who are dealing with family planning
issues are incompetent because we are too ignorant to realize that abortion is one possibility in the panoply of family planning options."

The second message is obviously inaccurate; the government and its subsidized workers know full well that abortion is available as a family planning option. On the other hand, the first message accurately renders (albeit without the sugar coating) what the government was attempting to say when it passed the regulations at issue in Rust.

Nevertheless, the government is unlikely ever to phrase its message in this way (i.e., forthrightly). This is not because the message inaccurately characterizes the government's views, but rather because if the government candidly said what it really meant, the message would be totally ineffective with members of the target audience, who are unlikely to take kindly to the government's blunt moral paternalism.

If the Court had considered the messages that the government was actually trying to send when it adopted the gag rule at issue in Rust, and also considered the message actually communicated by the method chosen by the government (that is, the gag rule), then the Court would have had a much more difficult time upholding the Rust regulations than was apparent from the Court's opinion. Despite the Court's use of the government speech rationale for upholding the gag-rule regulation, this rationale does not logically apply to the message actually being communicated by the government in Rust because no government worker was forced by the regulations to acknowledge the content of the government's real message of moral hostility toward the abortion procedure. If the government really wanted to use government speech as its defense to the health-care workers' First Amendment claims, then the government should be forced to actually speak; that is, to articulate fully and clearly the content of its official message. After all, if one of the primary purposes of the government
speech category is to facilitate debate on matters of public importance by having the
government contribute its views to the debate, then the government's speech does not warrant
constitutional protection because its ambiguous silence contributes nothing to the debate.
Proponents of government speech who focus on the marketplace-of-ideas rationale for the
doctrine argue that "governments' speech must consist not just of information but also of
explanation, persuasion, and justification to a polity tethered to the policies and preferences
acted upon by its representatives." Is so, however, the converse must also be true. Therefore,
speech that conveys no information, explains nothing, is too cowardly to seek to persuade, and
provides no justification for government action should not be construed as government speech.
Given the facts of the case, the Court's decision in Rust is therefore directly contrary to the
entire point of having a government speech category under the First Amendment.

The Court attempts to avoid this result by drawing analogies between the gag-rule
regulation and other abortion precedents in which the Court had previously upheld
comprehensive government health-care programs that singled out and refused to subsidize

41 Both the academic literature and the Court's own opinions are remarkably silent about the precise
purpose for the government speech doctrine. The closest the Court ever comes to describing a particular purpose
for the doctrine is the language in Rust pertaining to the need to free the government from viewpoint-
discrimination rules because otherwise "numerous Government programs [would be rendered] constitutionally
suspect." Id. at 194. In other words, the Court posits a purely pragmatic rationale for giving the government a
First Amendment right to silence private speakers who interfere with the government's speech. A second purpose
for protecting government speech (if not for something so specific as a government speech doctrine) is suggested
by some of the academic literature on the subject. This second purpose relates to the government's salubrious
participation in the marketplace of ideas. One of the best discussions of this purpose can be found in Mark
Yudof's well-known book on the concept of government speech. See Mark Yudof, When Government Speaks 20-
37 (1983) (addressing the need in a democratic culture for a balance between government communications to the
public and public communications to the government). The question addressed by the present Article is whether
either of these proposed purposes for government speech -- the pragmatic purpose or the marketplace purpose --
requires the Court to create a government speech doctrine of the First Amendment. It will be argued below that
governments can accomplish the pragmatic purposes of governance and can contribute effectively to the
marketplace of ideas just as effectively without a government speech doctrine as with one. If true, then the
government speech doctrine serves only the nefarious purpose of giving the government a tool with which to
silence private speakers speaking out against the government -- which will have the consequence of warping the
marketplace of ideas by skewing it in the government's favor.
abortion services. The Court in *Rust* treats the conversations between health-care workers and patients covered by the gag rule as merely another form of abortion services that the government is refusing to provide. In fact, however, the provision of information in *Rust* is very different than the provision of actual services in the other cases cited by the Court. One major difference is how the two government actions affect the lives of those who are seeking government services. When the government refuses to provide subsidized abortion services, it reduces access to those services and severely diminishes the ability of poor women to obtain this type of health-care. But it does not warp the entire system by tricking women into believing one thing (that abortion is an effective tool for terminating a pregnancy when necessary) when the government knows that the opposite is true.

A properly applied government speech theory would underscore this difference by requiring the government to acknowledge the reality that it is attempting to manipulate. A proper government speech theory would also require the government to clear up any ambiguities of the message it was communicating. Recall the government's suggested response to patients seeking information about abortion: "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." This statement is ambiguous because the word "appropriate" could mean either "medically appropriate" or "morally appropriate." A patient could plausibly understand the statement to mean either of these two very different things. But the first statement is, from a medical perspective, factually inaccurate. As the Court itself has recognized, abortions (at

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43 See supra note 35.
least during the first two trimesters) are not only medically appropriate but actually far safer than carrying a pregnancy to term.\textsuperscript{46} No rational understanding of the government speech theory would grant the government the authority to disseminate factually inaccurate statements about reality. It is rational, however, for the government to be permitted to disseminate its views on contestable issues of moral and political policy. Therefore, in the \textit{Rust} example, in order to comport with the requisites of a rational government speech theory, the government should be forced to make clear that its communication is a moral assertion, not a scientific or medical one. Of course, for all the reasons noted above, the government will be unhappy with this requirement because a paternalistic moral assertion is unlikely to be very effective in discouraging those who are so inclined from pursuing abortions.

In \textit{Rust} the government should have been forced to acknowledge its true message. If it did not do so, then the government speech theory should not have been employed to protect the gag-rule regulation and the First Amendment rights of health-care workers receiving government subsidies should have been protected. Allowing the government to impose silence on those receiving government subsidies misleads the public about the government's position, contributes nothing to public debate within the marketplace of ideas, and communicates nothing that is worthy of First Amendment protection. From its very origins, therefore, the Court's new theory of government speech was on very shaky ground. The Court misjudged the

\textsuperscript{44} See \textit{Rust}, 500 U.S. at 192-93 (comparing the Title X restrictions on communications between healthcare workers and patients to restrictions on Medicaid funding of nontherapeutic abortions previously upheld by the Court).

\textsuperscript{45} \textit{Id.} at 180.

\textsuperscript{46} Even in \textit{Roe v. Wade} the Court recognized that abortions during the first trimester are far safer than taking a pregnancy to term. See \textit{Roe v. Wade}, 410 U.S. 113, 163 (1973). The Court also recognized as early as 1983 that abortions during the second trimester were often also safer than childbirth. \textit{City of Akron v. Akron Center for Reproductive Health, Inc.}, 426 U.S. 416, 429 n.11 (1983) ("There is substantial evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions have extended the period in which abortions are safer than childbirth." (Citations omitted)).
theory's purpose, misapplied the theory in a situation in which it did not apply, and used the theory inappropriately to undermine the First Amendment rights in a situation where critical and sometimes life-threatening decisions require open discourse that is forthright, honest, and free of ideological manipulation by the government. In the subsequent manifestations of the government speech theory, the Court's record in defining and applying its new theory has not improved.

B. Manifestation Two: Illegitimate Government Speech as a Justification for Gagging Government Employees

Even those unfamiliar with First Amendment rights could easily understand the problems with giving the government the authority to silence the speech of the health-care workers in *Rust*. The average person would understandably become very nervous whenever the government is given the authority to manipulate the information a doctor gives to his or her patient about that patient's care. On the other hand, in cases dealing with whether the government can dictate the speech of its own employees when those employees are speaking on behalf of the government, the unschooled intuition of the average person will probably initially lean in favor of the government. After all, if an employer cannot tell its employee what to say on the employer's behalf, then it may seem to the average person that the inmates have taken over the asylum. If ever there were a situation which the government speech rationale should protect the government's prerogatives, it seems it should be this one. Yet upon closer inspection, the situation is not as clear-cut as it first seems, and the legitimacy of the government speech rationale becomes much more complex.

The application of the government speech rationale to government employment is complex because although government employees can clearly be deployed to speak exclusively on behalf of the government, there are constraints inherent in some of the areas in which the
government operates that limit what both the government and its employees may say. Therefore, the government speech theory should not protect the government when it attempts to dictate the speech of an employee in a way that would require that employee to violate a constraint on the government that applies in a particular area. Oddly enough, within a period of a few years the Court has both recognized and refused to recognize this limitation on the government speech theory.

The derivation of this limitation on the government speech doctrine is the proposition that in some contexts there are rules prohibiting the government from saying certain things. Both of the cases in which the Court confronted this proposition involved government lawyers (although only one case involving lawyers that could technically be described as government employees). The fact that cases involving government lawyers raised this issue makes sense given the fact that this is one of the easiest areas in which to grasp the inherent limitations on government speech. To cite only the most obvious examples of such limitations, government lawyers are bound by the same procedural rules that apply to all other lawyers, and therefore are not allowed to lie to the court or present false evidence.\footnote{For a comprehensive definition of fraud on the court, in a case in which the fraud was committed by government lawyers, see \textit{Demjanjuk v. Petrovski}, 10 F.3d 338, 348 (6th Cir. 1993), \textit{cert. denied}, 513 U.S. 914 (1994) (describing the standard for proving fraud on the court).} Under the current standards of due process, government lawyers are likewise prohibited from refusing to divulge to defense attorneys exculpatory evidence.\footnote{See \textit{Brady v. Maryland}, 373 U.S. 83 (1963) (requiring prosecutors to disclose material exculpatory evidence to defense attorneys before trial).} Thus, in both civil and criminal contexts, government speech is heavily constrained -- to the point that the government is actually forced to speak in some situations in which the speech will directly harm the government's interest in obtaining a conviction. In the first case in which the Court confronted this issue, the Court understood the

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\footnote{For a comprehensive definition of fraud on the court, in a case in which the fraud was committed by government lawyers, see \textit{Demjanjuk v. Petrovski}, 10 F.3d 338, 348 (6th Cir. 1993), \textit{cert. denied}, 513 U.S. 914 (1994) (describing the standard for proving fraud on the court).}
limitations on government expression in the legal context as extending far beyond these obvious examples. In the second case in which the Court confronted this issue, conversely, the Court behaved as if these limitations do not even exist.

The first case in which the Court discussed this issue is *Legal Services Corp. v. Velazquez*. In this case the Court struck down a series of limitations Congress had imposed on Legal Services lawyers litigating on behalf of indigents. These limitations included restrictions on the kinds of arguments that Legal Services lawyers could make to a court. Specifically, Legal Service attorneys were prohibited from arguing to a court that a state statute was inconsistent with a federal statute, or that either a state or federal statute violated the United States Constitution. The government relied primarily on *Rust* to justify limitations imposed on Legal Services attorneys. There was a certain logic in this. After all, both cases involved government-financed professionals -- doctors in one case, lawyers in another -- and in both cases information that was relevant to the client's case was withheld based on a government directive that was motivated by the government's ideological opposition to the information in question.

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. The Court's reasoning in refusing to apply *Rust* in *Velazquez* is not entirely clear, however. The Court offers two theories in rejecting the claim that the Legal Services attorneys were engaged in government speech. The first theory is that the government lawyers were engaged in private speech. The Court analogizes to public defenders. Both

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50 *Id.* at 537.
51 *Id.* at 542
public defenders and Legal Services attorneys exemplify government lawyers who almost by definition could never be engaged in government speech while representing a client, since in that capacity they work against the government to obtain an acquittal or public benefits that the government does not want to provide. As the Court summarized this point: "The lawyer is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message in the litigation."52

Unfortunately, if this is true of the lawyers in Velazquez, then it is also true of the doctors in Rust. As Justice Scalia pointed out, "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, which at the time of Rust we had held to be highly relevant to the permissible scope of federal regulation."53 As in Rust, the lawyers in Velazquez were not only being paid with government money, but were also operating within an intricately structured government program. The problems raised by cases such as Velazquez and Rust cannot be answered through sheer formalism. The question is not whether the recipients of subsidies in Velazquez or Rust are private or government doctors and lawyers; the question is whether -- regardless of how the recipients are categorized -- the government has the authority to regulate the recipients in order to advance its own positions

52 Id.
53 Id. at 554 (Scalia, J., dissenting). Of course, Justice Scalia also wants to avoid dealing with the intricacies of the government speech/private speech dichotomy, and so he creates yet a third category labeled "subsidized speech," which permits the government to impose a range of restrictions on any speech receiving government subsidies, although it is unclear how this category would operate differently than the Court's government speech model. Id. at 554. Certainly both the Court's government speech category and Justice Scalia's subsidized speech category would permit restrictions on private speakers that would violate the First Amendment if the restrictions were imposed as part of an ordinary regulatory scheme.
through government speech. At least to some extent, the Court's second explanation for distinguishing between *Velazquez* and *Rust* speaks to this point.

The Court's second explanation for refusing to allow the government to rely on *Rust* is somewhat more sophisticated than the first, in that it follows from an analysis of the inherent characteristics of the medium of expression in which the speaker participates. In this part of its discussion, the Court acknowledges that certain mediums of expression have their own rules, which even government speakers must obey. According to the Court,

[T]he Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations.\(^{54}\)

The Court's description of this principle is both abstract and broad. It is not at all clear how far the Court's principle extends, nor is it clear to which free speech cases it would apply. For example, it is not clear what the Court is referring to when it uses the phrase "medium of expression." There is little clarification of this term beyond reference to a handful of cases that the Court uses to support this principle, all of which involve government efforts to regulate the broadcast media.\(^{55}\) Oddly, later in its opinion the Court also refers to a rule in limited public forum cases, which allows the government to impose restrictions on speech in certain forums

\(^{54}\) *Id.* at 543.

in order to make those forums operate more efficiently.\textsuperscript{56} This reference is odd because the Court uses a public forum rule that permits the government to impose restrictions on speech as a justification for its holding that the government must remove restrictions on speech. In any event, based on the Court's various references the term "medium of expression" may refer to a physical space (such as a public park), a general context of expression (such as a university setting), or the role played by a particular speaker in a particular situation (such as Legal Services attorneys or public defenders).

In \textit{Velazquez}, the Court focused on the particular role traditionally played by attorneys in defining the rules pertaining to the relevant medium of expression. Two factors were key to the Court's analysis: the role attorneys play in providing independent advice to clients and the role attorneys play in providing assistance to the courts in their consideration of particular issues. Given these two crucial roles, the \textit{Velazquez} Court concluded that legal restrictions on the speech of government attorneys were inconsistent with this particular medium of expression, and in fact would undermine the entire medium. "Restricting [Legal Services] 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 in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited."\textsuperscript{57}

The Court's logic in this section of \textit{Velazquez} is flawless, and its analysis is unexceptionable if not laudable. But several curiosities remain. First, in its discussion of the legal system as a medium expression, the focus is on the courts, rather than the lawyers or the

\textsuperscript{56} \textit{Id.} ("When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program").

\textsuperscript{57} \textit{Id.} at 544.
clients. The Court spends several pages discussing the effects of the speech restrictions on judges, the litigation process, the structure of decision-making within the courts, and even the public's perception of how the courts are making their decisions.\textsuperscript{58} This is unusual because \textit{Velasquez} is a free speech case in which the speakers (that is, the Legal Services attorneys whose speech is being suppressed by the government) receive very little of the Court's attention. Focusing on the effects of speech restrictions on those other than the speaker is not necessarily a bad thing. Indeed, it may be a very good thing if it reflects the Court's recognition that the free-speech protections of the First Amendment function not only as the personal rights of individuals but also as structural rights of society as a whole, which serve to protect certain structural aspects of democracy -- in this case through the development and preservation of broad avenues of communication within society that are free of government control.\textsuperscript{59}

Unfortunately, everything that the Court says about the legal medium of expression would also apply directly to the medical medium of expression populated by those whose speech was affected by the rules in \textit{Rust}. Like the legal system, the medical system of which family planning clinics are a part depends upon the open availability of information to those partaking of the system. And like the legal system, in which individual lawyers advising

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\item[58] \textit{Id.} at 544-46.
\item[59] Another way of thinking about this issue is in terms of who the First Amendment protects. Most First Amendment free speech jurisprudence and commentary focus on the speaker’s interest in speaking his or her mind. Thinking of the First Amendment in terms of structural rights as opposed to individual rights would shift the focus of free speech analysis from the speaker’s interest to the listeners’ interest. This listener’s interest would complement the discussion in \textit{Velasquez} about the need to protect the speakers’ rights in order to facilitate the listeners’ ability to do their jobs. This shift in focus from speaker to listener has some support in the Court’s free speech jurisprudence. \textit{See} Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (noting that the First Amendment’s free speech protection extends beyond the speaker, and affords protection “to the communication, to its source and to its recipients both,” and noting further that “this Court has referred to a First Amendment right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive’”).
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individual clients are an indispensable component of the system, individual doctors and nurses are the gatekeepers who introduce patients into the comprehensive system of medical care. The Court's only explanation for not applying its theory to the medical workers in Rust is that patients receiving incomplete information from the government-restricted health-care workers have other options, whereas clients receiving incomplete information from government-restricted lawyers do not. "[W]ith respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to Rust. There, a patient could receive the approved Title X family planning counseling funded by the Government and later could consult an affiliate or independent organization to receive abortion counseling."60

Practical problems abound with the Court's explanation for applying different First Amendment rules to the speech of legal and medical professionals. As a practical matter, many patients of the medical professionals governed by the Rust regulations would not, in fact, have alternative sources for the pertinent information. Some of those seeking family planning counseling are likely to be too young or too uninformed to recognize the need for consulting a second source of information on the subject of abortion. Other patients -- especially those in small and medium-sized towns -- may not have access to privately funded individuals or organizations in their immediate vicinity with whom they could consult. Aside from the dubious factual predicates of the distinction between Rust and Velazquez, it is unclear why the Court in Velazquez believed that the impediments placed before patients by the Rust regulations are any more inhibiting than the Velazquez rules. After all, the Velazquez rules would simply require a client seeking a full rendition of his or her case to obtain representation

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60 Id. at 546-47.
from a privately funded social services organization or a private attorney rather than resorting to representation by a Legal Services attorney. This is no different than the burden placed on patients seeking information about abortion services in *Rust*. In both cases, the government's gag rules would create both logistical and financial problems for clients and patients, but in other constitutional law areas the Court has been impervious to claims that such impediments have any bearing on the claim that the government is impinging upon constitutional rights. 61

These practical problems with the Court's discussion in *Velazquez* are quite significant, but there are even more serious theoretical flaws in the Court's explanation of the differences between *Rust* and *Velazquez*. The Court's decision to strike down the gag rules in *Velazquez* is predicated upon the theory that the government was attempting to speak in a way that was incompatible with the rules of the pertinent medium of expression (i.e., the judicial system). But if a category of government speech exists, and if that category limits the First Amendment rights of private speakers, then the nature of the medium of expression in which a particular instance of government speech takes place should not matter. The very concept of government speech suggests that government speech is a boon to every medium of expression because it increases the total quantum of speech in that medium. Under this theory, unless the government speech is so comprehensive that it effectively excludes all private speech from the medium, the government should always be granted the "right" to speak. If the government

61 Decisions upholding state and federal laws denying Medicaid funding for abortion provide the most notorious examples of the Court holding that the Constitution does not require the government to take into account the fact that its legislation, when combined with financial and other practical obstacles, effectively prevents some individuals from exercising their fundamental rights. *See* Maher v. Roe, 432 U.S. 464, 474 (1977) ("The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult - and in some cases, perhaps, impossible - for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."); Harris v. McRae, 448 U.S. 297, 316 (1980) ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.").
really is a speaker, analogous to private speakers, then there is no reason that the Court should refuse to recognize that the government has the same ability as private entities to foreclose others from undermining or diluting the government's intended message.\textsuperscript{62}

If the Court's theory of government speech were applied consistently, the government should have prevailed in both \textit{Rust} and \textit{Velazquez} because in both cases private speakers continued to operate alongside the government within the relevant medium of expression. The fact that the government did not prevail in \textit{Velazquez} reflects the Court's recognition that in many situations even though government speech does not completely foreclose other speakers from a particular medium of expression, government speech frequently distorts that medium to such an extent that the medium of expression ceases to function effectively. Unfortunately, the same distortions were evident in \textit{Rust}. Even Justice Scalia, who firmly embraces the concept of government speech and dissented in \textit{Velazquez}, recognized that \textit{Rust} and \textit{Velazquez} were indistinguishable.\textsuperscript{63} Justice Scalia's solution to this dilemma was to argue that the Court should rule in favor of the government in \textit{Velazquez}. Although this approach would clear up the inconsistencies between \textit{Rust} and \textit{Velazquez}, it would embrace all of the unfortunate consequences produced by the government speech doctrine of \textit{Rust}. On the other hand, the \textit{Velazquez} Court's approach of applying the \textit{Rust} government speech doctrine until it becomes so intrusive that it distorts a particular medium of expression may be worse. The problem with limiting the concept of government expression in this way is that such distortions cannot be

\textsuperscript{62} See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) (holding that parade organizers have a First Amendment right to exclude from the parade those with whom they disagree, and noting that "this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid").

\textsuperscript{63} Id. at 558-59 (Scalia, J., dissenting) ("The LSC subsidy neither prevents anyone from speaking nor coerces anyone to change speech, and is indistinguishable in all relevant respects from the subsidy upheld in \textit{Rust}").
measured accurately, and so this focus produces a highly subjective and unpredictable rule that can easily be applied based on the popularity or unpopularity of the speech at issue -- the worst possible scenario under the First Amendment.

To underscore the haphazard nature of the Court's approach and add yet another level of unpredictability to the mix, the Court has decided another case since Velazquez that seems to undercut much of what is said in the earlier case about government speech in the context of the legal medium of expression. In this later case the Court treats government speech in the legal sphere as essentially unconstrained, thus ignoring both the holding of Velazquez and the medium of expression theory that the Velazquez Court used to justify its holding in that case. In *Garcetti v. Ceballos*, the Court upheld government sanctions imposed on an assistant district attorney who wrote a memorandum informing his supervisors of possibly fraudulent statements in an affidavit used by the police to obtain a search warrant in a pending case. Neither the Assistant District Attorney's supervisor nor the sheriff's office appreciated his efforts to detect errors in the warrant. The supervisor advised the assistant district attorney to pursue the prosecution despite the flawed warrant, and later demoted him because of his actions in the case.

At first blush, *Garcetti* should be a classic *Velazquez* case. Both cases involve the legal medium of expression. Both cases also involve government speech, in the sense that government lawyers are speaking to a court in order to communicate the government's position in a particular case. Both cases also involve situations in which the government is attempting

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65 *Id.* at 415 (the sanctions included "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.").
66 *Id.* at 414.
67 *Id.* at 414-15.
to silence one of its lawyers who seeks to deviate from the government's message. As in Velazquez, if the government's effort to silence this lawyer is upheld, the court would lack vital information that would be important for its decision.\textsuperscript{68} If anything, Garcetti is a far more important case in which to apply the principles articulated by the Court in Velazquez, because in a criminal case the consequences of a court rendering a decision based on incomplete or distorted facts are so much greater than in the civil context. If ever there were a situation in which we should worry about defending government speech in a way that "distorts the legal system by altering the traditional role of the attorneys,"\textsuperscript{69} it is this one. And yet the Court – in a majority opinion written by Justice Kennedy, who also wrote the majority opinion in Velazquez -- avoids the intricacies of the government speech doctrine and treats the Garcetti episode as an ordinary instance of office management. "If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."\textsuperscript{70} Not only does the Court fail to explain the inconsistencies between Garcetti and Velazquez, the Court does not even cite the earlier case.

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 it doesn't (Garcetti). The Court's distinctions are either nonexistent (the Court's use of the private/government speech to distinguish between Velazquez and Rust) or utterly baffling (Garcetti). Nevertheless, the clues

\textsuperscript{68} See Velazquez, 531 U.S. at 545 (noting that the restriction on Legal Service attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power").
\textsuperscript{69} Id. at 544.
for reconciling these disparate holdings are contained in each of these opinions.

One of the questions raised by these cases is whether they indeed involve government speech. The Justices have not been very consistent about this point. In cases such as Velazquez, some Justices have denied that the speech in question was government speech, while other Justices have reached contrary conclusions. In Velazquez, for example, Justice Scalia denied that Rust was a government speech case,\(^{71}\) while the Court’s majority argued that although Rust was a government speech case, Velazquez was not.\(^{72}\) Many of the same Justices then ignored the issue altogether in Garcetti. One gets the sense of a certain results-orientation in the willingness of some members of the Court to label a particular instance of expression government or private speech.

In truth, however, the Court’s internal disputes about these labels do not really matter. Even if one concedes the point that the speech involved in Rust, Velazquez, and Garcetti is government speech, the result in each case should still be that the government should lose the First Amendment battle with the speakers in those cases. The reason for this result is that even within the realm of government speech, there are certain things that the government is not permitted to say. These constraints on government speech stem from legal, ethical, and other external sources. This is illustrated most easily by the cases involving government-funded lawyers. Although the government is entitled to hire lawyers to speak on its behalf, and may instruct those lawyers to litigate particular cases in court, the government lawyers are constrained by their professional obligations as lawyers once they arrive in court. As

\(^{70}\) Garcetti, 547 U.S. at 423.
\(^{71}\) See Velazquez, 531 U.S. at 554 (Scalia, J., dissenting) (“If the private doctors’ confidential advice to their patients at issue in Rust constituted “government speech,” it is hard to imagine what subsidized speech would not be government speech.”).
Velazquez illustrates, the First Amendment takes these obligations into account. Thus, even government lawyers have a First Amendment right to disobey any government edict that would require them to contravene the lawyers' professional obligations. In this sense, the government is no different than a corrupt corporation or a drug dealer. The government has no more authority than a common criminal to ask its lawyer to engage in unprofessional conduct to win a case.

This seems to be roughly the sense of the Court's discussion in Velazquez of specialized mediums of expression. Thus, the government is prohibited from restricting the speech of government attorneys in any case in which such a restriction threatens to "distort[] the legal system by altering the traditional role of the attorneys." Unfortunately for the Court, there is nothing to suggest that the same analysis should not be applied in Garcetti. Whatever lawyers' obligations are in civil court, in criminal court these obligations must at least include the duty to present evidence to the court indicating that a defendant is about to be convicted on the basis of invalid evidence. And yet the Court permits the government to sanction an assistant District Attorney in Garcetti for attempting to bring to his supervisor's attention the fact that the office was potentially defrauding the court by relying on an invalid warrant. Although the Court treats this as a simple employment dispute, and does not specifically rely on the government speech doctrine, the case does, in fact, fit the Court's model for government speech -- that is, speech by the government communicating its perspective to a court. In any event, whether one characterizes this as an employment dispute or as government speech, the same restrictions on the government's action should apply. If the government is engaging in illegal conduct, then

72 See Velazquez, 531 U.S. at 542 ("the LSC program was designed to facilitate private speech, not to promote a governmental message").
73 Id. at 544.
the First Amendment should deny the government the ability to sanction employees for speaking out about such conduct.

At some level, the *Garcetti* Court seems to understand this. One of the strangest parts of the *Garcetti* opinion appears in the last few paragraphs, in which the Court suggests that although the First Amendment offers the whistleblower employee no protection, he may find some relief in asking the state bar association to enforce its state codes of professional conduct. The California code of professional conduct states: "A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause." The professional obligation could not be clearer, so under the terms of the Court's own decision in *Velazquez*, how could the government (through its supervisors) ever acquire the authority to force government employees to violate their professional obligations in a manner that could get them disbarred or even jailed? The only possible claim in response is that the government has the right to speak, but the simple fact is that the government does not have the right to speak in the form of a fraudulent warrant. The key to *Garcetti*, therefore, is not only that the employee has the right to speak about government misdeeds, but also that the government does not have the right to engage in the misdeeds in the first place -- even if those misdeeds take the form of speech.

A similar phenomenon is evident in *Rust*. The only difference is that the relevant professional obligation is medical in nature rather than legal. The different sources do not change the fact that the respective professional obligations limit the extent to which the government can "speak" through subsidized speakers. The argument that the government may

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74 *Garcetti*, 547 U.S. at 425.
force speakers who accept government money to violate their professional obligations is equivalent to the argument that the government has the authority to systematically misinform patients about the availability of medical procedures and intentionally divert patients from helpful medical care to forms of medical care that are unhelpful or even harmful to patients. It is unclear what possible justification could be mustered to defend government speech of this sort. If the primary justification for the government speech doctrine is to encourage the government to contribute helpful information to the marketplace of ideas, then nothing is to be gained by government contributions of false or harmful information. If anything, the marketplace is undermined directly by government speech as defined in cases such as *Rust* and *Garcetti* because the government is using its authority to speak in a way that suppresses accurate and helpful information and misleads those who are seeking to use that information to make important decisions.

The cases reviewed in this subsection are the cornerstone of the Court's new doctrine of government speech. As the discussion here indicates, this doctrine is deeply problematic because of the way the Court has gone about defining the parameters of the doctrine. The Court has been very sloppy about articulating justifications for the doctrine, and describing when the doctrine applies. The kinds of restrictions to the government speech doctrine suggested in *Velazquez* mark a first step toward defining government speech in a way that protects the government's legitimate prerogatives but does not infringe on the First Amendment rights of individual speakers who come into contact with the government. The basic restrictions that apply when the government is seeking to limit the speech of its employees or subsidized agents have to do with the professional role played by the individual speakers.

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When individual speakers who are engaged to speak on behalf of the government are obligated by their profession to adhere to a set of professional standards or codes, then the government has no authority to mandate that its employees or agents engage in speech that would violate those standards or codes. This rule would in no way inhibit the government from speaking in ways that the First Amendment should encourage -- for example, by disseminating the government's view of certain policies or practices, or by distributing accurate information about some matter of public concern. But when the government decides to enter into certain realms of professional discourse -- what the Court calls "mediums of expression" -- then the government has to abide by the same rules as all other speakers within that realm. The right of government speech does not apply in these situations because a government lawyer or doctor has no right to engage in speech that is prohibited to others in the same profession.

C. Manifestation Three: Commercial Government Speech -- the Government as Marketing Agent

The Supreme Court did not develop a very good track record in its early cases setting forth the doctrine of government speech. In Rust, the Court recognized a right of government speech in a case in which the government not only did not acknowledge its true message, but also chose to limit the speech of government-subsidized personnel in a way that would almost certainly mislead the public about the government's actual position on the matter at hand. In Velazquez and Garcetti, the Court dealt with the right of government speech in cases in which the government was either attempting to have government-funded lawyers say impermissible things (i.e., presenting to courts incomplete claims), or instructing its employees to do things

76 See supra notes 28-46 and accompanying text.
that the government was not allowed to do (such as defrauding the court by introducing into
evidence a tainted warrant).\textsuperscript{77}

Two lessons can be learned from the incoherence and confusion of these early cases.
First, if the government is going to seek a "right" to speak, the government should be forced to
actually say something. The government's message should be clear and ambiguous. If the
government speaks incomprehensibly or ambiguously, the government is contributing nothing
to the marketplace of ideas and the government's garbled speech does not warrant protection
under the First Amendment. Second, the government has no "right" to speak illegally or in any
way that deviates from the government's proper responsibilities. Because it is constrained by
other aspects of the Constitution in addition to the First Amendment, the government does not
get the same leeway regarding the content of its speech that a private speaker receives under a
case such as \textit{Brandenburg v. Ohio}\textsuperscript{78} -- in which the speaker is permitted to advocate illegal
conduct, as long as that conduct is not incited immediately.\textsuperscript{79} If a political faction controlling
the government acts illegally or advocates illegality, it essentially has relinquished its role as
the government, and in its extragovernmental capacity likewise has forsworn any claim to the
constitutional protection of government speech.

A third lesson regarding the proper parameters of the constitutional role of government
speech can be provided from a third set of cases in which the government speech doctrine has
manifested itself. This third lesson is that the "right" of government speech should not be used
to inhibit private speech when the limitations on private speech are not necessary for the

\textsuperscript{77} See supra notes 47-75 and accompanying text.
\textsuperscript{78} 395 U.S. 444 (1969) (describing the First Amendment rules protecting political speech).
\textsuperscript{79} Id. at 447 ("the constitutional guarantees of free speech and free press do not permit a State to forbid or
proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or
producing imminent lawless action and is likely to incite or produce such action.").
government to get its point across. In this third set of cases, the application of the government speech doctrine is generally more uncontroversial than in the first two categories of cases. This third category involves government speech of a commercial nature. In the facts that typically characterize this category, the government operates a marketing program for agricultural commodities, and charges farmers for the costs of the program. The First Amendment issues involve not only whether the government itself is allowed to speak through commercial advertising in this way, but also how much the government is allowed to force private speakers who operate in the same commercial area to join the government's speech and endorse (or even finance) the government's articulation of its position. At the end of the day, the lesson of this category is that although the government has the authority to participate in the economic marketplace in this way, there is very little if anything to be gained from allowing the government to coerce farmers who do not want to participate in the government marketing program from engaging in speech that those farmers think is unproductive or ill-advised.

Cases involving these issues give yet another insight into how confusing and contradictory the Court's decisions involving government speech have been. As these cases indicate, it is often difficult to determine in advance when the Court will conclude that the government is speaking. The Court has considered three cases involving government-organized agricultural marketing schemes. The first program, which the Court upheld in *Glickman v. Wileman Brothers & Elliott, Inc.*, involved mandatory assessments to market tree fruit. The second program, which the Court struck down as a violation of the First Amendment in *United States v. United Foods, Inc.*, involved mandatory assessments to market

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mushrooms.\textsuperscript{81} The third program, which the Court also upheld in \textit{Johanns v. Livestock Marketing Assn.}, involved mandatory assessments to market beef.\textsuperscript{82} What the Court found to be the constitutionally-significant differences between the three programs is somewhat difficult to fathom. The Court considered only one of the three programs -- the beef program -- to constitute government speech. According to the Court, the mushroom program struck down in \textit{United Foods} constituted private speech,\textsuperscript{83} which contributed to the Court's determination that mandatory assessments against unwilling farmers to finance the speech would violate the First Amendment. The tree fruit marketing program upheld in \textit{Glickman} did not constitute government speech, but it was part of the government's collectivist centralization of the market for tree fruit,\textsuperscript{84} which somehow led the Court to conclude that mandatory assessments for commercial speech within that market did not constitute compelled speech in violation of the First Amendment.\textsuperscript{85}

Given the fact that the Court struck down the second of these three programs (the one involving mushrooms), it is a given that even the Court recognizes that government compulsion of individuals to support speech -- including commercial speech -- with which they disagree can violate the First Amendment. The differences between the \textit{United Foods} mushroom program and the \textit{Johanns} beef program were so slight that the Court of Appeals found the two cases "in all material respects, identical."\textsuperscript{86} The only reason the Supreme Court

\textsuperscript{83} See \textit{United Foods}, 533 U.S. at 416 (describing the case as involving "mandatory assessments imposed to require one group of private persons to pay for speech by others").
\textsuperscript{84} See \textit{Glickman}, 521 U.S. at 475.
\textsuperscript{85} \textit{Id.} at 469-70 (discussing various differences between \textit{Glickman} and the Court's compelled speech precedents).
\textsuperscript{86} Johanns v. Livestock Marketing Assn., 335 F.3d 711, 717 (8th 2003).
reversed the court of appeals and upheld the beef program was that the Court characterized that program as involving government speech.

In fact, even if the speech in the beef marketing program could be characterized as "government speech," from the First Amendment perspective it should not matter. Everything the Court said in United Foods about the imposition on the personal free speech rights of farmers objecting to the mushroom program could also be said of the farmers participating in the beef program. The only salient difference between the United Foods mushroom program and the Johanns beef program is that private individuals and entities controlled the content of the mushroom marketing program while the government controlled the content of the beef marketing program. (Indeed, even that distinction is dubious, given the fact that the "private" mushroom program was created by a federal statute, which also provided the "Mushroom Council" the legal authority to collect the funds that were the basis of the compelled subsidy claims of the dissenting farmers who eventually won the case.87) The point is that from the perspective of the dissenting farmers, it does not matter who sits on the board and decides the content of the ads with which they disagree.

In Johanns the Court drew a bright line between legally compelled support of private speech and legally compelled support of government speech. According to the Court, the former is generally prohibited by the First Amendment and the latter is generally permitted. "'Compelled support of government' -- even those programs of government one does not approve -- is of course perfectly constitutional, as every taxpayer must attest."88 The Court's glib assumption that the compelled support of government in general is identical to the

87 See United Foods, 533 U.S. at 408 (describing the statutory basis for the mushroom marketing program).
88 Johanns, 544 U.S. at 559.
compelled support of a particular instance of government speech is reinforced elsewhere in the
*Johanns* majority opinion, where the Court argues that political accountability serves as an
adequate safeguard of the free speech rights of the plaintiffs. "Here, the beef advertisements
are subject to political safeguards more than adequate to set them apart from private
messages." 89

Setting aside the irony of depending on the political process to defend against
infringements of a counter-majoritarian constitutional provision such as the First Amendment,
the Achilles heel of the Court's approach to government speech in this area is the Court's
decision to equate the entire society's compelled support for government in general with a
narrow group's compelled support for a specific instance of government speech. First of all,
although the Court takes this interpretation as inherent in the First Amendment, it is by no
means a foregone conclusion that the First Amendment should be construed in this way. There
are intuitively obvious differences between paying one's taxes into the government's general
coffers and being assessed a specific tax for a specific instance of speech with which one
disagrees. Private speakers who are involved with particular endeavors, for example, are far
more likely to become associated with government speech programs pertaining to those
endeavors than general taxpayers are likely to be linked personally to a particular government
policy. The court is mistaken, therefore, to conclude that advertisements labeled as coming
from "America's Beef Producers" would not be attributable to individuals who are among
America's beef producers. 90 It seems logical that the dissenters' objections to the compelled
speech would be greater than when taxpayers are asked to finance broad government programs

89 *Id.* at 563.
90 *Id.* at 566.
that happen to include some government speech and are financed by general tax revenues. A reasonable interpretation of the First Amendment should take these differences into account.

The most important flaw in the Johanns Court's analysis of the government speech issue, however, is the Court's refusal to draw distinctions between different types of government speech programs and the need for compelled subsidies to support that speech. Contrary to the Court's tendency to lump all government speech programs together, there are important distinctions between broad, general government programs that also happen to involve speech and narrowly focused programs that involve nothing but speech, such as the program at issue in Johanns. With regard to broad, general government programs that involve several activities including speech, compelled support by taxpayers is unavoidable. In contrast, with regard to narrow, closely-focused government programs that include only speech, such as the marketing program in Johanns, compelled support for that speech is unnecessary.

As the Court itself suggests, government speech is permitted in generalized government programs because most programs could not be conducted without such speech. Examples of generalized government programs would include government programs to conduct a war in a foreign country, reform health care, or regulate the financial industry -- all of which would require various different types of government activity, including government speech to explain and implement the policies. In generalized government programs the government is routinely engaged in developing, enacting, and enforcing policies, and every step of the policy-making process requires the use of government speech. If individual taxpayers were allowed to opt out of supporting the program because they objected to some example of speech that was made in the course of the policymaking process, then government itself could not operate, and the
effects of allowing dissenters to withhold their support would not only relate to the government speech, but also to the government policies themselves.

In contrast to general government programs, narrowly focused government programs that involve primarily or exclusively speech require a different analysis. Taking the beef marketing program at issue in *Johanns* as an example, the program would not disintegrate if the dissenters were allowed to opt out of the funding regime. The program might get smaller as beef producers are allowed to withdraw their financial contributions, but there is no First Amendment principle that any speaker -- including the government -- should get any more speech than the speaker can support. Allowing the government to charge recalcitrant farmers to support the government's preferred marketing regime distorts the system of government speech that the Court itself has established by giving the government more speech than it deserves.

In the end, in its commercial government speech decisions, the Court has once again expanded the concept of government speech beyond what is necessary, and thereby needlessly inhibited private speech. As noted in the beginning of this subsection, the lesson to be learned from the Court's commercial government speech cases is that the "right" of government speech should not be used to limit the First Amendment rights of private speakers when those limitations are not necessary for the government to get its point across to the public. Allowing the beef producers who object to the government's marketing plan for the producer's product does nothing to inhibit the government's effort to get its message across, and therefore does not violate a properly constituted "right" to government speech.

**D. Manifestation Four: Government Speech When the Government Has Nothing to Say -- Public Forums as Speech**
One of the problems created by the Court's ill-defined concept of government speech is that the concept gets applied in situations in which it has no relevance. The concept of government speech therefore muddles First Amendment issues that otherwise would be relatively clear-cut. This is especially true in cases where the government creates a public forum. The natural inclination in such cases was once to treat private speech in public forums as attributable to the government. Under modern First Amendment jurisprudence, on the other hand, the concept of government speech has no application whatsoever in public forums. Although the government obviously owns the forum in which the speech takes place, public forum analysis assumes that speech in public forums is entirely private in nature, is not under the government's control, and is therefore not attributable to the government. The government is a silent operator of a forum in which others get to speak. The lesson to be drawn from the Court's public forum cases, therefore, is that in such forums the government should not be granted a "right" to speak when the government has nothing to say.

The basic First Amendment rules applied to public forums are not controversial within the Court, but in several cases the Court has raised the issue of government speech in the course of addressing matters relating to public forums. This is problematic not only because it confuses the analysis with regard to public forums, but also because it opens up an avenue for a government entity to undermine the openness of the public forum by entering that forum to speak on its own behalf in a way that forecloses speech in opposition to the government's position. Essentially, this is the situation in the *Pleasant Grove City, Utah v. Summum*, which will be addressed in the next subsection. For the moment, it is worth noting how the

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91 See *supra* notes 10-12 and accompanying text.
92 *Id.*
Court confuses public forum and government speech analysis in the cases leading up to
_Summum._

Two of the cases in which the Court addressed the issue of government speech in the
context of public forums involve speech financed by student activity fees at public universities.
In both _Rosenberger v. Rector and Visitors of Univ. of Virginia_\(^{94}\) and _Board of Regents of the
University of Wisconsin System v. Southworth_\(^{95}\) the basic question involved whether a public
university could collect from students fees that would then be used to finance the expression of
student groups with which many student fee-payers disagree. _Rosenberger_ held that public
universities have a First Amendment obligation to provide student activity fees to student
organizations on a content and viewpoint-neutral basis even to controversial student groups.\(^{96}\)
_Southworth_ dealt with the other half of the First Amendment equation, holding that the First
Amendment does not require public universities to allow students to opt out of paying
mandatory student activity fees that would ultimately be used to finance expression with which
the fee-payer does not agree.\(^{97}\) Both of these decisions are based on the Court's public forum
jurisprudence; the only unique aspect of the cases is that they recognize the existence of
"metaphysical" public forums\(^{98}\) -- that is, publicly-financed forums for public discussion that
take something other than the physical form of a park or sidewalk. Once the Court recognizes
that a public forum does not have to take a physical form, the outcomes of both _Rosenberger_
and _Southworth_ appear to be unavoidable. The only determination that needs to be made in

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\(^{95}\) 529 U.S. 217 (2000).
\(^{96}\) See _Rosenberger_, 515 U.S. at 837 (holding that denying student activity fees to a student organization
based on the viewpoint of that organization violated free-speech principles of the First Amendment).
\(^{97}\) See _Southworth_ 529 U.S. at 233 (holding that the University of Wisconsin system of financing student
activities -- which did not have an-opt out for dissenting students -- did not violate the First Amendment).
\(^{98}\) See _Rosenberger_, 515 U.S. at 830 ("The [student activities fund] is a forum more in a metaphysical
than a spatial or geographic sense, but the same principles are applicable.").
such cases is whether the government intended to "expend funds to encourage a diversity of views from private speakers."\textsuperscript{99}

The unfortunate thing about \textit{Rosenberger} and \textit{Southworth} is not, therefore, their holdings or their analysis of the public forum doctrine. Rather, the unfortunate thing is the subtle suggestion in \textit{Southworth} that government speech may in some way be relevant to the university enterprise. The issue of government speech comes up in \textit{Rosenberger}, but only briefly and in a context in which the Court gives itself the opportunity to reaffirm \textit{Rust}. The Court notes simply that "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message,"\textsuperscript{100} before concluding that the "distinction between the University's own favored message and the private speech of students is evident in this case."\textsuperscript{101}

In \textit{Southworth} the Court discusses the government speech concept in more detail, which is somewhat puzzling given the fact that the Court itself concedes that government speech is not an issue in the case.\textsuperscript{102} Since the Court acknowledges that the case does not involve government speech, the Court's discussion of the government speech issue is merely suggestive, although several of the Court's comments warrant concern. First, the Court suggests that if the university expressed a desire to consider the student activity fee-funded activities part of the university's own speech, the First Amendment analysis of the case might be different.\textsuperscript{103} If the Court were to pursue this suggestion, the simple assertion of the government's intent might be declared sufficient to place particular speech into the category of

\textsuperscript{99} Id. at 834.
\textsuperscript{100} Id. at 833.
\textsuperscript{101} Id. at 834.
\textsuperscript{102} Southworth, 529 U.S. at 229.
"government speech" and thereby foreclose substantial First Amendment protection of those not adhering to the government’s stated position. Second, the Court once again offers the possibility that "traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself."\footnote{Id. (noting that the case was not a government speech case because "The University's whole justification for fostering the challenged expression is that it springs from the initiative of students").} If the Court were to pursue this suggestion, the comments could be read to suggest that the First Amendment would not apply at all to particular examples of speech once they were declared to be the government's own. Third, at one point the Court links its discussion of government speech to the actions of universities in academic matters, in a context that seems to suggest the possibility that a university might exercise its "right" of government speech to control the speech of its professors, in much the same way that the government in \textit{Rust} was permitted to control the speech of government-financed doctors.\footnote{Id.} As with the Court's other comments in \textit{Southworth} on the subject of government speech, the Court did not elaborate on this suggestion, but the implicit notion that academic freedom is a function of an institution's own "right" to government speech rather than a personal right of academic professionals was enough to engage three concurring Justices in a long discussion of academic freedom and the possibility that expansive notions of institutional, rather than personal academic freedom might actually inhibit, rather then enhance speech at a university.\footnote{Id. at 235 (noting that \textit{Southworth} did not involve "speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered").}

The Court's discussion of the concept of government speech in the University public forum cases was both broad and indefinite. But given the fact that the Court itself admitted
that the government speech concept did not apply in either case, it is difficult to see why the
Court felt the need to raise the issue at all. The real lesson of these cases should be that when a
public forum exists, the government speech concept is simply inapplicable. There are
relatively few proper applications of the concept of government speech, and the Court does
everyone a disservice by behaving as if the concept defines a large and growing category of
First Amendment jurisprudence. Unfortunately, the Court's two University public forum cases
may be harbingers of a subtle shift in the Court's public forum analysis, in the sense that the
Court may intend to use the government speech concept to restrict speech in public forums.
The next subsection will discuss this shift, in which some of the Court's subtle suggestions in
cases like Southworth begin to bear fruit, in a way that both muddles public forum analysis and
undermines basic First Amendment rights.

E. Manifestation Five: Government Speech When the Government Has Nothing (Legal) to
Say -- Surreptitious Government Religious Speech

It is a measure of how uncomfortable the Court is with its new category of government
speech that it has never provided anything but cryptic descriptions of the category itself and of
the speech that the category is supposed to protect. A perfect case in point is the Court's most
recent government speech case, Pleasant Grove City, Utah v. Summum.107 In Summum, the
Court used the government speech concept to grant a local government the authority to place
an expressive object in a public forum while denying private speakers the right to place in the
same park their own expressive objects on the same subject. This result is bad enough from
the perspective that the government speech concept was being used to limit a private speaker's
access to a public forum to symbolically oppose a government action, but the result becomes

106 Id. at 239 & n.5 (noting that an expansive conception of institutional academic freedom "might be
thought even to sanction student speech codes in public universities").
even stranger in view of the fact that the Court went out of its way to avoid forcing the city to
acknowledge what message it was trying communicate its now-protected speech. The result
becomes even stranger still when one recognizes that the city resisted acknowledging its
messages because the message it wanted to communicate may have been unconstitutional.
Apparently *Summum* stands for the proposition that the government has the right to speak even
if the government will not say what it wants to say.

In some ways, *Summum* started as a relatively commonplace example of litigation over
the placement by a government entity of a Ten Commandments monument in a public space.
There is a great deal of litigation on this subject, and the Supreme Court has already ruled on
two of these cases. The Supreme Court's efforts in these cases did little more than confuse an
already confused jurisprudence, by upholding a Ten Commandments display on the grounds of
the state legislature in Texas,\(^{108}\) while holding unconstitutional a Ten Commandments display
in several government buildings in Kentucky.\(^{109}\) Like many of the Ten Commandments cases
(and one of the cases decided by the Supreme Court), *Summum* involved a monument that was
donated to the city in 1971 by a group called the Fraternal Order of Eagles.\(^{110}\) The Fraternal
Order of Eagles placed Ten Commandments monuments in many cities around the country in
addition to Pleasant Grove City. This effort started in the 1940s, when a Minnesota juvenile
court judge named E. J. Ruegemer decided that the Ten Commandments would provide
wayward juveniles with proper guidance through a common code of conduct.\(^{111}\) He contacted
the Fraternal Order of Eagles, who funded and carried out the judge's ideas, with a little help

\(^{110}\) *Summum*, 129 S.Ct. at 1129.
from Cecil B. DeMille, who used the monuments to promote his new movie "The Ten Commandments." In other words, the group that donated the Ten Commandments monument to the city intended to communicate a very specific -- and specifically religious -- message.

It is to be expected that when sectarian religious objects are placed in public by one religious group, other religious groups that have different perspectives will wish to express their own contrasting views. This was the case in Summum. Summum is a religious group based in the same state in which the dispute over the Ten Commandments monument arose. Summum is a derivative of Gnostic Christianity, which as it turns out had very specific views about the central feature of this case -- the Ten Commandments. According to the Summum theology, before bringing receiving from God the Ten Commandments, Moses received the Seven Aphorisms. These aphorisms provided a similar, but far more abstract guidance than the Ten Commandments. Because Moses believed that the Israelites were not yet ready to receive the Seven Aphorisms, he destroyed the original tablets and returned to Mount Sinai, where he received the Ten Commandments. Nevertheless, the Seven Aphorisms continue to exist as the higher level of theological understanding, in comparison with the lower level of understanding represented by the Ten Commandments. The significance of this little bit of Summum theology is that from their perspective, when Pleasant Grove City placed a copy of the Ten Commandments in its park, it was committing a grave theological error by including

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112 Id. at 294-95.
113 Summum, 129 S.Ct. at 1129.
115 Id.
only half the story and omitting the higher level of theological understanding represented by the Seven Aphorisms.

Oddly enough, what was really a theological dispute between competing religions -- the mainstream Protestant theology embraced by the city versus a Gnostic Christianity represented by Summum -- was turned by the Supreme Court into a technical dispute about the parameters of government speech. What should have been a case focused on the limits placed by the Establishment Clause on the government's ability to select one set of religious precepts for special favor instead turned into a case that generated a convoluted and unfocused majority opinion that attempted unsuccessfully to explain how the city could exercise its right of government speech and simultaneously refuse to acknowledge what it was trying to say.

It is not surprising that the Establishment Clause issues were deemphasized in this case. After all, one party was a city that was seeking to engage in religious speech at a public park, which was represented by Jay Sekulow, the chief counsel of the ACLJ, the evangelical litigation group founded by Pat Robertson. The other party was a religious group trying to get its own theological monument into the same park. So at the end of the day neither party was interested in aggressively litigating Establishment Clause limitations on religious speech in public parks.

Despite the parties' decision to willfully ignore the issue, however, Establishment Clause issues permeated the entire case, and the persistence of these issues probably explains why the Court's majority had such a difficult time explaining its ruling on the basis of government speech. In sum, here is the majority's difficulty: The source of the dispute in Summum is a granite monument that contains a distinctly Protestant version of the Ten

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116 Id.
Commandments. The phrases that appear in the Fraternal Order of Eagles monuments -- including "I AM the LORD thy God," "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven image," "Thou shalt not take the Name of the Lord thy God in vain," and "Remember the Sabbath day, and keep it holy" -- communicate a very specific and overtly religious message. If Pleasant Grove City intended to endorse this overtly religious message when it accepted the Fraternal Order of Eagles monument, then the city could face serious problems under the Establishment Clause. Indeed, as the Court points out in its majority opinion, deciding to accept a privately donated monument is no different than if the government had created the expressive artifact itself.

Summum understood all of this very well. It understood that by erecting the Fraternal Order of Eagles monument, the city was embracing a theology concerning the Ten Commandments that was different than Summum's, and also probably understood that the best way to convince the city to erect one of its own monuments was to underscore the (possibly unconstitutional) religiously exclusionary message that the city was sending by refusing to do so. So Summum requested that the city undertake a formal process in which the city would identify the specific message that it was endorsing by allowing the Fraternal Order of Eagles to

117 Id. at 1129; About the ACLJ, http://www.aclj.org/About/ (last visited June 15, 2009).
118 Because the majority in Summum viewed the Ten Commandments as essentially irrelevant to its decision, it did not print in its decision the version of the Ten Commandments that appears on the Fraternal Order of Eagles monument in Pleasant Grove City. The text used on the Fraternal Order of Eagles monuments can be found in other opinions, however, including one of the dissenting opinions in Van Orden, the case in which the court approved a Fraternal Order of Eagles monument on the grounds of the Texas legislature. See Van Orden, 545 U.S. at 707 (Stevens, J., dissenting).
120 See Van Orden, 545 U.S. at 707 (Stevens, J., dissenting)..
121 See Summum, 129 S.Ct. at 1133 ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.").
erect their monument.\textsuperscript{121} The city refused to do this, and the Supreme Court held that the formal process of declaring the city's intended message in adopting a privately contributed monument would be a "pointless exercise that the Constitution does not mandate."\textsuperscript{122}

Having freed the city from any obligation of announcing its intended message, the Court then engaged in a meandering discussion of various modes of public expression, ranging from John Lennon to the Statue of Liberty.\textsuperscript{123} This discussion is apparently intended to demonstrate the obvious propositions that guidance may convey different messages to different people, and that these messages may change with time. All of this is true, and entirely beside the point. The essential issue with regard to the question whether the city had violated the Establishment Clause is not what other people would read into a particular monument, but rather what the city itself was trying to communicate through that monument. After treating its readers to extensive quotes from John Lennon's "Imagine" and a sophomoric discussion on how different people's different points of view often produce different perceptions of expressive artifacts such as monuments, the Court moved on to a discussion of certain public forum issues without having in any way addressed what the city intended to say when it adopted the Fraternal Order of Eagles' religious monument. What the Court produced, in other words, was an opinion based entirely on its new concept of government speech in which the government apparently never intended to say anything -- or rather was too frightened of the legal consequences of its own expression to say what it wanted to say in public. In the end, therefore, the Court gave the city the right to say -- nothing.

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\textsuperscript{121} Id. at 1134.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 1134-37.
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As with many of the other categories of government speech discussed earlier in this article, *Summum* ends up being a case in which the concept of government speech simply does not apply to the facts at hand. *Summum*’s request that the city go through the formal exercise of announcing its message is not only perfectly reasonable, but an answer from the city is logically required by the terms of the city's "right" to government speech. If a governmental entity has no intention of expressing a message when it engages in a particular action, then the "right" to government speech simply does not apply. Likewise, if a city such as Pleasant Grove City is too sheepish about what it wants to communicate to announce its intended message publicly, then there is no reason that the First Amendment should give protection to what is essentially a non-communicative action. The Court has long held with regard to private speakers that a non-communicative action does not receive First Amendment protection. It is only logical that the same rule would apply to government entities. Moreover, if the governmental entity is avoiding announcing its intended message because that message may be illegal, then it is difficult to provide a plausible argument for why the First Amendment should provide constitutional cover for the government's unconstitutional actions.

In short, Pleasant Grove City loses under either of the two possible explanations for its conduct. One explanation for the city's conduct is that the city did not really have a message to communicate. In this case the government speech doctrine should not apply at all; no message, no speech. The second explanation for the city's conduct is that the government hesitated to announce its true message because it feared that the message was unconstitutional. In this case the city should be forced to articulate its message fully and submit that message to the courts.

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124 *See* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("'freedom of speech' means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person
for a determination of the message's legality. Only at the point at which a fully articulated and legal message is announced by the city should the government speech doctrine apply. Sloppy and ultimately incoherent opinions such as the Supreme Court's majority effort in *Summum* do little more than confuse First Amendment jurisprudence and encourage official misconduct using the government speech doctrine as a cloak.

As illustrated in the previous subsections, the carelessness that characterizes the Court's majority opinion in *Summum* unfortunately also distinguishes most of the Court's other opinions dealing with the government speech doctrine. In many of these decisions, the Court fails to come to terms with even the most basic issues such as: Is the government trying to speak? What is it trying to say? Is protecting the government speech necessary for the government to undertake its legitimate activities? Is the government's message illegal or unconstitutional? Is the government's interest in speaking sufficient to outweigh the First Amendment rights of government employees, government contractors, and private individuals expressing themselves on the same subject as the government? Applying the theory of government speech consistently and developing at a set of coherent conclusions about the limitations and parameters of that theory would require the Court to address each of these questions in every case, in contrast to the Court's lackadaisical approach in such cases thus far.

The Court will probably have an opportunity to address these issues again soon in a context that resembles *Summum*. The gaps and evasions in the Court's earlier government speech opinions may frustrate the Court's effort to address in a satisfactory way the latest manifestation of these issues. These new cases involve constitutional challenges to state
refusals to issue specialty license plates with the anti-abortion inscription "Choose Life." 125 All of these cases involve the issue of government speech, and one court of appeals decision states flatly that the entire matter of whether a state would refuse to issue a you "Choose Life" tag boils down to the empirical question of whether the state "has adopted the speech as its own." 126 Once a court makes the determination that the government has adopted the speech as its own, then only one conclusion could follow from everything the Court has said about the new doctrine of government speech: the government will win, and the private speaker will lose.

In attempting to apply the Supreme Court's new doctrine of government speech, most of the lower courts' efforts have been expended on trying to ascertain whether, in fact, the government has spoken. Several circuit courts have even adopted a dreaded four-part test to assist in determining the existence of government speech. This test assesses:

(1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker”; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech. 127

The factors in this test are both broad and obvious (and in the case of factors two and four, redundant). The test is probably a better indication of how confused the courts are about the government speech doctrine than it is a measure of how effectively the courts can apply

125 See Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009) (holding that the state of Missouri was obligated to issue a "Choose Life" tag); Arizona Life Coalition, Inc. v. Stanton, 550 F.3d 956 (9th Cir. 2008) (holding that the state of Arizona was obligated to issue a "Choose Life" tag); Choose Life v. White, 547 F.3d 853 (7th Cir. 2008) (holding that the Constitution does not prohibit the state of Illinois from refusing to issue a "Choose Life" tag).
that doctrine. This is evident if one recognizes first how easy it is to apply the test to produce the conclusion that the government is speaking in the "Choose Life" license plate cases, and second, how much the courts resist that conclusion. Under factor one of the test, the central purpose of the specialty license plate programs is to permit license plates to be used as an expressive medium that conveys ideas beyond the simple registration number of a particular automobile. Under factor three, the identity of the "literal speaker" is clearly the government, because even though the license plates adorn private as well as public vehicles, all vehicles must display a tag and that tag must come from the government. In terms of the physical reality (that is, who issues the physical plates) as well as public perception, license plates are a government endeavor. As for factors two and four, the "editorial control" and "ultimate responsibility" factors, once again the government seems logically to prevail. All of these programs permit only a limited number of specialty license plates and contain restrictions on the content of the message being proposed by particular groups seeking authorization for a specialty license plate; therefore, since the government retains ultimate editorial control over the speech that goes on its plates, it must be the "speaker." The fact that a private group actually devised the speech that the government adopted is irrelevant for purposes of determining the government speech issue, because that is exactly what happened in *Summum*, in which the Court concluded that a private monument that was adopted by the government and placed on government property constituted government speech.  

Given the ease with which the standard test for government speech produces a determination that the government is the speaker in specialty license plate cases, it is

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126 *Stanton*, 515 F.3d at 963.
127 *Id.* at 964.
128 *See supra* notes 110-12 and accompanying text.
interesting that none of the courts in the most recent decisions on the subject have relied on the
government speech rationale. Indeed, two of the three most recent decisions involving the
controversy over "Choose Life" specialty license plates have ruled that states are
constitutionally obligated to issue the plates whether they want the plates to convey that
controversial message or not.129 These decisions are not lacking in doctrinal support. The
easiest route to these conclusions are through the application of First Amendment public forum
document, a doctrine that provides abundant opportunities for courts to construct an opinion
requiring states to admit controversial speakers to the specialty license plate "forum."130 But it
tells us something important about the weakness and intellectually vacuous nature of the
Court's new government speech doctrine that a perfectly plausible opinion can be written using
the public forum doctrine in a situation in which the speech in question occurs on government
property, the government controls the content and form of the message, and the public
perceives that the government has some input into the message.

The fact is that in situations like this specialty license plate cases, the government both
is and is not speaking. Unfortunately, the fact that government speech is present to some
extent tells us nothing without knowing why the government is speaking, what it is saying, and
whether this particular form of government speech warrants protection under the First
Amendment (whether that protection is characterized in terms of affirmative First Amendment
right on behalf of the government, or rather in terms of a government defense to a First
Amendment free speech claim by a private person). To the extent that it is speaking in a

129 See Stouffer, 560 F.3d 860; Stanton, 550 F.3d 956.
130 For one version of the argument that state specialty license plate programs create a public forum, see
Stanton, 515 F.3d at 968-71 ("We therefore conclude that Arizona's specialty license plate program is a limited
public forum, and that any access restriction must be viewpoint neutral and reasonable in light of the purpose is
served by the forum.").
nonideological way about matters not relating to public policy disputes, it is not at all clear why the category of government speech should even apply, much less that such a category should be used to foreclose private speech in public forums.

The "Choose Life" license plate cases are important because they illustrate how problematic the government speech doctrine can be, and also how the existence of a government speech doctrine can potentially damage existing protections of private speech under the Free Speech Clause. Taking these cases as an example, consider the consequences of a ruling on the basis of government speech. Focusing on the free speech claims, there are only three possible ways in which courts could characterize the specialty license plate programs at issue in these cases. The courts could declare these programs examples of government speech, nonpublic forums, or designated public forums. There are significant differences in the free speech implications of each of these characterizations. The characterization of these programs as public forums will be very conducive to free speech, in the sense that many different groups would be able to place their logo or slogan on license plates and thus enable their supporters to disseminate the groups' messages freely. The governor would not be allowed to make content or viewpoint distinctions in deciding who got to use the license plates as an expressive medium, and every group would be treated the same. On the other hand, the characterization of these programs as nonpublic forums would significantly inhibit free speech, in the sense that all groups could be barred from using license plates as a medium to disseminate their messages. The good news, from a free speech perspective, is that once

\[131\] See Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.").

\[132\] See Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 189 (2007) ("it is . . . black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers..."
again all groups would be treated identically, and no group would be put at a disadvantage by failing to gain access to a prime state-owned expressive avenue.

From a free speech perspective, the worst possible outcome would be for a court to characterize the state specialty license plate programs as government speech. This is the worst possible outcome because some controversial ideological messages would be permitted in the prime expressive forum, but only those with which the government agrees; all other contrary messages with which the government disagrees would be banned from the forum. Thus, a government speech characterization distorts the free-speech market in ways that the alternative characterizations do not.

In addition to the problems with the Court's new government speech doctrine that are evident in the Court's earlier decisions, the fifth manifestation of this doctrine adds several more. First, *Summum* creates certain logical difficulties with the entire concept of government speech, since in that case the Court allows government entities to partake of the protections offered by the government speech doctrine without announcing the message that they intend to convey through that speech. The logical conundrum is that speech in this context means "convey a message." If the government is not conveying a message then by definition it is not speaking and therefore should not receive the benefits of the government speech doctrine. Second, as illustrated by the "Choose Life" litigation in the lower courts, the Supreme Court's conception of government speech is so broad that it has led to the development of a virtually meaningless standard for determining when the government is speaking. And as decades of First Amendment jurisprudence insists, meaningless standards are the bane of free speech because such standards permit government officials (including judges) to exercise unfettered

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on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light
discretion about what speech is permitted and what speech is not.\textsuperscript{133} Finally, these cases demonstrate that even if the government speech doctrine operates consistently and efficiently, it runs directly contrary to the most basic tenets of the First Amendment in that the government gets to decide which speakers gain access to precious government-owned forums and which speakers are relegated to less efficient modes of spreading their message.

Perhaps none of these problems would be fatal if the government speech doctrine actually served a legitimate purpose. Instead, the government speech doctrine serves no function that could not be better served by other, far less intrusive means of protecting the government's obligation to communicate with the public about matters of public policy. The next section addresses the question whether it is worth revisiting the relatively young government speech doctrine in order to limit that doctrine to its proper functions, or rather would it be more efficient to simply exterminate the new doctrine in its infancy in favor of some alternative method of protecting the government's legitimate interests.

II. THE RIGHT OF GOVERNMENT SPEECH WHEN THE GOVERNMENT HAS NOTHING TO SAY

There is no question that in some contexts the government must have the authority to speak about public issues and social concerns. When the President gives a speech about an economic stimulus program or a bank bailout, he is acting as the government, and no one would argue that the government (in the form of the President) should be prohibited from communicating its ideas to the public in that context. Nevertheless, the concept of government speech is very troublesome from a First Amendment perspective once it becomes defined as

\textsuperscript{133} See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) (discussing the use of official discretion to suppress speech of the licensing context, and noting that "the mere existence of the
broadly as the modern Court seems inclined to do. The Court’s own recent government speech cases indicate why this is so. In Rust, the Court uses the concept of government speech to permit the government to silence both private speakers who have different political positions from the government, and also medical professionals who are merely seeking to advise their patients on personal healthcare matters. In Garcetti, the Court uses the government speech doctrine to permit government prosecutors to withhold important information from (and possibly defraud) the courts. In Johanns, the Court uses the government speech rationale to coerce participants in a particular economic market to finance the government's preferred method of selling products in that market. And in Summum, the Court expands the government speech concept to provide the government legal protection despite the fact that the government refuses to articulate the message that it is allegedly endeavoring to communicate -- even though the government's circumspect attitude may be nothing more than an effort to skirt Establishment Clause restrictions on the government's endorsement of religion.

As this list of government speech cases indicates, the Court's treatment of the government speech doctrine to date has been highly unsatisfactory. The Court has not been careful about defining the parameters of the doctrine of government speech, has been even less careful about applying the doctrine of government speech in situations where the government licensor’s unfettered discretion, coupled with the power of prior restraint, intimidate parties into censoring their own speech, even if the discretion and power are never actually abused").

134 See Rust, 500 U.S. at 180 (discussing the need for organizations receiving government funds to keep themselves physically and financially separate from organizations engaged in abortion advocacy or lobbying).
135 Id. (discussing government instructions for health-care workers in advising patients without mentioning abortion).
136 See Garcetti, 547 U.S. 410 (upholding the application of employment sanctions to an assistant prosecutor who sought to inform the court of a potentially invalid warrant).
137 See Johanns, 544 U.S. 550 (upholding a program imposing fees on beef producers to support a government-organized campaign to market beef).
138 See Summum, 129 S.Ct. 1129 (holding that a city had the right to "speak" by placing a donated Ten Commandments monument in a restricted area of a public park).
is not really saying anything, and therefore has often permitted the government to use the mantle of government speech to suppress private speech when, in fact, the protection of that doctrine is not necessary to protect any legitimate governmental function. The question, then, is how do we preserve the range of government speech that is necessary for the government to conduct its business without permitting the government to use the government speech doctrine to suppress the expression of the government's political opponents and violate other constitutional restrictions? There are two possible answers to this question, one narrow and doctrinal and the other broad and severe.

The narrow answer to this question lies in the implementation of some of the lessons that should be learned from the recent government speech cases discussed above, in which the Supreme Court extended the government speech doctrine beyond what was necessary to serve the government's legitimate interests. These lessons reflect some relatively commonplace First Amendment principles, the application of which to the government speech doctrine could limit the doctrine sufficiently that it would be compatible with the basic protection of private speech under the First Amendment.

The first lesson comes from the government contractor and government employee cases such as *Rust*, *Garcetti*, and *Velazquez*. This lesson is that the government should not be allowed to overreach in using the government speech doctrine while seeking to ensure that its message is effectively communicated to the general public. This is little more than an adaptation of the traditional rule that government regulations of speech should not be substantially overbroad.\(^{139}\) In this context, one does not need to go any further than the facts of

\(^{139}\) *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (describing the requirement that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").
to find an example of government speech that goes far beyond the government's legitimate needs. Whatever the government needed to do to ensure that its family planning policies were effectively communicated to the public, that effort did not need to include suppressing the speech of health care workers advising individual patients about their specific conditions and treatments. A doctor's advice to a pregnant woman about her medical options would in no way detract from the efficacy of the government's message announcing its ideological opposition to abortion.\textsuperscript{140}

The effective enforcement of this lesson would require close attention to the professional roles of those being regulated by the government. If, as in \textit{Rust}, the government is attempting to regulate health care workers or, as in \textit{Velazquez}, the government is attempting to regulate the speech of attorneys, then the government's desire to suppress speech must be subordinated to the professional obligations of the speakers. This is not because the professional obligations of attorneys or doctors are sacrosanct, but rather because it is inconceivable that the government's need to communicate with the public would require it to undermine the professional obligations of doctors or attorneys.\textsuperscript{141} The government has many avenues for communicating its message to the public without using doctors or lawyers as mouthpieces. If in the course of performing their professional obligations doctors or lawyers happened to say things that run counter to the government's message, no member of the public is likely to treat those statements as issuing from the government. To the extent that the

\textsuperscript{140} For a full discussion of this point, see supra notes 60-61 and accompanying text

\textsuperscript{141} This approach is consistent with David Cole's suggestion several years ago that there are certain "spheres of neutrality," in which government neutrality toward speech is central to an institution's operation. See David Cole, \textit{Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech}, 67 N.Y.U. L. Rev. 675, 716 (1992). Among other things, Professor Cole sets forth several criteria for identifying a "sphere of neutrality," many of which deal with whether particular institutions are consistent with (or require) a neutrality mandate. \textit{Id.} at 736. Applying these criteria to speakers are operating within professions such as law or
government legitimate needs intersect with the professional obligations of doctors or lawyers (as would happen, for example, when the government legitimately expresses a desire to keep secret conversations with its own attorneys), the rules of professional obligation already take into account the government's needs by protecting attorney-client confidentiality.

As a final gloss on the first lesson, it should go without saying that the government speech doctrine should not give the government the ability to use the suppression of speech to engage in illegal activity, as was arguably the situation in *Garcetti*. Whatever the real justification for the government speech doctrine, it must be linked in some way with the government's legitimate dissemination of information to the public or (as in *Garcetti*) the need of one government institution to communicate with another. Allowing the government speech doctrine to be used as a mechanism for suppressing private, truthful speech in order to advance government falsehoods is impossible to reconcile with any conception of the First Amendment, or for that matter with any rational conception of legitimate governmental activity.

The second lesson limiting the government speech doctrine complements the first lesson. Whereas the first lesson deals with the use of the government speech doctrine to prevent private speakers from opposing the government, the second lesson deals with the use of the government speech doctrine to coerce private speakers to support the government. The result in both types of cases should be the same. Just as the government should not be allowed to use the government speech doctrine in a way that would freeze private speakers from the marketplace of ideas, it should also not be allowed to use the government speech doctrine to coerce private speakers into embracing government positions with which the private speakers disagree. This lesson is derived from the Court's cases dealing with government agricultural-

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medicine would produce the results discussed in the text -- that is, that the government must be neutral with regard
marketing programs, but this lesson would also apply to any other government program in which a group of interested speakers is targeted to pay for government speech regarding a matter with which that group is specifically interested.

There are two basic reasons for denying the government the ability to pay for its speech with targeted assessments. The first is the traditional First Amendment rule against compelled speech, and its derivative phenomenon, the compelled subsidy. Both types of compelled expression are governed by the same theory, which is that "the First Amendment does not 'le[ave] it open to public authorities to compel [a person] to utter' a message with which he does not agree." Although the Court in Johanns accepts the application of this proposition to compelled speech, it draws a distinction with regard to compelled subsidy cases between government compulsion to finance private speech and government compulsion to finance government speech. This distinction does not, however, comport with the general First Amendment principle that a person should never be forced to utter a message with which that person does not agree. From the perspective of the person who is being forced to embrace a message with which he or she disagrees, it does not matter whether the entity determining the content of the message is private or public. What matters is that one is being forced by the government to say something that one does not believe.

The Court's distinction between government-mandated support of private speakers versus government-mandated support of government speakers also cannot be explained by the government speech doctrine. The guiding principle of the government speech cases should be to facilitate the government's ability to communicate its policy preferences to the public.

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1 Anna L. Trujillo & Campbell Robinson, The First Amendment and Government Speech, supra note 1, at 44; personal and political speech.

142 See supra notes and 76-90 and accompanying text.
143 Johanns, 544 U.S. at 557 (quoting Barnette, 319 U.S. at 634).
Reconciling this principle with First Amendment free speech rights obligates courts to restrict the application of the government speech doctrine to situations in which the exercise of free speech rights by private citizens would thwart the government's ability to communicate with the public. This is not the case in Johanns, or indeed in most compelled subsidy cases. In cases such as Johanns, exempting from the mandate to support the government's speech those who object to the government's message would not thwart the government's ability to communicate that message. In such a situation the Government would still have two options. The first option would be to proceed with a less elaborate advertising campaign (that is, by buying fewer ads, or producing less expensive ads). The second option would be to broaden the financial base for the government's advertising campaign beyond a targeted and relatively small group of interested speakers by using general tax revenues to finance the campaign, which would not raise the same First Amendment concerns given the thin connection between any general taxpayer and a message that the government is communicating with that taxpayer's money. The point (and this is true of all the lessons learned from the Court's government speech cases) is that the government speech doctrine is inconsistent with the First Amendment if the application of the doctrine will have the effect of suppressing private speech and will not significantly improve the government efforts to get its message out to the public.

The third and fourth lessons to be learned from the Court's new government speech cases should be axiomatic -- except that they clearly are not, since the Court itself has ignored these lessons repeatedly in its government speech cases. The third lesson is that when the government claims a right to government speech the courts should require the government to articulate its message clearly so that the courts can determine how broadly the government

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144 See supra note 87 and accompanying text.
speech right should be construed; specifically, so that the courts can determine to what extent that right should be construed to suppress private speech opposing the government's message. The fourth lesson is simply an extension of the third. The fourth lesson is that if the government has nothing to say -- that is, if the government's actions could not plausibly be construed in such a way that the government could be viewed as engaging in speech -- then the government speech doctrine does not apply. Thus, the third lesson reinforces the fourth. If in attempting to comply with the requirement generated by the third lesson, the government cannot supply the courts with a clearly articulated message, then under the fourth lesson the government should lose his claim under the government speech doctrine.

Both of these lessons hearken back to the basics of the government speech doctrine. If the justification for the government speech doctrine is to facilitate government speech in order to broaden the public's access to ideas in an intellectual marketplace, then the doctrine should only be applied when it actually accomplishes that goal. Thus, the doctrine is simply inapplicable when the government is speaking ambiguously, incomprehensibly, or is not speaking at all. The doctrine is also inapplicable when the government is using speech as a tool in illegal activities, or using the excuse of government speech to avoid other constitutional limitations on its behavior. Unfortunately, these examples of when the government speech doctrine should be inapplicable describe many of the cases in which the Court has applied its new doctrine.145

145 For example, Rust involved ambiguous speech, see supra notes 39-44 and accompanying text, in Summum the government refused to declare its message, see supra notes 117-22 and accompanying text, in Garcetti the government may have been trying to defraud the courts, see supra notes 64-69 and accompanying text, and in Summum the government may have been trying to skirt Establishment Clause prohibitions, see supra notes 117-22 and accompanying text.
Once one reduces the government speech doctrine to its essence, the most notable thing about the doctrine is how little real substance or impact a properly construed government speech doctrine would have. ("Properly construed" in this context means a government speech doctrine that conforms to the four lessons described above.) At the end of the day, a properly construed government speech doctrine would do very little because it would simply recognize the commonsense proposition that occasionally the government must communicate with the public, and therefore must be given the tools with which to do so. This raises the question whether the government speech doctrine is necessary at all. The answer is probably no. There is nothing in the Constitution that would prevent the government from addressing the public in the absence of a government speech doctrine. More precisely, there is nothing in the Constitution that would prevent the government from creating a family planning program, an agricultural marketing program, a student activity program at a public university, or from placing monuments in public parks -- in other words, there is nothing in the Constitution to prevent the government from doing exactly what it has done in all the cases in which the Court chose to apply its government speech doctrine. In each of these cases, the government would have been allowed to do precisely the same thing in the absence of the government speech doctrine as it was permitted to do after the application of that doctrine. The only thing that would have changed in these cases is the treatment of the private speech that arose in response to the government speech.\footnote{Caroline Mala Corbin has suggested a different approach to the Court's new government speech cases. She suggests that instead of focusing on the contrast between government speech and private speech in these cases, we should instead recognize that these cases involve mixed speech -- that is, a combination of government and private speech. Caroline Mala Corbin, Mixed Speech: When Speech is Both Private and Governmental, 83 N.Y.U. L. Rev. 605, 671-75 (2008). She then suggests that the courts apply a version of intermediate scrutiny to all First Amendment claims within the mixed speech category. \textit{Id.} at 675-80. Although this a worthwhile contribution to the debate in a particularly confused First Amendment area, there are several reasons why adopting the mixed speech approach is not advisable. First of all, an intermediate scrutiny approach simply}
This last point is the rub: the government speech doctrine is not, in the end, about the
government's speech at all. As it has been applied by the Court, the government speech
doctrine is about using the government's speech as an excuse to circumvent other constitutional
rules, such as those protecting private speech, restricting the government's religious activities,
or structuring the government's ability to prosecute individuals for criminal activities. Viewed
in this way, the government speech doctrine is not only unnecessary, but actually harmful to
several different constitutional values. Perhaps the best solution, therefore, is simply to
dispense with the government speech doctrine in its infancy, before the Court allows the
doctrine to leech to into other areas in which government and private expression may clash.
Exterminating the government speech doctrine would do nothing to inhibit the government
from communicating with the public about legitimate areas of government interest, but it
would greatly enhance the freedom of private speakers to oppose the government, which is, of
course, the whole point of the First Amendment.

Conclusion

There is no denying that at times the government has to speak to the public.
Unfortunately, the Supreme Court has taken this undeniable but uninteresting truth and used it

introduces into this area a balancing test. The reason this is a problem is that balancing tests will never favor
speakers with valid First Amendment claims. In normal circumstances, a valid First Amendment claim will mean
that the government may not regulate the speech. In an area governed by a balancing test, however, the
government is given a second chance to suppress the otherwise protected speech by arguing that the government
has a substantial interest in suppressing the speech. This substantial interest is often indistinguishable from
ordinarily be considered impermissible viewpoint discrimination. Corbin's own description of the government’s
interests confirms this. See id. at 683 ("The government may also wish to regulate mixed speech to avoid
supporting, condoning, or associating with speech it finds undesirable."). The second problem with the mixed
speech approach is that it is factually inaccurate. It is simply not true that these cases involve an amalgamation of
government and private speech. Rather, these cases involve a competition between distinct categories of
government and private speech. In the cases discussed in this article, when the government wins, the private
speech is suppressed. If we are interested in preserving the general presumptions of the First Amendment --
especially, the presumption that the government is allowed to regulate speech only under compelling
circumstances -- the approach advocated in the text is preferable to one in which very real private expressive
interests are routinely subordinated to the dominant social interests represented by the government.
as an excuse to construct an increasingly elaborate doctrinal edifice to protect government speech. Even more unfortunately, the Court has used this new doctrine to provide the government with the authority to suppress private speech opposed to the government. In truth, there is little to indicate that something like a government speech doctrine is even necessary. The cases in which the Court has applied the new government speech doctrine provide little evidence that a government speech doctrine does anything significant to facilitate government communication with the public. In each of these cases, every one of the government's legitimate communicative actions would have been permissible without any reference to the government speech doctrine. At best, the government speech doctrine is either completely irrelevant or a constitutional makeweight. At worst, the doctrine is a nefarious and surreptitious way of providing the government with a method of engaging in illicit speech, or suppressing private speech with which the government disagrees. The only way to avoid the latter consequence is to limit the government speech doctrine in the manner suggested in the last section of this Article. As noted in that section, if we limit the government speech doctrine in this way then the doctrine basically ceases to exist, which from a First Amendment perspective is probably the best result of all.