

Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say?

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ABSTRACT: 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 private persons who wish to speak out against the government. In much the same way that the Court has long given private speakers a First Amendment right to fend off government control of their speech, the Court has now afforded the government a First Amendment "right" to free speech. 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 was communicating either ambiguously or not at all. It is a mystery why the Court should give the government a First Amendment "right" to speak (and thereby suppress private speech) when the government has nothing to say. After reviewing the cases in which the Court develops the government speech doctrine, this Article concludes that these cases do not support the Court's increasingly expansive conception of government speech. Rather, these cases indicate 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 that the Court is developing. This Article concludes by proposing, in the alternative, that the Court could eliminate the government speech doctrine

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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.

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I. INTRODUCTION

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,¹ the regulation of speech by individuals or private entities receiving government subsidies,² compulsory speech connected to mandatory student-fee regimes at public universities,³ government-coordinated cooperative advertising regimes,⁴ and, most recently, government-sponsored religious speech.⁵ 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 antiabortion inscription “Choose Life.”⁶ 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, however. The Court resists calling

1. See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (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).

2. See *Rust v. Sullivan*, 500 U.S. 173, 178 (1991) (holding that the government can dictate the speech of those hired to speak on the government’s behalf).

3. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232–33 (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 & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (discussing government speech in the context of holding that a public university must distribute student-activity fees on a content- and viewpoint-neutral basis to all student groups).

4. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (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. Sumnum*, 129 S. Ct. 1125, 1138 (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, 871 (8th Cir. 2009) (holding that the State of Missouri was obligated to issue a “Choose Life” tag); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 855–56 (7th Cir. 2008) (holding that the Constitution does not prohibit the State of Illinois from refusing to issue a “Choose Life” tag), *cert. denied*, 130 S. Ct. 59 (2009); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 973 (9th Cir. 2008) (holding that the State of Arizona was obligated to issue a “Choose Life” tag); *infra* Part III.F (discussing these three cases).

government speech a First Amendment right of the government. In its most recent government speech opinion, the Court concluded that a government action that can be viewed as a form of government speech “is not subject to the Free Speech Clause.”⁷ 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.⁸ 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 as a First Amendment right belonging to the government. 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.⁹ Hence, while the Court has not phrased the government speech doctrine in this way, the Court implicitly seems to view the government as 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 government’s right to speak on its own behalf about particular issues.¹⁰ Also, it is not at all clear that one can logically construe a government subsidy as “speech.”¹¹ 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

7. *Summum*, 129 S. Ct. at 1138.

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.” Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 568 (1980). Although these questions remain compelling today, the more immediate issue given the Court’s recent decisions is whether the government can use its new “right” of government speech to suppress private speech with which the government disagrees.

10. *See infra* notes 43–67 and accompanying text (discussing the government’s ability to speak without regulating private speech).

11. *See infra* Part III.A (cataloging the reasons why a government subsidy should not be considered “speech”).

speech, the government is not really saying anything.¹² Even more problematic is the Court's most recent government speech case, *Pleasant Grove City, Utah v. Summum*, in which the government asserts that it is indeed saying something but will not reveal the precise details of the message.¹³ In *Summum*, the Court enhances the government speech category of First Amendment law to the point that the government can evade other First Amendment restrictions on its behavior without engaging in the communicative behavior that supposedly justified the evasion in the first place.¹⁴

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 on matters of public concern—is unexceptionable, it is not at all clear why this has anything to do with the First Amendment. It is unclear, for example, why the government should have the affirmative First Amendment right to speak, since the structural function of the First Amendment is to limit government power.¹⁵ 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—where the government seems to have had a much more compelling case to silence its opponents.¹⁶

In short, the Court has not yet made the case for why the periodic need for the government to 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 requires that the government communicate an actual message before having a First Amendment right to speak, 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 Part II with the early cases that provided the framework for the category. These cases mostly deal with government efforts to squelch the speech of government employees or private persons who receive government

12. See *infra* Part III.E (discussing the phenomenon of ambiguous government speech).

13. *Summum*, 129 S. Ct. at 1138.

14. See *infra* Part III.E (arguing that the *Summum* decision enables government to speak without acknowledging the content of that speech).

15. A purely textual approach to the Constitution would reach the same conclusion. One cannot plausibly construe the phrase “Congress shall make no law” as a grant of government power to express itself. U.S. CONST. amend. I.

16. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (describing the First Amendment protection of radical political speech).

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 speech of private persons to get an official government message across. Part III will 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 Part will also address *Summum*, the Court's most recent effort to explain the government speech model.

The root of the critique below is that the Court's creation and expansion of a government speech category involves the creation of a new First Amendment analysis that allows the government to suppress political speech—the Court's primary First Amendment category and the one that normally 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 that the Court has expressed 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.

II. 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 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, in the earliest public-forum cases, the government made a government speech claim, asserting 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).¹⁷ 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 that “[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more 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.”¹⁸

Ultimately, the United States Supreme Court rejected the notion that the government's right not to speak encompassed the right to foreclose

17. See *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895) (holding constitutional a city ordinance restricting private individuals' free-speech rights in a city park unless they receive a permit), *aff'd*, 167 U.S. 43 (1897).

18. *Id.*

private speech on its property, holding that public parks and sidewalks were considered quintessential areas of public discourse, and that the government could not prohibit speech within those areas based on the content or the viewpoint of the speech.¹⁹ Although the Court settled these disputes over the use of government property a long time ago, the modern Court has revived them through the use of the government speech doctrine by 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).²⁰ 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.²¹ 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.²² 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.²³ 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

19. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (describing the rules governing the regulation of speech in a traditional or quintessential public forum).

20. See *infra* notes 140–59 and accompanying text (discussing this revival).

21. Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380 (codified as amended at 4 U.S.C. § 4 (2006)).

22. See *infra* note 23 (discussing the West Virginia pledge requirement).

23. Consider the resolution decreeing that all students participate in a mandatory recitation of the Pledge of Allegiance in West Virginia schools after the State Board of Education concluded that “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.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627 n.2 (1943).

originally conceived as a government assertion of uniformity and solidarity,²⁴ 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 national solidarity became, in effect, a loyalty oath.

The problem, as the Court would conclude after considering the issue several times,²⁵ 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 illustrates some of the difficulties this new category of First Amendment law poses. The central difficulty is that in many situations when the government expresses itself, the government 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 government speech is to enhance the marketplace of ideas with the government's own contributions.²⁶ 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 opposes the government's position on some major public issue.²⁷ To put this point

24. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) ("As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.").

25. The Supreme Court ruled on five different occasions that mandatory flag salutes were constitutional. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) (rejecting on the merits a constitutional challenge to a flag-salute mandate); *Gabrielli v. Knickerbocker*, 306 U.S. 621, 621 (1939) (dismissing the appeal of an unsuccessful flag-salute challenge due to want of jurisdiction); *Johnson v. Deerfield*, 306 U.S. 621, 621 (1939) (summarily affirming the lower-court decision rejecting a constitutional challenge to a flag-salute mandate); *Hering v. State Bd. of Educ.*, 303 U.S. 624, 624 (1938) (dismissing the appeal of an unsuccessful flag-salute challenge due to the lack of a substantial federal question); *Leoles v. Landers*, 302 U.S. 656, 656 (1937) (same). The Court reversed itself and held that there is a constitutional right not to salute the flag in *Barnette*, 319 U.S. at 642.

26. 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) (explaining how state expression contributes to the marketplace of ideas); 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 of the government speech doctrine, see *infra* note 57.

27. Two good examples of this phenomenon are *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), in which the government attempted to suppress speech that was contrary to the government's perspective in the broad areas of family

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 where government speech ends and private speech begins can be illustrated by a case that the Court treats as a derivative of its Pledge decisions. In *Wooley v. Maynard*,²⁸ two Jehovah's Witness residents of New Hampshire objected to the inscription "Live Free or Die" on that state's license plates.²⁹ The objectors covered up this inscription on their license plates and were then arrested and charged with defacing the plates—a misdemeanor under New Hampshire law.³⁰ 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."³¹ Although the Court recognized government speech as a legitimate interest, it did not create a separate First Amendment 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."³² The Court has not been willing to overrule *Wooley*, but the Court long ago abandoned the proposition that the government can never have a speech interest sufficient to outweigh individuals' First Amendment right.

III. THE SIX MANIFESTATIONS OF THE COURT'S NEW RIGHT OF GOVERNMENT SPEECH

In the three cases discussed in the previous Part—*Hague* (the public-forum case), *Barnette* (the Pledge of Allegiance case), and *Wooley* (the license plate case)—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 persons.

The first theme is that private individuals have a right not to be associated with views with which they disagree, which is evident from the

planning and legal services. *See infra* notes 43–68 and accompanying text (discussing these cases further).

28. *Wooley v. Maynard*, 430 U.S. 705 (1977).

29. *Id.* at 707.

30. *Id.* at 708.

31. *Id.* at 717.

32. *Id.*

holdings in *Barnette* and *Wooley*.³³ At the same time, however, 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 expressive instruments such as the Pledge of Allegiance,³⁴ and also from the fact that antigovernment protesters can enter government-owned public forums and verbally attack the government's positions with impunity.³⁵

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 automobile registration) to enhance the scope, volume, or effectiveness of the views it seeks to communicate to the public. On the other hand, the second theme's effectiveness is limited significantly by the fact that although the Court does not give the government unfettered power to use its 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 the onus of keeping the government in check on citizens. Since most citizens will choose not to opt out of the government-communication scheme, the government will, in fact, manage 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 private counterspeech out of the marketplace, then the right of private speakers should trump 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 a speaker, rights that are in many ways coextensive with the rights that private speakers enjoy under the First Amendment.³⁶ This has occurred without any serious discussion by the Court about why the government needs enhanced speech rights to conduct its official business. This is especially disturbing since one noteworthy

33. See *supra* notes 22–23, 28–32 and accompanying text (analyzing the *Barnette* and *Wooley* cases).

34. See *supra* notes 22–27 and accompanying text (analyzing the *Barnette* case).

35. See *supra* notes 19–20 and accompanying text (describing how the government cannot prohibit speech within certain areas based on the content or viewpoint of the speech).

36. See *infra* notes 43–103 and accompanying text (discussing cases involving speech by the government in its role as employer and the purchaser of services, in which the Court essentially treats the government's authority to regulate the speech rights of those it hires as coextensive with the authority of private entities).

feature of the Court's most recent government speech cases is that when the Court gives the government the right to speak, the Court simultaneously gives the government the right to silence private speakers who disagree with the government.³⁷ 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 counterspeech.

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 each of the six manifestations of government speech that the Court has recently addressed, the government either has nothing at all to say,³⁸ wants to say something that it is not allowed to say,³⁹ wants to say something that no conceivable conception of a democratic political process would allow it to say,⁴⁰ or speaks in such a garbled manner that no one can determine what it is saying.⁴¹ 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 since the Court is providing the government the right to speak in situations where the government has nothing legitimate to say.

In short, each of these features of the Court's recent cases raises the question of whether the creation of a category of government speech was necessary. These features also raise the question of 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 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?

37. For examples of this phenomenon, see the discussions of *Rust v. Sullivan*, *infra* notes 43–68 and accompanying text, and *Summum*, *infra* notes 139–59 and accompanying text.

38. See *infra* notes 140–59 and accompanying text (discussing the government speech rights where the government fails to articulate a message).

39. See *infra* notes 68–103 and accompanying text (discussing the constraints placed on the government in certain professions).

40. See *infra* notes 68–103 and accompanying text (discussing the restrictions imposed on the government by the legal system).

41. See *infra* notes 43–67 and accompanying text (discussing the Public Health Service Act that prohibited recipients of federal funds from engaging in abortion planning).

A. *MANIFESTATION ONE: THE CONSTITUTIONAL PROTECTION
OF GARBLED GOVERNMENT SPEECH*

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*.⁴² In *Rust*, the Court upheld Bush Administration regulations implementing the Public Health Service Act.⁴³ The Act made federal funds available to private organizations that provided family-planning services.⁴⁴ The regulations were designed to ensure that no federal funds available under the Act were used to facilitate abortion as a family-planning device in any way.⁴⁵ 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.⁴⁶ The regulations even prohibited federally funded healthcare providers from referring a pregnant woman to an abortion provider, even upon that woman's specific request.⁴⁷ 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 the regulations prohibited.⁴⁸

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, the federal government was telling doctors and other health professionals 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: "[T]he project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."⁴⁹

42. *Rust v. Sullivan*, 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).

43. *Id.* at 178.

44. *Id.*

45. *See id.* at 179 (noting that Congress intended federal funds available under the Act to be used only for preventative family planning).

46. *Id.* at 179–80.

47. *Rust*, 500 U.S. at 180.

48. *Id.* (internal quotation marks omitted).

49. *Id.* (internal quotation marks omitted).

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 an inquiring patient. According to the Court, the answer to that question is "yes" because the funding program involves government speech.⁵⁰ 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 abortion services.⁵¹ "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."⁵²

In *Rust*, the Court, at times, behaves as if there is no First Amendment interest involved 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."⁵³ Since the government designed the program to pursue a particular result, employees of groups receiving funds under the program are likewise obligated to follow the guidelines detailing the government's 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."⁵⁴ 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 *Rust* involved a program that was not truly akin to a standard business transaction by the government. The *Rust* program was different because it involved a complicated mixture of constitutional rights (including not only abortion rights, but also the First

50. Although the Court's discussion 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 Servs. 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.").

51. *Rust*, 500 U.S. at 192–93 (discussing *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), in which the Court upheld welfare programs where Medicaid patients received subsidies for childbirth but not for abortion).

52. *Id.* at 193.

53. *Id.* at 196.

54. *Id.* at 198.

Amendment rights of doctors and patients to communicate freely) and speech about those rights. The central theme of this Article is that the Court has 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 that the Court has considered. 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: "[T]he project does not consider abortion an appropriate method of family planning" ⁵⁵ But this antiseptic proposition is not an accurate description of the message that the government is trying to communicate. The program in *Rust* denied women information about a procedure that the federal government at the time considered immoral. The message that the program communicated 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, ⁵⁶ 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."

If the government wanted to communicate its real message, then simply ordering the silence of healthcare 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 might 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 situation that would likely engender disenchantment and even disobedience in many patients. This is undoubtedly why the government chose to accomplish its purpose (reducing the number of

55. *Id.* at 180 (internal quotation marks omitted).

56. See Op-Ed., *The President and Choice*, WASH. POST, Aug. 17, 1992, at A12 (discussing President Bush's "impassioned and profound antiabortion conviction").

abortions in the United States) in a furtive way by denying patients information about the procedure through the silence of healthcare workers.

But the silence of healthcare workers, to the extent that it communicated any message at all, communicated one of two different messages. 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. The government's other possible message communicated to patients by the doctors' silence is even less attractive. This message 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 if the Court also had 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 its 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 that the government is actually communicating in *Rust* because the regulations did not force any government worker to acknowledge 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 healthcare workers' First Amendment claims, then the Court should force the government to actually speak—that is, to articulate fully and clearly the content of its official message. After all, if a primary purpose of government speech is to facilitate debate on matters of public importance by having the government

contribute its views to the debate,⁵⁷ then the government's ambiguous silence does not warrant constitutional protection because it contributes nothing to the debate.

The marketplace-of-ideas rationale for the government speech doctrine dovetails nicely with the requirements of the First Amendment—which is the source of the doctrine, according to the Court. It is axiomatic that before receiving First Amendment protection, a speaker actually has to express some message. This is evident from the text of the First Amendment itself; how can the First Amendment logically provide a right of free speech where there is no speech to protect?

The Supreme Court has been very clear about the First Amendment requirement that speakers must engage in definitive communication before receiving constitutional protection for speech. For example, the Court stated:

“[F]reedom 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 undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.⁵⁸

Thus, the exact same gesture may receive First Amendment protection if undertaken with the intention of communicating a specific message, but no

57. 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 has ever come to describing a particular purpose for the doctrine is in *Rust*, where the Court claimed that unless government is free from viewpoint-discrimination rules, “numerous Government programs [would be rendered] constitutionally suspect.” *Rust*, 500 U.S. 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. Academic literature on the subject suggests a second purpose for protecting government speech (if not something as specific as a government speech doctrine). 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 G. 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. This Article argues 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.

58. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

constitutional protection whatsoever when undertaken to communicate an ambiguous message or no message at all.⁵⁹

The First Amendment requirement that a speaker be communicating specific ideas before receiving constitutional protection for that speech has even been described by some courts as limiting First Amendment protection to the expression of ideas that make some definitive contribution to the marketplace of ideas. For example, in one prominent case involving public-employee speech, Judge Richard Posner denied First Amendment protection to the employee's speech because it did not contribute "to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment."⁶⁰

None of this is intended to suggest that the First Amendment protects only speech that contains "a narrow, succinctly articulable message";⁶¹ if that were so, the First Amendment would not protect the abstract arts, such as painting, fiction, or film. But the government is not Ezra Pound; in *Rust* and other cases in which the Court has granted the government the right of government speech, the government is neither creating a painting nor writing pieces of abstract poetry. Whereas poets can use ambiguous language to convey the deeper meaning of a literary text, and musicians can use silence to underscore the power of the musical passages that surround the silence, in the Court's new government speech cases the government is using ambiguous language and total silence not to increase meaning but rather to eliminate it.

It is one thing to grant First Amendment protection for private speakers engaged in this kind of meaningless, expressive behavior, because their meaningless speech can do little harm. Indeed, if the First Amendment default is set at "more speech," as it should be, then private speakers should be given the benefit of the doubt as to whether they intended their actions to convey a message. On the other hand, two reasons suggest that the Constitution should not protect meaningless speech when the government is the speaker. First, unlike a private speaker, when courts grant speech rights to the government, the effect is to suppress the speech of private speakers. *Rust* is a perfect example of this. Thus, granting the government speech rights in these circumstances provides us with the worst of both worlds:

59. See, e.g., *Virginia v. Black*, 538 U.S. 343, 366–67 (2003) (upholding a Virginia statute banning cross burning with the intent to intimidate, but holding that the statute cannot be applied to crosses burned with expressive purposes); *Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989) (extending First Amendment protection to physical desecration of the flag where that desecration is intended to express a political idea, but emphasizing that the First Amendment does not protect similar acts of desecration that are not expressive).

60. *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990).

61. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995).

private speakers who may oppose the government are silenced, and the public is misled about what the government is actually doing by the government's duplicitous speech, thereby reducing the possibility of a political response to government misbehavior. The second reason for treating the government differently than private speakers is that there are constitutional constraints on government speech, such as the Establishment Clause, that do not apply to private speakers.⁶²

Proponents of government speech who focus on the marketplace-of-ideas rationale 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."⁶³ If so, however, the converse must also be true. Therefore, speech that conveys no information, explains nothing, and is too cowardly to seek to persuade does not provide a justification for government action and therefore should not be construed as protected government speech. Thus, given the facts of *Rust*, the Court's decision in the case is 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 healthcare programs that singled out and refused to subsidize abortion services.⁶⁴ The Court in *Rust* treats the conversations between healthcare workers and patients covered by the gag rule as merely another form of abortion services that the government is refusing to provide.⁶⁵ In fact, however, the provision of information in *Rust* is very different than the provision of actual services in the other cases the Court cited. 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 not 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

62. See *infra* Part III.E (addressing the use of the government speech concept to avoid the restrictions of the Establishment Clause).

63. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001).

64. See *supra* note 51 (discussing the *Rust* Court's view of precedent).

65. See *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (comparing the Title X restrictions on communications between healthcare workers and patients to restrictions on Medicaid funding of nontherapeutic abortions that the Court had previously upheld).

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: "[T]he project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."⁶⁶ 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 least during the first two trimesters) are not only medically appropriate but actually far safer than carrying a pregnancy to term.⁶⁷ 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 Court to permit the government to disseminate its views on contestable issues of moral and political policy. Therefore, in the *Rust* example, to comport with the requisites of a rational government speech theory, the Court should force the government 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.

The Court in *Rust* should have forced the government to acknowledge its true message. If it did not do so, the Court should not have used the government speech doctrine to protect the gag-rule regulation; instead, the Court should have protected the First Amendment rights of healthcare workers receiving government subsidies. 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 origins, therefore, the Court's new theory of government speech was on very shaky ground. The Court misjudged the theory's purpose, misapplied the theory in a situation in which it did not apply, and used the theory inappropriately to undermine First Amendment

66. *Id.* at 180 (internal quotation marks omitted).

67. Even in *Roe v. Wade*, 410 U.S. 113 (1973), the Court recognized that abortions during the first trimester are far safer than taking a pregnancy to term. *See id.* at 163 (citing "the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth"). The Court also recognized as early as 1983 that abortions during the second trimester were often also safer than childbirth. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 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." (citation omitted)).

rights in a situation where critical and sometimes life-threatening decisions require discourse that is open, 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 doctrine has not improved.

*B. MANIFESTATION TWO: THE CONSTITUTIONAL PROTECTION
OF ILLEGITIMATE GOVERNMENT SPEECH*

Even those unfamiliar with First Amendment rights could easily understand the problems with giving the government the authority to silence the speech of the healthcare 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 in which the government speech rationale should protect the government's prerogatives, it seems it should be this one. Yet on closer inspection, the situation is not as clear-cut as it first seems, and the legitimacy of the government speech rationale becomes much more complete.

The application of the government speech rationale to government employment is complex because although government can use its employees 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. The official rules of conduct that attend various professions would be one example, and legal orders, such as injunctions, would be another. Therefore, the government speech theory should not protect the government when it attempts to dictate an employee's speech in a way that would require the employee to violate a communicative constraint on the government. Oddly enough, the Court has both recognized and refused to recognize this limitation on the government speech theory within a period of a few years.

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 the lawyers could only technically be described as government employees in one of these cases). The fact that cases involving government lawyers raised this issue makes sense since this is one of the easiest areas in which to grasp the inherent limitations on government speech. An obvious example of such a

limitation is that procedural rules that are generally applicable to lawyers also bind government lawyers, which means government lawyers cannot lie to the court or present false evidence.⁶⁸ Further, under current standards of due process, government lawyers cannot refuse to divulge exculpatory evidence to defense attorneys.⁶⁹ 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 where the speech will directly harm the government’s interest in obtaining a conviction. In the first case where the Court confronted this issue, the Court understood the limitations on government expression in the legal context as extending far beyond these obvious examples. Conversely, in the second case where the Court confronted this issue, the Court behaved as if these limitations do not even exist.

The first case where the Court discussed this issue is *Legal Services Corp. v. Velazquez*.⁷⁰ In this case, the Court struck down a series of limitations Congress had imposed on Legal Services lawyers who were representing indigents. These limitations included restrictions on the kinds of arguments that Legal Services lawyers could make to a court; specifically, the limitations prohibited Legal Services attorneys 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.⁷¹ The government relied primarily on *Rust* to justify the limitations,⁷² and there was a certain logic in this. Both cases involved government-financed professionals (doctors in one case, lawyers in another) and government suppression of information that was relevant to a client’s case because of 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 rationale for refusing to apply *Rust* in *Velazquez* is not entirely clear, however. The Court used two theories to reject 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.⁷³ The Court analogized to public

68. For a comprehensive definition of fraud on the court in a case in which government lawyers committed the fraud, see *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993) (describing the standard for proving fraud on the court).

69. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring prosecutors to disclose material, exculpatory evidence to defense attorneys before trial).

70. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

71. *Id.* at 537.

72. *Id.* at 540 (“The United States and LSC rely on *Rust v. Sullivan*, 500 U.S. 173 (1991), as support for the LSC program restrictions.”).

73. *Id.* at 542.

defenders.⁷⁴ Both public defenders and Legal Services attorneys exemplify government lawyers who could almost never engage in government speech while representing a client. This is because both types of attorneys are in an adversarial relationship with the government and have the goal of obtaining an acquittal in a criminal trial or public benefits in a civil trial—neither of which are results that the government seeks. 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.”⁷⁵

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:

[T]he majority’s contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients—which at the time of *Rust* we had held to be highly relevant to the permissible scope of federal regulation.⁷⁶

As in *Rust*, the lawyers in *Velazquez* were not only being paid with government money, but they were also operating within an intricately structured government program. Cases such as *Velazquez* and *Rust* raise problems that 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 to advance its own positions through government speech. The Court’s second explanation for distinguishing between *Velazquez* and *Rust* speaks to this point, at least to some extent.

The Court’s second explanation for refusing to allow the government to rely on *Rust* is somewhat more sophisticated than the first and follows from an analysis of the inherent characteristics of the medium of expression in which the speaker participates. Certain mediums of expression have their

74. *Id.*

75. *Velazquez*, 531 U.S. at 542.

76. *Id.* at 554 (Scalia, J., dissenting) (citation omitted). 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.* 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 government imposed the restrictions as part of an ordinary regulatory scheme.

own rules, the Court says, 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.⁷⁷

The Court's description of this principle is both abstract and broad. It is not at all clear how far the principle extends, nor is it clear to which free-speech cases it applies. 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.⁷⁸ Oddly, the Court also refers to a rule in limited-public-forum cases that allows the government to impose restrictions on speech in certain forums to make those forums operate more efficiently.⁷⁹ 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 *Velazquez*, the Court focused on the particular roles traditionally played by attorneys in defining the rules for the relevant medium of expression. Two roles 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 issues.⁸⁰ Given these two crucial roles, the *Velazquez* Court concluded that legal restrictions on the speech of government attorneys were inconsistent with this particular medium of expression and would in fact undermine the entire medium. The Court said:

77. *Id.* at 543 (majority opinion).

78. *Id.* (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (permitting producers at a public television station to exercise their editorial judgment in denying a minor political candidate access to a televised debate) and *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (overturning government rules prohibiting editorializing by public broadcasting networks)).

79. *Id.* ("When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program.").

80. *Velazquez*, 531 U.S. at 542, 545–46 (discussing the role of attorneys in assisting clients and the courts).

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.⁸¹

The Court's logic in this section of *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 of expression, the focus is on the courts, rather than the lawyers or the 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 make their decisions.⁸² This is unusual because *Velazquez* is a free-speech case in which the speakers (that is, the Legal Services attorneys) receive very little of the Court's attention. Focusing on the effects of speech restrictions on individuals 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. This societal function of the First Amendment protects certain structural aspects of democracy—in this case, through the development and preservation of broad avenues of communication within society that are free from government control.⁸³

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 *Rust*. Like the legal system, the medical system (of which family-planning clinics are a part) depends on the open availability of information to participants of the system. And like the legal system, in which individual lawyers advising individual clients are an indispensable component of the system, individual

81. *Id.* at 544.

82. *Id.* at 544–46.

83. Another way of thinking about this issue is in terms of whom 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 listeners' interest would complement the discussion in *Velazquez* about the need to protect the speaker's rights, which would facilitate the listeners' ability to do their jobs. This shift in focus from speaker to listeners has some support in the Court's free-speech jurisprudence. *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’” (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972))).

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 healthcare workers have other options, whereas clients receiving incomplete information from government-restricted lawyers do not. The Court noted:

[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.⁸⁴

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 from which to receive the pertinent information. Some of those patients 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 medical professionals 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 were 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 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 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 mean that the government is impinging on constitutional rights.⁸⁵

84. *Velazquez*, 531 U.S. at 546–47.

85. 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. *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

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 predicated its decision to strike down the gag rules in *Velazquez* on 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 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.⁸⁶ If the government really is speaking like a private speaker would, then there is no reason 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.⁸⁷

If the Court consistently applied its theory of government speech, the government should have prevailed in both *Rust* and *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 *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 ceases to function effectively. Unfortunately, the same distortions were evident in *Rust*. Even Justice Scalia, who firmly embraces the concept of government

rather of her indigency."); see *Maier v. Roe*, 432 U.S. 464, 474 (1977) (discussing financial constraints and their influence on reproductive decisions). The Court stated:

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.

Id.

86. See *Rust v. Sullivan*, 500 U.S. 173, 198–99 (1991) (rejecting plaintiffs' First Amendment claims in part on the ground that private speech opposed to the government will continue to exist in the marketplace, funded by private monies).

87. See *Hurley v. Irish-American Gay, Lesbian & 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").

speech and dissented in *Velazquez*, recognized that *Rust* and *Velazquez* were indistinguishable.⁸⁸ Justice Scalia's solution to this dilemma was to argue that the Court should rule in favor of the government in *Velazquez*.⁸⁹ Although this approach would clear up the inconsistencies between *Rust* and *Velazquez*, it would embrace all of the unfortunate consequences produced by the government speech doctrine in *Rust*. On the other hand, the *Velazquez* Court's approach of applying the *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 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 *Velazquez* said 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 *Garcetti v. Ceballos*,⁹⁰ 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 that police used to obtain a search warrant in a pending case.⁹¹ Neither the assistant district attorney's supervisor nor the sheriff's office appreciated his efforts to detect errors in the warrant.⁹² 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.⁹³

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 communicating the government's position in a particular case to a court. Both cases also involve situations in which the government is attempting to silence one of its lawyers

88. *Velazquez*, 531 U.S. 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 *Rust* . . .”).

89. *Id.* at 553–59 (arguing that *Velazquez* is indistinguishable from *Rust* and that the Court therefore should uphold the restrictions on the speech of LSC lawyers).

90. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

91. *Id.* at 415 (noting that the sanctions included “reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion”).

92. *See id.* at 414 (describing a “heated” meeting in which “one lieutenant sharply criticiz[ed] [the assistant district attorney] for his handling of the case”).

93. *Id.* at 414–15.

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.⁹⁴ 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 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,"⁹⁵ 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."⁹⁶ 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 the Court decides that imposing limits on government-funded speakers in the legal medium of expression is just fine (*Garcetti*). The Court's distinctions are either nonexistent (the Court's use of the private-or-government-speech distinction to distinguish between *Velazquez* and *Rust*) or utterly baffling (*Garcetti*). Nevertheless, each of these opinions contains the clues for reconciling these disparate holdings.

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,⁹⁷ while the Court's majority

94. See *Velazquez*, 531 U.S. at 545 (noting that the restriction on Legal Services attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power").

95. *Id.* at 544.

96. *Garcetti*, 547 U.S. at 423.

97. 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.").

argued that although *Rust* was a government speech case, *Velazquez* was not.⁹⁸ Many of the same Justices then ignored the issue altogether in *Garcetti*.⁹⁹ 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 that the speech involved in *Rust*, *Velazquez*, and *Garcetti* is government speech, the government should still have lost the First Amendment battle with the speakers in those cases. This is because 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. The cases involving government-funded lawyers best illustrate these constraints. 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 *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 a way that threatens to "distort[] the legal system by altering the traditional role of the attorneys."¹⁰⁰ Unfortunately for the Court, there is nothing to suggest that the Court should not have applied the same analysis 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 in *Garcetti* to sanction an assistant district attorney for attempting to notify his supervisor 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 because the government was communicating to a court. In any event, whether one characterizes this as an

98. See *id.* at 542 (majority opinion) ("[T]he LSC program was designed to facilitate private speech, not to promote a governmental message.").

99. Seven of the nine Justices participated in both *Velazquez* and *Garcetti*. The exceptions were Chief Justice Roberts and Justice Alito, who joined the Court after it decided *Velazquez*.

100. *Velazquez*, 531 U.S. at 544.

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 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 where 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.¹⁰¹ The California Rules of Professional Conduct state: "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."¹⁰² The professional obligation could not be clearer. Under the terms of *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 response is that the government has the right to speak. Even so, however, 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 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 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 government speech in *Rust* and *Garcetti* undermines the marketplace because the government is using its authority to speak in a way that suppresses accurate

101. *Garcetti*, 547 U.S. at 425.

102. CAL. RULES OF PROF'L CONDUCT R. 5-110 (2009).

and helpful information while misleading those who are seeking to use that information to make important decisions.

The cases reviewed in this Subpart are the cornerstone of the Court's new doctrine of government speech. As this discussion indicates, the doctrine is deeply problematic because of the way the Court has defined its parameters. The Court has been very sloppy about articulating justifications for the doctrine and describing when it 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. The basic restrictions that apply to the doctrine 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. 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 in no way inhibits 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 enters realms of professional discourse—what the Court calls “mediums of expression”—then the government must abide by the same rules applicable to 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: THE CONSTITUTIONAL PROTECTION
OF COMMERCIAL GOVERNMENT SPEECH

The Supreme Court did not develop a very good track record in its early cases for 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 limited 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.¹⁰³ In *Velazquez* and *Garcetti*, the Court dealt with the right of government speech in cases where the government was either attempting to have government-funded lawyers say impermissible things (i.e., presenting incomplete claims to courts), or was instructing its employees to do things

103. See *supra* notes 42–67 and accompanying text (discussing the Court's decision in *Rust*).

that the government was not allowed to do (such as defrauding the court by introducing evidence obtained as fruits of a tainted warrant).¹⁰⁴

One can learn two lessons from the incoherence and confusion of these early cases. First, if the government seeks a “right” to speak, a court should force the government to actually say something. The government’s message should be clear and unambiguous. If the government speaks incomprehensibly or ambiguously, the government contributes nothing to the marketplace of ideas and the government’s garbled speech does not warrant First Amendment protection.

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 like *Brandenburg v. Ohio*¹⁰⁵—in which the speaker is permitted to advocate illegal conduct as long as that conduct is not incited immediately.¹⁰⁶ If a political faction controlling the government acts illegally or advocates illegality, it essentially has relinquished its role as the government and has forsworn any claim to the constitutional protection of government speech.

A third lesson regarding the proper parameters of the government speech doctrine can be derived from a third set of cases in which the doctrine has manifested itself. This third lesson is that government should not use its “right” to speak to inhibit private speech when the inhibition on private speech is unnecessary for the 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 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 position.

104. See *supra* notes 68–103 and accompanying text (explaining the Court’s application of the government speech doctrine in these cases).

105. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (describing the First Amendment rules protecting political speech).

106. *Id.* at 447. The Court stated:

[T]he 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.

Id.

Ultimately, the lesson of this category is that although the government may 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.

This third set of cases illustrates how confusing and contradictory the Court's government speech decisions have been. As these cases indicate, it is often difficult to predict 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 Bros. & Elliott, Inc.*, involved mandatory assessments to market tree fruit.¹⁰⁷ 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 mushrooms.¹⁰⁸ The third program, which the Court upheld in *Johanns v. Livestock Marketing Ass'n*, involved mandatory assessments to market beef.¹⁰⁹ In each of these three programs, a government-authorized entity collected fees from producers of the particular commodity, usually based on the volume of the product sold, and then used these fees to advertise or otherwise promote the sale of the commodity.¹¹⁰

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.¹¹¹ According to the Court, the mushroom program struck down in *United Foods* constituted private speech,¹¹² 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 *Glickman* did not constitute government speech, but it was part of the government's collectivist centralization of the market for tree fruit,¹¹³ which somehow led

107. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 463 (1997) (explaining the challenged advertising program).

108. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

109. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 566–67 (2005).

110. *See id.* at 553–54 (describing the mechanics of the beef program); *United Foods*, 533 U.S. at 408 (describing the mechanics of the mushroom program); *Glickman*, 521 U.S. at 460–62 (describing the mechanics of the tree-fruit program).

111. *See Johanns*, 544 U.S. at 560 (holding that the Beef Board's commercial efforts constitute government speech because “[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself”).

112. *See 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”).

113. *See Glickman*, 521 U.S. at 475 (“While the First Amendment . . . protects the individual producer's right to advertise its own brands, the statute is designed to further the economic interests of the producers as a group.”).

the Court to conclude that mandatory assessments for commercial speech within that market did not constitute compelled speech in violation of the First Amendment.¹¹⁴

Since the Court struck down the program involving mandatory assessments to market mushrooms, it is evident 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 *United Foods* mushroom program and the *Johanns* beef program were so slight that the court of appeals found the two cases “in all material respects, identical.”¹¹⁵ The only reason the Supreme Court reversed the court of appeals and upheld the beef program was that the Court characterized that program as involving government speech.¹¹⁶

From a First Amendment perspective, however, the Court’s characterization of the beef marketing program as “government speech” should not matter. Everything the Court said in *United Foods* about the imposition on the free-speech rights of farmers objecting to the mushroom program could also be said of the farmers who participated 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.¹¹⁷ (Indeed, even that distinction is dubious since the “private” mushroom program was created by a federal statute, which provided the “Mushroom Council” with the legal authority to collect the funds that were the basis of the compelled-subsidy claims of the dissenting farmers.¹¹⁸) 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 First Amendment generally prohibits the former and permits the latter. “Compelled support of government’—even those programs of government one does not approve—is of course

114. *Id.* at 469–70 (discussing various differences between *Glickman* and the Court’s compelled-speech precedents).

115. *Livestock Mktg. Ass’n v. U.S. Dep’t of Agric.*, 335 F.3d 711, 717 (8th Cir. 2003) (quoting *Livestock Mktg. Ass’n v. U.S. Dep’t of Agric.*, 207 F. Supp. 2d 992, 1002 (D.S.D. 2002), *vacated sub nom. Johanns*, 544 U.S. at 550).

116. *See Johanns*, 544 U.S. at 560–67 (discussing various ways in which the beef program constituted government speech and therefore did not violate the First Amendment).

117. *Compare id.* at 553–54 (describing the operation and makeup of the beef marketing board), *with United Foods*, 533 U.S. at 408 (describing the operation and makeup of the mushroom marketing board).

118. *See United Foods*, 533 U.S. at 408 (describing the statutory basis for the mushroom marketing program).

perfectly constitutional, as every taxpayer must attest.”¹¹⁹ The Court’s glib assumption that the compelled support of government in general is identical to the 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. The majority observed that “[h]ere, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages.”¹²⁰

Setting aside the irony of depending on the political process to defend against infringements of a countermajoritarian constitutional provision such as the First Amendment, the Achilles’ heel of the Court’s approach to government speech in this area is its equation of 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, 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 this way. There are intuitively obvious differences between paying 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 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.¹²¹ It seems logical that the dissenters’ objections to the compelled speech would be greater than when taxpayers are asked to finance broad government programs 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,

119. *Johanns*, 544 U.S. at 559.

120. *Id.* at 563.

121. *Id.* at 566.

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, the Constitution permits government speech in generalized government programs because the government could not conduct most programs 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 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 policymaking 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 the government 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 primarily or exclusively involve speech require a different analysis. Taking the beef marketing program from *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 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 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 has thereby needlessly inhibited private speech. As noted in the beginning of this Subpart, 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 unnecessary for the government to communicate its point to the public. Allowing the beef producers who object to the government's marketing plan for the producer's product to opt out of that plan would not inhibit the government's ability to communicate its message and therefore, would not violate a properly constituted "right" to government speech.

D. *MANIFESTATION FOUR: THE CONSTITUTIONAL PROTECTION OF 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 Court applies the concept in situations in which it has no relevance. The government speech concept 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.¹²² However, under modern First Amendment jurisprudence, 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.¹²³ 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.¹²⁴ This is problematic not only because it confuses the analysis with regard to public forums, but also because it gives a government entity the opportunity 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 *Pleasant Grove City, Utah v. Summum*,¹²⁵ a case that the next Subpart addresses. For the moment, it is worth noting how the Court confused public-forum and government-speech analysis in the cases leading up to *Summum*.

Two of the cases in which the Court addressed government speech in the context of public forums involved speech financed by student-activity fees at public universities. In both *Rosenberger v. Rector & Visitors of University of Virginia*¹²⁶ and *Board of Regents of the University of Wisconsin System v. Southworth*,¹²⁷ the basic question was whether a public university could collect student fees and then use them to finance the expression of student

122. See *supra* notes 17–18 and accompanying text (discussing *Davis*).

123. See *supra* note 19 and accompanying text (discussing early public-forum case law).

124. See *infra* notes 125–38 and accompanying text.

125. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

126. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

127. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

groups with which many student fee-payers disagreed. *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.¹²⁸ *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 the University uses to finance expression with which the fee-payer disagrees.¹²⁹ 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 forums¹³⁰—that is, publicly financed forums for public discussion that have a nonphysical form, unlike 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 the Court needs to make in such cases is whether the government intended to "expend[] funds to encourage a diversity of views from private speakers."¹³¹

The unfortunate aspect of *Rosenberger* and *Southworth* is not, therefore, their holdings or their analyses of the public-forum doctrine. Rather, it is the subtle suggestion in *Southworth* that government speech may in some way be relevant to the university enterprise. The issue of government speech comes up in *Rosenberger*, but only briefly and in a context in which the Court gives itself the opportunity to reaffirm *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,"¹³² before concluding that the "distinction between the University's own favored message and the private speech of students is evident" in this case.¹³³

In *Southworth*, the Court discusses the government speech concept in more detail, which is somewhat puzzling since the Court concedes that government speech is not an issue in the case.¹³⁴ 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

128. 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).

129. See *Southworth*, 529 U.S. at 233–34 (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).

130. See *Rosenberger*, 515 U.S. at 830 ("The [student-activities fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

131. *Id.* at 834.

132. *Id.* at 833.

133. *Id.* at 834.

134. *Southworth*, 529 U.S. at 229.

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.¹³⁵ If the Court pursued this suggestion, the Court might declare the simple assertion of the government's intent to be sufficient to place particular speech into the category of "government speech" and thereby foreclose substantial First Amendment protection to 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."¹³⁶ If the Court pursued this suggestion, one could read these comments to suggest that First Amendment restrictions on government would not apply at all to speech that the Court 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. The discussion suggests 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 Court permitted the government in *Rust* to control the speech of government-financed doctors.¹³⁷ As with the Court's other comments in *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 than enhance, speech at a university.¹³⁸

The Court's discussion of the concept of government speech in the university public-forum cases was both broad and indefinite. But since the Court admitted that the government speech concept did not apply in either case, it is difficult to see why it felt the need to raise the issue at all. The real lesson of these cases should be that when a public forum exists, the

135. *Id.* (noting that the case was not a government speech case because "[t]he University's whole justification for fostering the challenged expression is that it springs from the initiative of the students").

136. *Id.*

137. *Id.* at 235 (noting that *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").

138. *Id.* at 238–39 & n.5 (Souter, J., concurring in the judgment); *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").

government speech concept is simply inapplicable. The Court has yet to identify a single proper application of the constitutional 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, *Rosenberger* and *Southworth* may be harbingers of a subtle shift in the Court's public-forum analysis to use the government speech concept to restrict speech in public forums. The next Subpart will discuss this shift and will note how some of the Court's subtle suggestions in cases like *Southworth* have begun to bear fruit in a way that has both muddled public-forum analysis and undermined basic First Amendment rights.

E. *MANIFESTATION FIVE: THE CONSTITUTIONAL PROTECTION OF 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 constitutional 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*.¹³⁹ In *Summum*, the Court used the government speech doctrine 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.¹⁴⁰ This result is bad enough from the perspective that the Court used the government speech doctrine to limit a private speaker's access to a public forum to symbolically oppose a government action. But, the result becomes even stranger given the fact that the Court went out of its way to avoid forcing the City to acknowledge what message it was trying to communicate through its now-protected speech. The result becomes even stranger still when one recognizes that the City resisted acknowledging its messages because they may have been unconstitutional. Apparently, *Summum* stands for the proposition that the government has the right to speak even if the government will not reveal what it wants to say.

In some ways, *Summum* started as a relatively commonplace example of litigation over the placement of a Ten Commandments monument in a public space by a government entity. 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,¹⁴¹ while holding unconstitutional a Ten Commandments display in several government

139. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

140. *Id.* at 1129.

141. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

buildings in Kentucky.¹⁴² Like many of the Ten Commandments cases (and one of the cases decided by the Supreme Court), *Summum* involved a monument that a group called the Fraternal Order of the Eagles donated to the City in 1971.¹⁴³ 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.¹⁴⁴ He contacted the Fraternal Order of Eagles, who funded and carried out the judge's ideas with a little help from Cecil B. DeMille, who used the monuments to promote his new movie, *The Ten Commandments*.¹⁴⁵ 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 one religious group places sectarian religious objects in public, other religious groups that have different perspectives will wish to express their own contrasting views. This was the case in *Summum*. *Summum* is a religious group based in the same state in which the dispute over the Ten Commandments monument arose.¹⁴⁶ *Summum* is a derivative of Gnostic Christianity and is a religion with very specific views about the central feature of this case—the Ten Commandments.¹⁴⁷ According to the *Summum* theology, before receiving the Ten Commandments from God, Moses received the Seven Aphorisms.¹⁴⁸ These aphorisms provided similar, but far more abstract guidance than the Ten Commandments. Because Moses believed that the Israelites were not yet ready to receive the Seven Aphorisms, he destroyed the original tablets and returned to Mount Sinai where he received the Ten Commandments.¹⁴⁹ Nevertheless, according to the *Summum* religion, the Seven Aphorisms continue to exist as the higher level of theological understanding, in comparison with the lower level of understanding represented by the Ten Commandments. 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

142. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005).

143. *Summum*, 129 S. Ct. at 1129.

144. *See Books v. City of Elkhart, Ind.*, 235 F.3d 292, 294 (7th Cir. 2000).

145. *Id.* at 294–95.

146. *Summum*, 129 S. Ct. at 1129.

147. *See id.* at 1129 n.1 (discussing the *Summum* beliefs about the Ten Commandments and the Seven Aphorisms); *The Aphorisms of Summum and the Ten Commandments*, <http://www.summum.us/philosophy/tenccommandments.shtml> (last visited Apr. 18, 2010) (same).

148. *Summum*, 129 S. Ct. at 1129 n.1.

149. *Id.*

by including only half the story and omitting the higher level of theological understanding represented by the Seven Aphorisms.

Oddly enough, the Supreme Court turned what was really a theological dispute between competing religions—the mainstream Protestant theology embraced by the City versus a version of Gnostic Christianity represented by *Summum*—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 while simultaneously refusing to acknowledge what it was trying to say.

It is not surprising that the Establishment Clause issues were de-emphasized in this case. After all, one party was a city that sought to engage in religious speech in a public park.¹⁵⁰ The other party was a religious group trying to get its own theological monument into the same park. So, neither party had an interest 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 Commandments.¹⁵¹ 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 images,” “Thou shalt not take the Name of the Lord thy God in vain,” and “Remember the Sabbath day, to keep it holy”¹⁵²—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

150. *Id.* at 1129. Jay Sekulow, chief counsel of the American Center for Law and Justice (“ACLJ”) represented the City. The ACLJ is an evangelical litigation group founded by Pat Robertson. See American Center for Law and Justice, About ACLJ, <http://www.aclj.org/About/> (last visited Apr. 18, 2010) (describing the ACLJ’s purpose in a letter from Jay Sekulow).

151. 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. Other opinions contain the text used on the Fraternal Order of Eagles monuments, 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 v. Perry*, 545 U.S. 677, 707 (2005) (Stevens, J., dissenting) (describing the text customarily used on the Fraternal Order of Eagles monuments). For a discussion of the theological and political significance of the different versions of the Ten Commandments, see generally Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477 (2005).

152. *Van Orden*, 545 U.S. at 707 (Stevens, J., dissenting).

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.¹⁵³

Sumnum 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 Sumnum's. Further, Sumnum also probably understood that the best way to convince the City to erect a monument with the Seven Aphorisms was to underscore the (possibly unconstitutional) religiously exclusionary message that the City was sending by refusing to do so. So, Sumnum requested that the City undertake a formal process of identifying the specific message that the City was endorsing by allowing the Fraternal Order of Eagles to erect the monument of the Ten Commandments.¹⁵⁴ 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."¹⁵⁵

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.¹⁵⁶ This discussion was apparently intended to demonstrate the obvious propositions that monuments may convey different messages to different people, and that these messages may change with time. All of this is true, and entirely beside the point. The essential issue with regard to the question of 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 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 addressed what the City intended to say when it adopted the Fraternal Order of Eagles religious monument.¹⁵⁷ 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

153. See *Sumnum*, 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.")

154. *Id.* at 1134.

155. *Id.*

156. *Id.* at 1134–37.

157. *Id.* at 1137–38.

its own expression to publicly acknowledge what it wanted to say. In the end, therefore, the Court gave the City the right to say nothing.

As with many of the other categories of government speech discussed earlier in this Article, *Summum* ends up being a case where 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 government 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 noncommunicative action. The Court has long held with regard to private speakers that a noncommunicative action does not receive First Amendment protection.¹⁵⁸ It is only logical that the same rule would apply to government entities. Moreover, if the government entity is avoiding announcing its intended message because that message may be illegal, then it is difficult to construct 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 courts should force the city to articulate its message fully and submit that message to the courts for a determination of the message's legality. Only at the point at which the city announces a fully articulated and legal message 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.

158. See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (explaining that private speakers do not receive First Amendment protection for their noncommunicative actions). The Court stated:

"[F]reedom 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 undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Id.

As illustrated in the previous Subparts, the carelessness that characterizes the Court's majority opinion in *Sumnum* 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 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 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.

F. *THE LATEST MANIFESTATION OF THE CONSTITUTIONAL PROTECTION OF GOVERNMENT SPEECH—THE SPECIALTY LICENSE PLATE CASES*

The Court will probably have an opportunity to address these issues again soon in a context that resembles *Sumnum*. The gaps and evasions in the Court's earlier government speech opinions may frustrate the Court's effort to address the latest manifestation of these issues in a satisfactory way. These new cases involve constitutional challenges to state refusals to issue specialty license plates with the antiabortion inscription "Choose Life."¹⁵⁹ All of these cases involve the issue of government speech, and one court of appeals decision states flatly that the constitutionality of a state's refusal to issue a "Choose Life" tag boils down to the empirical question of whether the state "has adopted that speech as its own."¹⁶⁰ Once a court determines 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:

159. See *Roach v. Stouffer*, 560 F.3d 860, 871 (8th Cir. 2009) (holding that the State of Missouri was obligated to issue a "Choose Life" tag); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 855–56 (7th Cir. 2008) (holding that the Constitution does not prohibit the State of Illinois from refusing to issue a "Choose Life" tag), *cert. denied*, 130 S. Ct. 59 (2009); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 960 (9th Cir. 2008) (holding that the State of Arizona was obligated to issue a "Choose Life" tag).

160. *Stanton*, 515 F.3d at 963.

(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 speech¹⁶¹

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 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 drivers to use license plates 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. 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 that particular groups propose to place on 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 the government adopted and placed on government property constituted government speech.¹⁶²

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 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 “Choose Life” license plates have ruled that states are constitutionally obligated to issue the plates whether they want the plates to convey that controversial message or

161. *Id.* at 964.

162. *See supra* notes 140–46 and accompanying text (discussing the Court’s holding in *Summum*).

not.¹⁶³ These decisions are not lacking in doctrinal support. The easiest route to these conclusions is through the application of the First Amendment public-forum doctrine, a doctrine that provides abundant opportunities for courts to construct an opinion requiring states to admit controversial speakers to the specialty license plate “forum.”¹⁶⁴ But it tells us something important about the weakness and intellectually vacuous nature of the Court’s new government speech doctrine that the Court can write a perfectly plausible opinion using the public-forum doctrine in a situation where 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 these 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 an 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 the government is speaking in a nonideological way about matters unrelated to public-policy disputes, it is unclear why the government speech doctrine should even apply, or why courts should use the doctrine 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 how the existence of a government speech doctrine can potentially damage existing First Amendment protection of private speech. 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 ways a court could characterize the specialty license plate programs. The court could declare these programs to be 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 would be very conducive to free speech because many different groups would then be able to place their logo or slogan on license plates and thus enable their supporters to disseminate the groups’ messages freely. The

163. See *Stouffer*, 560 F.3d at 871 (holding that the State of Missouri was obligated to issue a “Choose Life” tag); *Stanton*, 515 F.3d at 960 (holding that the State of Arizona was obligated to issue a “Choose Life” tag).

164. For one version of the argument that state specialty license plate programs create a public forum, see *Stanton*, 515 F.3d at 968–71; *id.* at 971 (“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 served by the forum.”).

government could not 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.¹⁶⁵ On the other hand, the characterization of these programs as nonpublic forums would significantly inhibit free speech because the government could bar all groups from using license plates as a medium to disseminate their messages.¹⁶⁶ The good news, from a free-speech perspective, is that once 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, however, 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 it would permit some controversial ideological messages 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, *Sumnum* and this newest manifestation of the doctrine add several more. First, *Sumnum* creates certain logical difficulties with the entire concept of government speech since in that case the Court protects government entities with the government speech doctrine without requiring the entities to announce the message that they intend to convey through their speech.¹⁶⁷ The logical conundrum is that speech in this context means to "convey a message." If the government is not conveying a message, then by definition it is not speaking and therefore should not benefit from 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

165. See *Police Dep't of Chi. 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.").

166. See *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007). The Court stated:

[I]t is . . . black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.

Id.

167. See *supra* notes 155–56 and accompanying text (noting that the Court in *Sumnum* did not require the city to adopt a particularized message).

determining when the government is speaking.¹⁶⁸ 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 discretion about what speech to permit and what speech to ban.¹⁶⁹ 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 because 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 authority to communicate with the public about matters of public policy. The next Part addresses the question of whether it is worth revisiting the relatively young government speech doctrine to limit the doctrine to its proper functions, or whether it would 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.

IV. 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 broadly as the modern Court seems inclined to do and is then used to justify the government's suppression of private speech. The Court's own recent government speech cases indicate why this is so. In *Rust*, the Court used the concept of government speech to permit the government to silence both private speakers who had different

168. See *supra* notes 161–62 and accompanying text (setting forth the four-part test that some courts of appeals use in determining whether there is government speech).

169. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (discussing the use of official discretion to suppress speech in the licensing context, and noting that “the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused”).

political positions from the government,¹⁷⁰ and also medical professionals who were merely seeking to advise their patients on personal healthcare matters.¹⁷¹ In *Garcetti*, the Court used the government speech doctrine to permit government prosecutors to withhold important information from (and possibly defraud) the courts.¹⁷² In *Johanns*, the Court used 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.¹⁷³ And in *Summum*, the Court expanded the government speech concept to provide the government with legal protection despite the government's refusal to articulate the message that it is allegedly endeavoring to communicate—even though the government's refusal may be nothing more than an effort to skirt Establishment Clause restrictions on the government's endorsement of religion.¹⁷⁴

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 government speech doctrine and has been even less careful about applying the doctrine of government speech in situations where the government is not really saying anything. As a result, the Court has often permitted the government to use the mantle of government speech to suppress private speech when, in fact, the government speech doctrine is not necessary to protect any legitimate government 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, where the Court extended the government speech doctrine beyond what was necessary to serve the government's legitimate

170. See *Rust v. Sullivan*, 500 U.S. 173, 180 (1991) (discussing the need for organizations receiving government funds to keep themselves physically and financially separate from organizations engaged in abortion advocacy or lobbying).

171. *Id.* (discussing government instructions for healthcare workers in advising patients without mentioning abortion).

172. See *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (upholding the application of employment sanctions to an assistant prosecutor who sought to inform the court of a potentially invalid warrant).

173. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 567 (2005) (upholding a program imposing fees on beef producers to support a government-organized campaign to market beef).

174. See *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1138 (2009) (holding that a city had the right to "speak" by placing a donated Ten Commandments monument in a restricted area of a public park).

interests. These lessons reflect some relatively commonplace First Amendment principles, the application of which could limit the government speech 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 Court should not allow governments to overreach in using the government speech doctrine while they are seeking to ensure that their 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.¹⁷⁵ *Rust* is an example of government speech that goes far beyond the government's legitimate needs. Whatever the government needed to do to ensure that it effectively communicated its family-planning policies to the public, that effort did not need to include suppressing the speech of healthcare workers who were 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.¹⁷⁶

The effective enforcement of this lesson would require close attention to the professional roles of those being regulated by the government. If, as in *Rust*, the government is attempting to regulate healthcare workers or, as in *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.¹⁷⁷ The government has many avenues for communicating its message to the public without using

175. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (“[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”).

176. For a full discussion of this point, see *supra* notes 61–62 and accompanying text (describing *Rust* as a “perfect example” of how the government’s speech rights suppress private speech).

177. 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. David Cole, *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. *Id.* at 736. Applying these criteria to speakers operating within professions such as law or medicine would produce the results discussed in the text—that is, that the government must be neutral with regard to speech falling within the parameters of the professional obligations of the speaker.

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 attribute those statements to the government. To the extent that the government's 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*.¹⁷⁸ 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. Using the government speech doctrine as a mechanism for suppressing private, truthful speech 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 government 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 use the government speech doctrine in a way that would freeze private speakers from the marketplace of ideas, the government should not use the government speech doctrine to coerce private speakers into embracing government positions with which they disagree. This lesson is derived from the Court's cases dealing with government agricultural marketing programs,¹⁷⁹ 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

178. See *supra* notes 90–103 and accompanying text (discussing *Garcetti*).

179. See *supra* notes and 107–22 and accompanying text (discussing these cases).

message with which he does not agree.”¹⁸⁰ Although the Court in *Johanns* accepted the application of this proposition to compelled speech, it distinguished between compelled-subsidy cases involving government compulsion to finance private speech and those involving government compulsion to finance government speech.¹⁸¹ 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 message’s content is private or public. What matters is that the government is forcing someone to say something that he or she does not believe.

The Court’s distinction between government-mandated support of private speakers and 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. Reconciling this principle with free-speech rights obligates courts to restrict the application of the government speech doctrine to situations where 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 those who object to the government’s message from the mandate to support the government’s speech 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 applying the doctrine will effectively suppress private speech and will not significantly improve the government’s efforts to get its message out to the public.

180. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943)).

181. *See supra* notes 110–16 and accompanying text (discussing what the Court found were constitutionally significant differences between the three agricultural programs).

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 has ignored these lessons repeatedly in its government speech cases. The third lesson is that when the government claims a right to speak, courts should require the government to articulate its message clearly so that the courts can determine how broadly the government speech right should be construed and so 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 third lesson's requirement the government cannot supply the courts with a clearly articulated message, then under the fourth lesson the government should lose its 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 to broaden the public's access to ideas in an intellectual marketplace, then the Court should only apply the doctrine when it actually accomplishes that goal. Thus, the doctrine is simply inapplicable when the government is speaking ambiguously, incomprehensibly, or not at all. The doctrine is also inapplicable when the government uses speech as a tool in illegal activities or as an excuse to avoid other constitutional limitations on its behavior. Unfortunately, these examples of when the government speech doctrine should not apply describe many of the cases in which the Court has applied its new doctrine.¹⁸²

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 common-sense 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 of whether the government speech doctrine is necessary at all. The answer is probably no.

182. For example, *Rust* involved ambiguous speech, *see supra* notes 56–67 and accompanying text; in *Summum*, the government may have been trying to skirt Establishment Clause prohibitions when it refused to declare its message, *see supra* notes 155–58 and accompanying text; and in *Garcetti*, the government may have been trying to defraud the courts, *see supra* notes 91–94 and accompanying text.

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 applying 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.¹⁸³

This last point is the rub: the government speech doctrine is not, in the end, about the government's speech at all. As the Court has applied it, the government speech doctrine is about using the government's speech as an excuse to circumvent other constitutional rules, 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

183. Caroline Mala Corbin suggests 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. *Id.* at 675–80. Although this is 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 introduces a balancing test into this area. The reason this is a problem is that balancing tests seldom 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 what a court would ordinarily consider to be 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.

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 into other areas where government and private expression may clash. Exterminating the government speech doctrine would not 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.

V. CONCLUSION

There is no denying that at times the government must speak to the public. Unfortunately, the Supreme Court has taken this undeniable but uninteresting truth and used it 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 Part III of this Article. As noted in that Part, if we limit the government speech doctrine in this way, then the doctrine basically ceases to exist. From a First Amendment perspective, this is probably the best result of all.