

Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values

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I. INTRODUCTION

For the last quarter century, the public forum doctrine has been the dominant paradigm for resolving questions about the right of access to government property or support. That dominance may be coming to an end as the Supreme Court increasingly relies on and expands the government speech doctrine. Although the government speech doctrine is a relative newcomer to First Amendment jurisprudence, any doubts to its importance were dispelled by the Supreme Court's unanimous embrace of the doctrine over the more established public forum doctrine in the recent case of *Pleasant Grove City v. Summum*.¹

The *Summum* case was not the first time that the public forum doctrine and the government speech doctrine have clashed in court. As the courts wrestle with when to apply one doctrine or the other, a decisive influence has been the relative importance courts place on the competing values of equality and democracy. On the one hand, the public forum doctrine is premised on the idea that all citizens have an equal right to speak in the public forum and a right to equal treatment from the government that cannot vary with whether the government agrees or disagrees with their viewpoints. On the other hand, the government speech doctrine is rooted in the democratic ideal that the government should be able to favor the points of view that reflect the policies and values of the majorities that elected it.

These different value systems explain the difference in the central tenets of each doctrine. The fundamental rule of the public forum is that the government cannot discriminate based on a speaker's viewpoint. In contrast, the central assumption of the government speech doctrine is that the government not only can, but must, support some viewpoints over others if it is to govern at all, and it is the very act of picking and choosing among different possible viewpoints that is the hallmark of government speech.

This article assesses the implications of the government speech doctrine's displacement of the public forum doctrine as the dominant First Amendment paradigm for government-subsidy cases. Section two briefly reviews the origins of the public forum doctrine and explains how its original application to streets and parks decisively shaped its future conception as a guarantee of equal treatment regardless of a speakers' viewpoint.

Section three sketches the rise of the government speech doctrine and argues that the doctrine reasserts the democratic principle that government should carry out the wishes of the majorities that elected it.

Section four demonstrates that, at least for the moment, when given the choice, courts consistently embrace the democratic principles of the government speech doctrine over the egalitarian principles of the public forum doctrine.

1. See *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1128-29 (2009).

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Section five examines potential limits on the government speech doctrine and concludes that, because the doctrine is premised on democracy, limits over and above a few narrow categories, if they are to come at all, will need to come from the ballot box and not from the courthouse.

II. A BRIEF HISTORY OF THE PUBLIC FORUM DOCTRINE

A. *Origins of the Public Forum Doctrine*

In the long human history before modern technology gave millions of people instant access to a worldwide audience at the press of a few buttons, speakers who wanted to reach a public audience went to the public square to find sympathetic ears.² In its original form, the public forum doctrine gave legal acknowledgement to this history.

The public forum doctrine originated in a 1939 case where the government tried to keep union organizers off of city streets.³ Without access to the public thoroughfares, the unions could not effectively recruit new members to their cause. This restriction on the unions' access to the public prompted Justice Roberts to sketch out the essential features of what would later be known as the public forum doctrine in a famous passage⁴:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to

2. The classic example is the great Roman forum. The forum is described as "the central heart and business hub of the ancient city [of Rome]. From this communal gathering area all manner of life and livelihood accumulated. Those in commerce, trade, and general business to those in politics, plays, and prostitution all gathered in the Roman Forum where religious cult practices and the administration of justice were dispensed side by side." The Roman Forum - Archaeology Expert (UK), <http://www.archaeologyexpert.co.uk/TheRomanForum.html> (last visited Aug. 29, 2009). A more modern example is London's Hyde Park where "since 1872, people have been allowed to speak at Speaker's Corner on any subject they want to." Hyde Park History and Architecture, http://www.royalparks.org.uk/parks/hyde_park/history.cfm (last visited Aug. 29, 2009).

3. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 504-05 (1939).

4. Use of Lexis Nexis's Sheperd's @ revealed that, as of Aug. 31, 2009, *Hague* has been cited in 1,558 decisions.

the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁵

Within the lofty phrases of this crucial passage are a few ideas that bear specific mention. First, the public forum doctrine is rooted in (and justified by) history. This history is not described because it extends back to “ancient times.”⁶ It is so old that its origins are “immemorial[]” and shrouded in “time out of mind.”⁷ Since the doctrine is justified and defined by the way things were done in the past, its application to the modern instruments of government must be by analogy and inference and can be limited by the same history that created it.

Second, the public’s free access is limited to the specific, outdoor, geographic spaces of “streets and parks.”⁸ Because streets and parks are subject to rules that apply equally to all, requiring the government to give equal treatment to all speakers is not much of a stretch.

Third, even in streets and parks, some government regulation is permissible. Notions such as “general comfort and convenience” and “peace and good order” can justify regulation of speech even in public forums like streets and parks that have “been held in trust . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁹

Finally, although some regulation can be justified, the right to speak in a public forum cannot “be abridged or denied” through “the guise of regulation.”¹⁰ In other words, a line must be drawn between reasonable regulation that is permissible and abridgement of the right to speak, which is forbidden by tradition and, consequently, by the Constitution.

At first tentatively and then with increasing vigor and precision, in the 1970s and 1980s, the Supreme Court began the work of drawing that line between regulation and abridgement.¹¹ In 1972, in *Police Dept. of Chicago v. Mosley*, the concept of the public forum made a forceful reappearance as a basic right of the people.¹² Like the original public forum case of *Hague, Mosley* also dealt with labor unions and picketing, this time in the streets around schools.¹³ In a sign of how labor’s fortunes

5. *Hague*, 307 U.S. at 515-16.

6. *Id.* at 515.

7. *See id.*

8. *Id.*

9. *Id.* at 515-16.

10. *Id.* at 516.

11. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965) (strongly influencing the revival of the public forum doctrine in the 1970s and 1980s); *see also* Samuel Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273 (1967); Allan Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931 (1969).

12. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

13. *Id.* at 92-93.

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had improved in the intervening 33 years, while *Hague* was about a law that explicitly banned union demonstrations, in *Mosley* picketing was banned for all groups *except* labor unions.¹⁴ In analyzing whether all picketing except labor union picketing could be kept off the streets, the Court returned to the rhetoric of the public forum with the firm statement that “[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”¹⁵ Accordingly, the ban in *Mosley* was illegal because the government discriminated in favor of labor picketing and against all other picketing.¹⁶ In the public forum, all speakers needed to be treated equally.

In many ways, *Mosley* was a natural case for the public forum concept to appear because the picketing ban applied to streets, where, along with parks, tradition dictated people be allowed to speak freely. Two years later, in 1974, the public forum doctrine took a tentative step beyond its traditional bounds and towards becoming something much larger and more significant: a unified theory of the right to access government property.

In *Lehman v. City of Shaker Heights*, the Supreme Court considered whether banning political ads from the sides of buses while allowing other kinds of ads violated the Constitution, in the way that banning all picketing but labor picketing violated the Constitution in *Mosley*.¹⁷ The plaintiff, a candidate for political office whose campaign ad had been refused, argued that the ad space on the buses was a “public forum.”¹⁸ A majority of the Court refused to go along with this expansion of the doctrine.¹⁹ The Court found the public forum concept did not apply for the simple reason that “[h]ere, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce.”²⁰

The significant development in *Lehman*, was not in the majority opinion, but in the fact that four members of the Supreme Court were ready to look past the public forum doctrine’s open-space origins and apply it to ads on city buses. Justice Brennan, writing for the four dissenters, argued that the city had created a “forum for

14. *Id.* at 94.

15. *Id.* at 96.

16. *Id.* at 101-02. Technically speaking, *Mosley* was decided under the Equal Protection Clause rather than the First Amendment. *Id.* at 94-95. Nevertheless, the Court itself noted that “the equal protection claim in this case is closely intertwined with First Amendment interests.” *Id.* at 95. It is no accident, however, that the free speech clause bumps into the Equal Protection Clause in the public forum because the essence of the freedom of speech in the public forum is equal treatment of speakers. As discussed below, this commitment to equality eventually becomes the hallmark of the public forum doctrine: the prohibition on viewpoint discrimination.

17. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299 (1974).

18. *Id.* at 301.

19. *Id.* at 301-02 (plurality opinion).

20. *Id.* at 303 (plurality opinion.; *see also id.* at 306 (Douglas, J., concurring) (“[A] streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home.”).

communication” by allowing advertisements on buses.²¹ As a consequence, the decision to exclude political advertisements needed to be “closely scrutinized” to make sure that “subject matter or content” was not the sole basis for the “selective exclusion[].”²²

This form of reasoning marked a radical rethinking of the public forum doctrine. In its original articulation, the doctrine was justified by historical practices that existed since “ancient times.”²³ In Justice Brennan’s restatement, the doctrine applied to all “forums of communication” opened wittingly or unwittingly by the government.²⁴ Although this broader view of what should be considered a “public forum” did not prevail in *Lehman*, Justice Brennan’s forceful argument would reverberate in future cases.²⁵

The broader reconceptualization of the public forum doctrine advanced by Justice Brennan and the *Lehman* dissenters gained momentum the following year when the Court held that a municipal theater was a public forum that was “designed for and dedicated to expressive activities,” and that it was unconstitutional to deny permission to use the theater based on the content of the proposed performance was unconstitutional.²⁶

The idea picked up more speed when, in 1976, the Supreme Court held that a public school teacher could not be prohibited from addressing a school board meeting under a statute that prohibited the school from “negotiating” with members represented by the teachers’ union.²⁷ “Forum” language slipped in as the Court observed that “[w]here the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings.”²⁸ In the span of a few years, the public forum doctrine had escaped

21. *Id.* at 314 (Brennan, J., dissenting).

22. *Id.* at 316-17 (Brennan, J., dissenting).

23. *See supra* note 5 and accompanying text.

24. *See Lehman*, 418 U.S. at 310 (Brennan, J., dissenting).

25. Twenty-five years later, a similar case regarding the effect of allowing advertisements on the walls of a high school’s baseball field was analyzed without controversy under the, subsequently expanded public forum doctrine—although the ultimate result was the same. *See Diloretto v. Downey Unified Sch. Dist. Bd.* 196 F.3d 958, 967 (9th Cir. 1999) (holding that “the baseball field fence was a non-public forum open for a limited purpose.”).

26. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). In this case, the Court characterized the city’s refusal to permit the performance as an illegal “prior restraint.” *Id.* at 556, 559. In future cases, as the public forum doctrine took its modern shape, the Court would not feel compelled to link its decision to the more established line of cases dealing with prior restraints.

27. *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 176 (1976).

28. *Id.* at 175. Meanwhile, Justice Brennan in his concurrence continues to argue for an expanded conception of public forum, describing the school board meeting as “a public forum dedicated to the expression of views by the general public.” *Id.* at 179 (Brennan, J., concurring).

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from the cold outdoors of streets and parks and slipped into the warm interiors of theaters and public meetings.

B. The Public Forum Doctrine's Modern Shape

From these tentative antecedents, the public forum doctrine decisively broke out from its traditional confines in 1981 in *Widmar v. Vincent*, a case involving access to meeting rooms on a public university campus.²⁹ In *Widmar*, the University had a general policy of allowing student groups to reserve campus space, but, out of concern for violating the Establishment Clause, the University excluded groups that sought to use the space “for purposes of religious worship or religious teaching.”³⁰

Leaving behind the history of streets and parks as the exclusive realm of the public forum and drawing on its earlier references to school board meetings and municipal theaters as public forums, the Supreme Court concluded that the University had created a “public forum” by letting its students use its property. The Court held that “[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.”³¹ The University may not have been “required to create the forum in the first place,” but, once having created it, the University “assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”³²

In a footnote, the Court implicitly acknowledged that its holding constituted a departure from its prior public forum jurisprudence. The Court recognized that “[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters.”³³ Nevertheless, the Court also found that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”³⁴ Thus, for the first time, possessing “characteristics of a public forum” was enough for the public forum doctrine to apply.

Widmar cast the door wide open to applying the public forum concept to new places unconnected to the traditional streets and parks. Yet it lacked an organized framework to guide decisions under the doctrine. That framework came two years later in 1983 in the landmark case of *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*.³⁵

Drawing from the Court's prior public forum decisions, Brennan asserted that the State could “no more prevent [the public school teacher] from speaking at this public forum than it could prevent him from publishing the same views in a newspaper or proclaiming them from a soapbox.” *Id.*

29. *Widmar v. Vincent*, 454 U.S. 263, 264-65 (1981).

30. *Id.* at 265 (quoting University regulations) (internal quotations omitted).

31. *Id.* at 267.

32. *Id.* at 267-68.

33. *Id.* at 268 n.5.

34. *Id.* at 267 n.5.

35. *See* 460 U.S. 37, 45-46 (1983).

Perry involved a dispute between two competing labor unions over access to the school district's internal mailboxes and mail system.³⁶ The school would only allow the recognized union to use the school's mail system.³⁷ The unrecognized union had to find some other way to communicate with teachers, and it demanded equal access, arguing that the mailboxes were a "public forum" that the school had opened up for expression by allowing its rival union access.³⁸

In analyzing the claim that denial of access to the school mailboxes violated the union's constitutional right of access to a public forum, the Court identified three different types of forums.³⁹ First, there was the "traditional" public forum. This consisted of the streets and parks in the original public forum cases.⁴⁰ In these places, government needed a "compelling" justification for restricting speech.⁴¹

Next, there was the "designated" public forum, "consist[ing] of public property which the State ha[d] opened for use by the public as a place of expressive activity."⁴² Because the government opened these places for "expressive activity," it was "bound by the same standards as apply in a traditional public forum."⁴³

Finally, there was everywhere else, and these areas the Court denominated "non-public forums."⁴⁴ As a catch-all, the non-public forums constituted the largest class of government property, and also provided the most flexible rules. In non-public forums, the government was like a "private owner of property" and had the "power to preserve the property under its control for the use to which it is lawfully dedicated."⁴⁵ The crucial feature was that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."⁴⁶

This power to discriminate based on subject matter and speaker identity came with two important qualifications. First, the distinctions drawn had to be "reasonable in light of the purpose which the forum at issue serves."⁴⁷ Second, while distinctions

36. *Id.* at 40-41.

37. *Id.*

38. *Id.* at 47.

39. *Perry*, 460 U.S. at 45-46. See generally Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005) (providing a good summary of how forum analysis is applied and "the issues that precede and follow its application.").

40. *Perry*, 460 U.S. at 45.

41. *Id.*

42. *Id.* at 45.

43. *Id.* at 45-46.

44. *Id.* at 46-47.

45. *Id.* at 46 (quoting *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981) (internal quotations omitted)).

46. *Perry*, 460 U.S. at 49.

47. *Id.*

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based on speaker status were legitimate, the government could not discriminate based on the speaker's "viewpoint"—the distinctions had to be "viewpoint neutral."⁴⁸

C. The Public Forum Doctrine's Many Applications

By providing a manageable framework for analyzing speech cases involving government property, the public forum doctrine began a slow and steady domination of free speech cases involving government property.⁴⁹ After *Perry*, public-forum analysis showed up in such disparate places as signs on public property,⁵⁰ newspaper racks,⁵¹ and even fundraisers for charities in government workplaces.⁵²

In the mid-1990s, another case from a college campus seemed to confirm the role of the public forum doctrine as an all-purpose tool for resolving free speech cases. With echoes of *Widmar*, the original public forum case on a college campus, *Rosenberger v. Rectors & Visitors of the University of Virginia* involved a public university that attempted to avoid Establishment Clause problems by refusing to fund a student newspaper because it published religious articles.⁵³ The newspaper sued, demanding equal access to the student activity fund that funded other student groups.⁵⁴

Even though a "student activity fund" could not be characterized as a street or park by any stretch, the Supreme Court applied the public forum doctrine and characterized the fund as "a forum more in a metaphysical than in a spatial or geographic sense."⁵⁵ The Court found that, even though the student activity fund was not a physical forum, "the same principles are applicable."⁵⁶ Yet, the Court did not identify which type of forum the fund represented because it concluded that

48. See *id.*; see also *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (citing *Perry* for proposition that viewpoint discrimination is "presumed impermissible when directed against speech").

49. See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221-22 (1984) (noting that the Court "has been unable to articulate any line between permissible content regulation and censorship"); Robert C. Post, *Between Governance And Management: The History and Theory of The Public Forum*, 34 UCLA L REV. 1713, 1714-15 (1987) (calling the accelerated development of the public forum doctrine "heedless of its constitutional foundations").

50. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 791-92 (1984).

51. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 753 (1988).

52. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985).

53. 515 U.S. 819, 822 (1995).

54. *Id.* at 827.

55. *Id.* at 830.

56. *Id.*

excluding religiously oriented newspapers from funding was “viewpoint discrimination, which is presumed impermissible when directed against speech. . . .”⁵⁷

With *Rosenberger*, it seemed, the public forum doctrine could, and would, handle all cases involving access to government property. The doctrine, however, crested in 1998 when the Supreme Court decided *Arkansas Educational Television Comm’n v. Forbes*.⁵⁸ In *Forbes*, the Court applied the public forum doctrine to a candidate debate sponsored by a state-owned public television broadcaster.⁵⁹ The same forum analysis that began with streets and parks, and then moved to municipal theaters and public meetings, had entered college campuses, and found definition in school mailboxes, now proved flexible enough to be applied even to “metaphysical” forums like student activity funds and public broadcasting debates.

Yet, even as *Forbes* invoked the public forum doctrine, the decision expressed the first hint of doubt about the doctrine’s general applicability. Though the Court ultimately applied the public forum doctrine to the candidate debate in *Forbes*, the Court hesitated to apply the doctrine to public television broadcasting in general.⁶⁰ With a newfound emphasis on the doctrine’s early history, the Court wrote:

Having first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting [B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.⁶¹

If applying the public forum doctrine would be “antithetical” to allowing the public television broadcasters to fulfill their purpose, then what rules should apply? In answering that question, the Supreme Court would come to develop the government speech doctrine.

III. THE RISE OF THE GOVERNMENT SPEECH DOCTRINE

A. *Introduction to the Government Speech Doctrine*

The government speech doctrine began modestly with an observation by legal scholars that in modern America, with vast governmental agencies collecting and disseminating otherwise unobtainable information, the government was the most powerful speaker in the marketplace of ideas, and this power created a danger that

57. *Id.* at 829-31.

58. 523 U.S. 666 (1998).

59. *Id.* at 676-77.

60. *Id.* at 672-73.

61. *Id.*

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government could overwhelm public discourse.⁶² The fundamental observation was that the government was not just a regulator of speech, but rather a speaker in its own right. The government speech doctrine answers the question of what restrictions the First Amendment imposes on the government as a speaker.

B. The Government Speech Doctrine as an Endorsement of Democratic Values

At its heart, the government speech doctrine embraces the democratic value that winners of elections have the right to control government and to use its machinery to advance their political goals. This strong deference to democracy explains why the mechanics of the government speech doctrine can be summarized in one succinct sentence: When the government is promoting its own policies through speech or spending, the First Amendment does not apply and the government has essentially no constraints.⁶³

The rationale for this unusual freedom of action is that government can only promote and support its programs and policies by presenting its point of view to the exclusion of opposing viewpoints.⁶⁴ In the words of the Supreme Court, it is “inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”⁶⁵ The government prevents its message from being lost, garbled, or miscommunicated by “regulat[ing] the content

62. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 38-50 (1983); see also Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 961-62 (1984) (“A prominent theme in this ‘government speech’ debate is that the government’s powerful voice can easily overwhelm weaker private voices, creating a monopoly of ideas and inhibiting the dialectic on which we rely to reach decisions.”). Ironically, these criticisms have been leveled at the Government speech doctrine itself as that doctrine has come to be understood. See, e.g., *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1102 n.20 (E.D. Cal. 2003) (“Implicit in the government speech cases is a suggestion that government is just one more participant in the marketplace of ideas. Such a notion appears to this court to be naive. It ignores the force of government, as compared to private speech, and, even more importantly, the access that government speech has to free media, much less the paid media at issue here.”), *amended by* 423 F.3d 906 (9th Cir. 2005).

63. See, e.g., *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1131 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”); *Johanns, Sec’y of Agric. v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech ... is exempt from First Amendment scrutiny.”); see also EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 410 (3d ed. 2008) (“[G]overnment has largely unlimited power to control what is said in its official organs (newspapers, radio broadcasts, and the like) or in organs that it officially endorses, even if this control is exercised in a viewpoint-based way.”).

64. See *infra* note 66 and accompanying text.

65. *Bd of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

of what is or is not expressed.”⁶⁶ “Indeed,” the Court has argued, “it is not easy to imagine how government could function if it lacked this freedom.”⁶⁷

At its root, the government’s speech represents the voice of the people that elected it, so the check on excesses in government speech is not in the Constitution or in the courts but at the ballot box:

When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.⁶⁸

This embrace of democratic values is at tension with the traditional role of the First Amendment as a restraint of government power. This is exactly the same tension that always arises when deference to majority rule is balanced against concern for protection of minority viewpoints. While the public forum doctrine emphasized that the government had to treat everyone equally, the government speech doctrine explicitly removes that constraint when the government is advancing its own agenda.

C. The Breadth of Government Speech

If the government speech doctrine were limited to the point that government officials have a right to advocate for different points of view, then the doctrine would not have much significance for First Amendment jurisprudence. However, the government speech doctrine can be, and has been, applied in many other more controversial settings because of the many different ways the government can speak.⁶⁹ For purposes of the government speech doctrine, the government speaks in nearly every situation where the government chooses to favor one side of a debate over another.⁷⁰ This turns out to cover a lot of territory.

1. The Government Can Speak Through Private Citizens

Two hundred years after the adoption of the First Amendment, the Supreme Court decided the first government speech case, *Rust v. Sullivan*.⁷¹ It’s possible that what brought this first case to the Court’s attention was the seemingly unusual circumstance that the government was not speaking directly through its officers and

66. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

67. *Sumnum*, 129 S.Ct. at 1131.

68. *Southworth*, 529 U.S. at 235; accord *Sumnum*, 129 S.Ct. at 1132 (citing *Southworth*, 529 U.S. at 235).

69. See *infra* notes 71-102.

70. See *infra* notes 113-119.

71. 500 U.S. 173 (1991).

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employees but indirectly through private citizens who happened to receive funds from government grants. Also, the speech was about abortion.

Eighteen years later, *Rust* is still the seminal government speech case. In *Rust*, the government authorized subsidies to family planning clinics with the restriction that none of the government's money could be "used in programs where abortion is a method of family planning."⁷² In other words, the doctors who worked in these government-subsidized clinics could discuss any family planning methods they thought appropriate, except abortion.⁷³ The question in *Rust* was whether the government's prohibition on talking about abortion at these clinics violated free speech rights protected by the First Amendment.

The Supreme Court thought not.⁷⁴ The Court drew a distinction between "direct state interference with a protected activity" and "state encouragement of an alternative activity consonant with legislative policy."⁷⁵ By precluding family planning clinics that received federal money from discussing abortion, the Court reasoned, the government was merely defining the limits of the program the government had chosen to fund.⁷⁶ No one was forbidden from speaking about abortion.⁷⁷ The government regulations merely required that grant recipients keep abortion speech out of the clinics the government was subsidizing.⁷⁸ If the doctors in the program wanted to discuss abortion options with their patients, they could do it on their own time or find another job.⁷⁹

In one sense, the *Rust* decision was not at all surprising. The government, like any entity, can only "speak" through agents. If the government is going to be able to disseminate any messages at all, it must be able to control what its agents say (at least when they are at work for the government).⁸⁰ What made *Rust* significant was that the agents were not government employees but private clinics that merely received money from the government. In other words, the government could speak through

72. *Id.* at 178 (quoting Public Health Services Act, 42 U.S.C. § 300a-6 (2006)).

73. *Id.* at 178 (quoting Public Health Services Act, 42 U.S.C. § 300a-6 (2006)).

74. *Id.* at 193-94.

75. *Id.* at 193 (citing *Maier v. Roe*, 432 U.S. 464, 475 (1977)).

76. *Id.* at 194 ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

77. *Id.* at 196.

78. *Id.* ("The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.").

79. *Id.* at 199 ("The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.").

80. The Supreme Court elaborated on this concept in *Rosenberger*, 515 U.S. at 833 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

private citizens.⁸¹ The power here was in the government's ability to define the scope of the program it was funding and through that definition preclude private recipients from discussing disfavored topics on pain of a massive monetary loss.⁸² Some of the possibilities inherent in this power were explored in the next big government speech case.

2. The Government Can Speak Through Selective Funding

Rust established the principle that the government can choose to spend money on activities that promote its programs and refuse to spend money on activities that do not promote its programs. Recipients either conform to the government program or lose access to government money.⁸³

Enforcing the government program in *Rust* was relatively uncomplicated because the program limitation had a bright line: no talking about abortion. In *National Endowment of the Arts v. Finley*, the Supreme Court confronted a program that was limited by the much fuzzier concepts of "decency" and "respect."⁸⁴

In *Finley*, the National Endowment of the Arts was a government program that awarded money to artists if they could demonstrate "artistic excellence and artistic merit."⁸⁵ In judging excellence and merit, the NEA was also required to consider "general standards of decency and respect for the diverse beliefs and values of the American public."⁸⁶ Against a challenge that the terms "decency" and "respect" would inevitably result in the government awarding grants based on the viewpoints of

81. Although the *Rust* decision itself did not use the term "government speech," the case has come to stand as the archetypal government-speech case. *See, e.g.*, *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

82. The losing litigants in *Rust* tried to call this loss a "penal[ty]," but the Court ruled it was merely a "subsidy," commenting, "[t]he recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." *Rust*, 500 U.S. at 199 n.5. While this distinction is important for the Court's constitutional analysis, from the point of view of a grant recipient, the effect is the same: one day checks come, the next day they stop. It takes a brave citizen to walk away from their livelihood for principle.

83. As the Supreme Court put it in *Rust*: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. 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." *Rust*, 500 U.S. at 193; *see also id.* at 194 ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

84. 524 U.S. 569, 572 (1998).

85. *Id.*

86. *Id.*

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the artists, the Supreme Court held that “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”⁸⁷ The criteria, vague as they were, defined the program’s purpose, and therefore, the government could limit awards to artists whose work fell within the program’s parameters.⁸⁸

The upshot of *Finley* was that the government could fund private speakers (artists) who disseminated messages the government approved of (decent, respectful ones) and refuse to fund messages that the government did not approve of (indecent, disrespectful ones). In other words, the government could reward private citizens for promoting the government’s favored messages.

3. The Government Can Speak Through Compiling the Ideas of Third Parties

The government can also speak by selectively broadcasting points of view that it approves of. In *Forbes*, the Court made this point in passing when it observed that public television broadcasters were entitled to exercise editorial discretion in deciding what points of view to broadcast and what points of view to leave out.⁸⁹ This ability gives government the power to amplify its favored points of view while omitting disfavored ones. It also can save the government the trouble of formulating and articulating its own position because it can speak by compiling and presenting the positions of private citizens with whom the government agrees.

4. The Government Can Speak By Refusing to Fund Access to Disfavored Speakers

The power of the government’s editorial discretion became evident when the Supreme Court considered a case involving a government program that cut off government funding to libraries unless they censored certain Internet web sites.

In *United States v. American Library Ass’n*, the government was concerned about private citizens using computers at public libraries to surf the Internet for pornography.⁹⁰ Congress had passed a law that any library receiving federal money to help connect to the Internet had to install filtering software that would block access to pornography.⁹¹ The question in the case was whether the government could use its spending power to require libraries to censor information the government did not like.⁹²

87. *Id.* at 587-88.

88. *See id.* at 588.

89. *See supra* note 61 and accompanying text.

90. 539 U.S. 194, 198-99 (2003) (plurality) (“To address the problems associated with the availability of Internet pornography in public libraries, Congress enacted the Children’s Internet Protection Act (CIPA).”).

91. *Id.* at 201.

92. *See id.* at 203.

A plurality of the Supreme Court looked to *Forbes* and *Finley* as examples where the government had been permitted “to make content-based judgments in deciding what private speech to make available to the public.”⁹³ Like journalists and art patrons, libraries “necessarily consider content in making collection decisions and enjoy broad discretion in making them.”⁹⁴ In another blow to the public forum doctrine, the Supreme Court expressly rejected the idea that public-forum principles applied to public libraries. According to the plurality, libraries were “not forum[s] for Web publishers to express themselves” but existed “to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.”⁹⁵

In other words, because the *purpose* of the library was not to facilitate “speech,” but to facilitate “research, learning, and recreational pursuits” the government could control the content made available by libraries that accepted government dollars.⁹⁶

5. The Government Can Speak Without Disclosing that It’s Speaking

For the women who sought medical advice from the government-funded family-planning clinics in *Rust*, it might have surprised them to learn that their doctors’ advice was being shaped by the government.⁹⁷ When the government speaks, is the government required to let people know that they are hearing a government-controlled message? In a word, no.

In *Johanns v. Livestock Mktg. Ass’n* the government ran an ad campaign to promote the consumption of beef.⁹⁸ These ads bore the attribution “Funded by America’s Beef Producers.”⁹⁹ For some, this attribution was highly misleading because it masked the government’s role in sponsoring the advertising campaign.¹⁰⁰ Over that objection, the Court held that nothing in the Constitution could be construed as requiring the government to identify itself as a speaker and that it did not

93. *Id.* at 204-05.

94. *Id.* at 205.

95. *Id.* at 206.

96. *Id.*

97. Certainly, the pregnant women could have consulted the Federal Register and learned about the new regulations promulgated by the Secretary of Health and Human Services under Title X of the Public Health Services Act before visiting the doctors in the subsidized clinics. *See* 53 Fed. Reg. 21, 2923-24 (Feb. 2, 1988) (to be codified at 42 C.F.R. pt. 59). Even so, it seems unlikely that many (if any) prospective patients would have thought to check to see if the government had imposed any constraints on the medical advice they would receive from their doctors.

98. 544 U.S. 550, 554 (2005) (describing multi-million dollar campaign to promote “Beef. It’s What’s for Dinner.”).

99. *Id.* at 555.

100. *Id.* at 577-78 (Souter, J., dissenting).

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matter “whether or not the reasonable viewer would identify the speech as the government’s.”¹⁰¹

And so, the government can speak even if no one recognizes the government as the speaker.¹⁰² This ability of the government to speak “anonymously”—that is, without affirmatively disclosing itself as the speaker—is an enormous power. Practically any government offering—other than a street or a park (*i.e.*, the traditional public forum)—can be seen as the government conveying a “message” favoring one group over another. Because the government can convey messages without an affirmative statement that it is speaking, private speakers and courts alike often must wrestle to determine whether speech truly belongs to the government. This ambiguity opens many doors that the public forum doctrine might otherwise have left closed.

IV. GOVERNMENT SPEECH IS BEGINNING TO SUPPLANT THE PUBLIC FORUM

A. Distinguishing Government Speech from the Public Forum

Public forum cases and government speech cases are both subsidy cases with different baselines.¹⁰³ In public forum cases, the baseline is that people are entitled to use the government property for free, and the government has the burden of justifying its actions if it tries to treat people unequally.¹⁰⁴ In the nonpublic forums, the justification need only be “reasonable”, but in all cases the government’s action must be viewpoint neutral.¹⁰⁵ In contrast, in government speech cases, the baseline is that people are not entitled to participate in government programs, and the government is presumed to have the power to exclude whomever it chooses.¹⁰⁶

101. *Id.* at 564 n.7. The Court did note that the analysis is different if the Government *misattributes* its own speech to a private citizen. In that case, the private citizen might have cause to complain under a compelled speech theory. *Id.* at 564 & n.7; *See also* *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that the government may not compel private citizen to display government slogan “Live Free or Die” on license plate).

102. This is one of the most controversial elements of the Government speech doctrine in its current form. *See infra* note 110-119.

103. *See generally* WARD FARSNWORTH, *THE LEGAL ANALYST* 198-206 (discussing the legal applications of the baseline analysis).

104. *See supra* text accompanying notes 40-41.

105. *See supra* text accompanying notes 44-48.

106. The clearest expression of this baseline approach is in *United States v. American Library Ass’n*, when Chief Justice Rehnquist states that the Child Internet Protection Act “does not ‘penalize’ libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress’ decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.” 539 U.S. 211, 212 (2002). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1436 (May 1989) (“[T]he characterization of a condition as a ‘penalty’ or as a ‘nonsubsidy’ depends on the baseline from which one measures.”).

How can the two subsidies be told apart? If the public forum were limited to streets and parks, it would be easy to spot a public forum, but as we've seen, public forum analysis can be applied to "metaphysical" forums, like student activity funds (*Rosenberger*), candidate debates (*Forbes*), and charitable fund-drives (*Cornelius*). If government speech were limited to government employees promoting government policies, government speech would be easy to spot as well, but as we've also seen, government speech can take place through third-parties (*Rust*), can be articulated by funding some speech but not others (*Finley*; *American Libraries Ass'n*), can include expression created by private parties (*Summum*), and does not have to be expressly identified with the government (*Johanns*).

Separating the two doctrines, therefore, turns on determining whose message is being advanced by the subsidy. If the government is acting to promote its own message, it's government speech.¹⁰⁷ If the government is acting to facilitate private speech, it's a public forum.¹⁰⁸ That's fine as far as it goes, but especially when the government program involves private actors, it can be difficult to determine whether the speech is the government's or a private citizens. For example, the funding of artists in *Finley* was government speech, while the funding of student newspapers in *Rosenberger* was private speech.¹⁰⁹ Two funding decisions were made, two different outcomes resulted. What's the difference?

The definitive mark of government speech is the government's explicit or implicit approval of the message. *Johanns* makes the point most clearly. The campaign to promote beef consumption in that case was formally under the authority of the Secretary of Agriculture, but as the Supreme Court noted, the Secretary "does

107. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.* (1995), 515 U.S. 819, 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.") (citations omitted).

108. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) ("[T]he LSC [Legal Services Corporation] program was designed to facilitate private speech..."); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students."); *Rosenberger*, 515 U.S. at 834 ("The University ... expends funds to encourage a diversity of views from private speakers."). In *Pleasant Grove City, Utah v. Summum*, the Supreme Court added another test for identifying when public forum principles might apply: the number of possible speakers. Justice Alito wrote: "The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." 129 S. Ct. 1125, 1137 (2009). Although it is not entirely clear, numerosity here appears to be a feature characteristic of forums established to encourage a diversity of views rather than an independent test for establishing a public forum.

109. See *supra* text accompanying notes 84-88 and 53, respectively, for discussions of *Finley* and *Rosenberger*.

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not write ad copy himself.”¹¹⁰ Instead, the Secretary delegated the design of the campaign to a board (the “Beef Board’s Operating Committee”), half of whose members were private citizens.¹¹¹ Despite this influence from private parties, the promotional campaign firmly remained the government’s speech because the Secretary exercised “final approval authority over every word used in every promotional campaign.”¹¹² The Court was emphatic that approval was the touchstone:

When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.¹¹³

In *Summum*, the Supreme Court reiterated the importance of the government’s “acceptance” of a message as the touchstone for government speech. The Court found that “privately financed and donated monuments” speak for the government when the government “accepts and displays” the monuments in a public park.¹¹⁴ Even though monuments donated from private parties are not conceived of by the government, the government signals its approval by practicing “selective receptivity.”¹¹⁵ Monuments are government speech because “Government decisionmakers select the monuments that portray what they view as appropriate for the place in question...”¹¹⁶

The importance of government “approval” and “selective receptivity” explains the different outcomes in *Finley* and *Rosenberger*. *Finley* was a government-speech case because the government approved grants to artists by applying selective criteria (excellence, decency, respect).¹¹⁷ In contrast, in *Rosenberger*, the University required that the newspapers expressly agree that they did not represent the views of the University.¹¹⁸ By funding private activities without putting a stamp of approval on

110. *Johanns, Sec’y of Agric. v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005).

111. *Id.* Although the Secretary could appoint only half of the Beef Board’s Operating Committee’s members, all members of the Board’s Operating Committee were subject to removal by the Secretary. *Id.*

112. *Id.* at 561.

113. *Id.* at 562.

114. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009).

115. *Id.* “Selective receptivity” echoes the “editorial discretion” that the Supreme Court in *Forbes* found to be exempt from the requirements of the public forum doctrine.

116. *Id.* at 1134.

117. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 584, 585 (1998) (“The very assumption of the NEA is that grants will be awarded according to the artistic worth of competing applications, and absolute neutrality is simply inconceivable.”) (internal quotations omitted).

118. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824 (1995) (requiring student groups to sign an agreement, explaining that University-granted benefits “should not be

them, the University's student activity fund was not government speech, and therefore, was treated like a public forum.¹¹⁹

The approval test sharply contrasts with the most basic premise of the public forum doctrine: equal treatment of all people regardless of their particular viewpoint.¹²⁰ The imperative of equality in the public forum is often stated in forceful language, such as: "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."¹²¹ Even in a nonpublic forum, the sphere where the government can operate with the most latitude, the government cannot favor one point of view over another.¹²² In the government speech cases it is precisely the fact that the government has put its seal of approval on one message to the exclusion of others that exempts the government's decisions from judicial scrutiny.¹²³ With the government's endorsement, the special treatment is an expression of democratic will, and where majorities rule, by definition, minority viewpoints must give way.

B. How Government Approval Can Transform a Public Forum Case into a Government Speech Case

If the government exercises approval authority in creating a message (*Summum, Johanns*), the government can pick and choose among private speakers that it will support based on vague criteria such as the speaker's "excellence," "decency" or "respectfulness" (*Finley*), the government can exercise editorial discretion based on what it determines to be newsworthy (*Forbes*), or exercise judgment about what information is best for research or learning (*American Library Ass'n*).¹²⁴ These broad criteria are extremely flexible and adaptable to new circumstances. As these principles are applied in new contexts, the breadth of the government speech doctrine is expanding and the public forum doctrine is retreating. A few examples illustrate this trend.

misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities" (quoting Brief for the Petitioners, *Rosenberger*, 515 U.S. 819 (No. 94-329), 1994 WL 704081 (internal quotations omitted)).

119. See *Rosenberger*, 515 U.S. at 833.

120. See *supra* note 48 and accompanying text.

121. Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

122. See *supra* notes 44-48 and accompanying text.

123. See *supra* notes 110-116 and accompanying text.

124. See *supra* note 63 and accompanying text; discussion *supra* Parts III.C.2, III.C.3; and *infra* note 197.

1. Specialty License Plates

Not long ago, government regulations on what people could and could not put on specialty license plates were routinely analyzed by courts and commentators alike by applying standard public-forum principles (e.g., by asking questions concerning the nature of the forum, whether there is viewpoint discrimination, etc.).¹²⁵ Then, in the early 2000s, things began to change. Suddenly, courts began describing specialty license plates as examples of government speech.¹²⁶ Picking up on the trend, commentators rushed in with fresh analysis of specialty license plates under the government speech doctrine.¹²⁷

How did specialty license plates go from being forums analyzed under the public forum doctrine to government speech? In adopting the government speech doctrine as the appropriate way of viewing specialty license plates, the Sixth Circuit explained in *A.C.L.U. of Tenn. v. Bredesen* that the Supreme Court had previously made clear that “when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.”¹²⁸ By choosing the message that went on the specialty plate, the government made the message its “own,” and the government speech doctrine applied.¹²⁹

Citing *Johanns*, the *Bredesen* court brushed aside objections that the government did not identify itself as a speaker on the license plates and the idea that the government was not the speaker because the license plates had to be chosen by private citizens.¹³⁰ In this way, the government speech doctrine liberated a

125. See, e.g., Jack Achiezer Guggenheim & Jed M. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 577 (2000) (collecting cases and arguing that “[s]pecialty plates should be considered a limited public forum, whereas vanity plates should be considered a nonpublic forum.”).

126. See, e.g., *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 371-72, 375 (6th Cir. 2006) (stating that specialty license plates are government speech, and ruling that the government is not mandated to issue “pro-choice” plates in light of its decision to manufacture a series of plates bearing the phrase “Choose Life”); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) (holding that a specialty license plate was considered a form of “mixed” government and private speech).

127. As late as 2000, courts and commentators were treating these license plates as public forums. By 2006, the same plates were being treated as government speech. See, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

128. *Bredesen*, 441 F.3d at 375 (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. at 560-68).

129. *Bredesen*, 441 F.3d at 376.

130. *Id.* at 377-78 ; see also *supra* notes 80-82, 98-103 and accompanying text.

communicative space that once was governed by the public forum doctrine from the overriding requirement of viewpoint neutrality.¹³¹

2. Newspaper Advertisements

Specialty plates are only the beginning. Recently, in *Bryant v. Gates*, two judges in the D.C. Circuit debated whether the public forum doctrine or the government speech doctrine should be applied to a request to place an ad in a military newspaper.¹³² In *Bryant*, the plaintiff submitted to military newspapers numerous advertisements that asked soldiers to come forward and blow the whistle on wrongdoing in the military.¹³³ The military newspapers refused to publish the ads because they were “political,” and the military’s policy prohibited political advertisements.¹³⁴ The plaintiff sued, arguing that because the newspapers accepted ads from other private citizens and the newspaper ad space was governed by the public forum doctrine, he was the victim of illegal viewpoint discrimination.¹³⁵

The majority in *Bryant* applied the public forum doctrine to the newspaper advertisements. After proceeding through the normal public-forum analysis, the majority concluded that the advertising section was a “nonpublic forum.”¹³⁶ It also concluded that the regulations prohibiting “political” ads were reasonable because political content could “disrupt the mission [of a military command] by undermining the camaraderie of service members, their clear understanding of and commitment to their mission, or even ‘the American constitutional tradition of a politically neutral military establishment under civilian control.’”¹³⁷ The majority concluded that the rule was also viewpoint neutral because all political ads were banned.¹³⁸

What’s remarkable about this analysis is that the disruption that the rule against “political ads” was intended to prevent came from the anti-military ideas that the

131. See, e.g., *Children First Found., Inc. v. Martinez*, Civ. No. 1:04-CV-0927, 2008 U.S. Dist. LEXIS 3167, at *7 (N.D.N.Y. Jan. 15, 2008) (allowing the Government to amend its answer to add the Government speech doctrine as an affirmative defense).

132. 532 F.3d 888 (D.C. Cir. 2008).

133. *Id.* at 892.

134. *Id.* at 892. Interestingly, although the opinion talks about a ban on “political” ads, the words in the regulation referred to, among other things, “political *campaigns*, candidates, [and] issues” (emphasis added) and to “lobbying elected officials on specific issues.” The focus is clearly on elections and legislation. The plaintiff’s ads asking for people to “blow the whistle” do not seem to fit into either category. The court did not address this possible distinction, and since it is not pertinent to the Government speech aspects of the case, further discussion is outside the scope of this article.

135. *Id.* at 895-96 (“*Bryant* contends the advertising section of a CEN [Civilian Enterprise Newspaper] is a public forum. . .”).

136. *Id.* at 896 (“We conclude the advertising section of a CEN is a nonpublic forum.”).

137. *Id.* at 897 (quoting *Greer v. Spock*, 424 U.S. 828, 839 (1976)).

138. *Id.* at 897-98.

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speech might stir up in readers.¹³⁹ By asking servicemen and women to “blow the whistle,” the court imagined that the servicemen and women who read the message might have less “camaraderie” or have their understanding of and commitment to the mission clouded.¹⁴⁰ The danger, therefore, lay in the ideas the speech conveyed.

Government censorship of a topic because it might make listeners think “bad thoughts” is shaky ground under the public forum doctrine, even for a nonpublic forum. On the other hand, this is very solid ground under the government speech doctrine and is exactly where Judge Kavanaugh turned in his concurrence, arguing that “military-run newspapers and the advertising space in them are not forums for First Amendment purposes but instead are the Government’s own speech.”¹⁴¹

How is it that ads written by private citizens could be the government’s speech? Judge Kavanaugh explained: “As the case law makes clear, “government speech” can include not only the words of government officials but also “compilation of speech of third parties” by government entities such as libraries, broadcasters, newspapers, museums, schools, and the like.¹⁴² Because the government “compiles” the ads, the ads represent the government’s speech and “therefore [the government] may exercise viewpoint-based editorial control...”¹⁴³

Because the majority endorsed a forum analysis, *Bryant* might be taken as evidence that the court preferred to decide the case under the public forum doctrine over the government speech doctrine, but that view would be mistaken. The court applied the public forum doctrine because the government attorneys framed the case as a public forum case.¹⁴⁴ Guided by Judge Kavanaugh’s concurrence, the next case will, without doubt, raise government speech as an affirmative defense.

3. Links on Government Websites

Another example of the movement away from the public forum doctrine is how courts approach government websites that promote certain people and points of view to the exclusion of others with disfavored points of view. Less than ten years ago, this question was approached as a public forum one. now, it’s government speech.¹⁴⁵

139. *Id.* at 897.

140. *Id.* at 897.

141. *Id.* at 898 (Kavanaugh, J., concurring).

142. *Id.* (quoting *PETA v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005)).

143. *Id.* at 899 (reasoning that because “the military newspapers constitute government speech,” the military has editorial control over the newspapers’s content).

144. *Id.* at 898 (“In light of the way the Government argued the case, I join the Court’s fine opinion. Lest this precedent be misinterpreted, however, I write separately to point out that, as Judge Kollar-Kotelly suggested in footnote 5 of her thorough district court opinion, there is a far easier way to analyze this kind of case under the Supreme Court’s precedents.”) (Kavanaugh, J., concurring) That easier way is the Government speech doctrine.

145. *See, e.g.*, R. Johan Conrod, Note, *Linking Public Website to the Public Forum*, 87 VA. L.

In *Putnam Pit, Inc. v. City of Cookeville* a city operated a website that had hyperlinks to local businesses.¹⁴⁶ The Putnam Pit, an independent newspaper, requested that the City add a link to the newspaper's website.¹⁴⁷ In response to the request, the city quickly cobbled together a policy that limited links first to non-profit entities and then to organizations that "would promote the economic welfare, tourism, and industry of the city."¹⁴⁸ In the city's judgment, the Putnam Pit did not meet the criteria, so the city refused to add the link.¹⁴⁹

The Putnam Pit contested the city's refusal to add the link.¹⁵⁰ In analyzing the newspaper's claim, the Sixth Circuit was faithful to the fashion of the time and extended the public forum doctrine to hyperlinks on government websites, new territory that could not possibly have been imagined when the doctrine was first conceived.¹⁵¹ The court wrote: "The public forum analysis, which has traditionally applied to tangible property owned by the government, is an appropriate means to analyze...[the] claim."¹⁵² The court quickly determined that the website was a nonpublic forum, but that did not end the analysis because, even in nonpublic forums, "the government may not discriminate based upon the viewpoint of the speaker."¹⁵³ The court worried that the broad criteria that required that linked websites "promote the city's tourism, industry, and economic welfare gives broad discretion to city officials, raising the possibility of discriminatory application of the policy based on viewpoint."¹⁵⁴ Because evidence existed that the city refused to link to the Putnam Pit's website because it didn't like the Pit's opinions, the court reversed the grant of summary judgment and remanded the case to district court to determine if the city had engaged in impermissible viewpoint discrimination.¹⁵⁵

The *Putnam Pit* case exemplifies traditional public forum analysis. In such cases, excessive discretion on the part of government officials raises fears of viewpoint discrimination.¹⁵⁶ But what would have happened if the court had considered the government speech doctrine? The government would have won outright.

REV. 1007 (2001) (arguing that links on government websites should be analyzed under the public forum doctrine).

146. 221 F.3d 834, 841 (6th Cir. 2000).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 841-42.

151. *Id.* at 842-44.

152. *Id.* at 842.

153. *Id.* at 844-45.

154. *Id.* at 845.

155. *Id.* at 846.

156. See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 752-53 (1988); see generally Anthony M. Barlow, Case Note, *The First Amendment Protection Of Free Press And Expression—State Licensing Laws For Newspaper Vending Machines: City of Lakewood v. Plain*

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Under a government speech analysis, it is well within the government's discretion to approve or disapprove a message that marks the speech as belonging to the government, and therefore unreviewable by the courts.¹⁵⁷ The city in *Putnam Pit* had chosen a message (promoting local tourism and economic welfare) and it had selected which websites it thought promoted that message.¹⁵⁸ The *Putnam Pit* didn't make that cut. Even though the reason might have been the newspaper's disfavored viewpoint, the city was entitled to exclude the newspaper for that reason because it was promoting its own message.¹⁵⁹ As we have seen, the fact that the government spoke by promoting the messages of favored third parties is no obstacle in the government speech doctrine.

Evidence that the government would have won had *Putnam Pit* been argued as a government speech case can be found in a similar case decided eight years later. In *Page v. Lexington County School Dist. One*, the Fourth Circuit confronted a similar refusal by government to put on its website links to a private citizen's website with an opposing point of view.¹⁶⁰ In *Page*, a school district launched a campaign urging the defeat of a bill under consideration by the state legislature.¹⁶¹ The campaign included web pages on the district's website, internet links to documents that expressed opposition to the bill and emails from the district that sometimes included information written by private citizens who also opposed the bill.¹⁶²

The plaintiff in *Page* was a private citizen who supported the bill that the district opposed.¹⁶³ He demanded that the district give him "equal access" to the means of communication that the district was using in its campaign.¹⁶⁴ When the district refused, he sued, arguing that the district discriminated against him based on his viewpoint.¹⁶⁵

Unlike the city in *Putnam Pit*, the school district in *Page* sidestepped the public forum doctrine, with its prohibition on viewpoint discrimination, and argued the case under the more favorable government speech doctrine.¹⁶⁶ The district embraced the charge that it chose what messages to include in its communications based on their viewpoint.¹⁶⁷ That was the whole point as the district was trying to defeat a bill before

Dealer Publishing Co., 108 S. Ct. 2138 (1988), 58 U. CIN. L. REV. 285 (1989).

157. See *supra* notes 110-116 and accompanying text.

158. *Putnam Pit*, 221 F.3d at 841.

159. *Id.* at 841.

160. 531 F.3d 275, 278 (4th Cir. 2008).

161. *Id.* at 277.

162. *Id.* at 278.

163. *Id.* at 277.

164. *Id.*

165. *Id.* at 277-78.

166. *Id.* at 278.

167. See *id.* at 280.

the state legislature. Including messages from supporters of the bill would have undermined exactly what the district was trying to accomplish.¹⁶⁸

Given this understanding of the city's webpage, the court in *Page* wholeheartedly endorsed the government speech doctrine. The court noted how the choice between the government speech doctrine and the public forum doctrine was the crux of the entire case:

The School District's success in this case—based on the contentions of the parties—thus depends on whether its communications about its opposition to the . . . [bill] were government speech or whether the School District used its channels of communication to disseminate the viewpoints of *private speakers against* the . . . [bill], to the exclusion of private speakers in favor of the bill, thus discriminating in a limited public forum based on the speaker's viewpoint.¹⁶⁹

Using a variant of the approval test, the court concluded that the school district's campaign was government speech because the district *established* the message (*i.e.*, defeat the bill) and *controlled* the content and dissemination of the message.¹⁷⁰

As in previous cases, the fact that the district communicated its message by promoting the speech of favored private citizens was of no consequence. When the district's website linked to third parties or when its emails distributed material written by third parties, the district "adopted and approved" the speech thereby making the speech its own.¹⁷¹ The very discretion to select which private speakers to promote that caused the court so much concern in *Putnam Pit* was the critical fact that secured victory for the school district in *Page*.

4. Displays on Public Property

Although parks are the most traditional of the traditional public forums, even there government speech is encroaching on the public forum doctrine's territory. In *Pleasant Grove City v. Summum*,¹⁷² the Supreme Court held that the placement of certain permanent monuments in a city park constituted government speech.¹⁷³ This was true even though a private party conceived of and designed the monument.¹⁷⁴ As noted before, the critical fact was that, in deciding whether or not to allow the

168. *Id.* at 282.

169. *Id.* at 280.

170. *Id.* at 282 ("[T]he government established the message; maintained control of its content; and controlled its dissemination to the public.").

171. *Id.* at 282.

172. *Summum*, 129 S.Ct. 1125 (2009).

173. 129 S.Ct. 1125, 1138 (2009).

174. *Id.*

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monument to be placed in the park, the government “exercised selectivity.”¹⁷⁵ Consequently, even in the heart of the public forum, the government could give preference of place to one private message over another.

One way to see the *Sumnum* case could be simply as a pragmatic decision dictated by the physical reality that if private speakers were allowed to erect permanent monuments at will in public parks, the parks would soon be overflowing with monuments.¹⁷⁶ The better view, however, is that *Sumnum* is just one more step in a journey that began 18 years ago in *Rust* of the courts deferring to the people’s right to express themselves through their government. Those who don’t agree with the government do not have the same claim to government support, and if they don’t like it, they can gather enough votes to win the next election.

Evidence that the permanence of the monuments in *Sumnum* was not the most important factor can be found in the D.C. Circuit case of *PETA v. Gittens*, which dealt with temporary displays.¹⁷⁷ In *PETA*, the District of Columbia asked artists to submit designs to decorate 100 donkeys and 100 elephants that would be installed in prominent locations throughout the city.¹⁷⁸ The city was looking for “creative, humorous art” that “would showcase the whimsical and imaginative side of the Nation’s Capital.”¹⁷⁹ The city would pick the winning designs through a selection committee.¹⁸⁰ For those who paid \$5,000 to be a high-level sponsor, their designs could bypass the normal selection committee, but the city “reserve[d] the right of design approval” and would own the decorated animal.¹⁸¹

People for the Ethical Treatment of Animals (PETA), an animal rights organization, paid the \$5,000 sponsor-fee and submitted as its design a picture of a sad elephant with a message criticizing circuses.¹⁸² The city rejected PETA’s sad elephant because it wasn’t “designed to be festive and whimsical, reach a broad based general audience and foster an atmosphere of enjoyment and amusement.”¹⁸³ PETA sued and argued that the design contest created a “limited public forum” and that the

175. *Id.* at 1133.

176. Justice Alito’s opinion lends support to this view when he argues that the public forum doctrine cannot apply to the placement of monuments in parks because “public parks can accommodate only a limited number of permanent monuments.” *Id.* at 1137.

177. *PETA*, 414 F.3d 23 (D.C. Cir. 2004).

178. *Id.* at 25.

179. *Id.* (quoting language from the “Call to Artists,” put out by the District of Columbia’s Commission on the Arts and Humanities) (internal quotations omitted).

180. *Id.* at 25.

181. *Id.* (quoting the Commission’s language).

182. *Id.* at 26. In PETA’s design, the sign tacked to the elephant’s side read: “The CIRCUS is Coming See: Torture Starvation Humiliation All Under the Big Top.” *Id.*

183. *Id.* (quoting an affidavit of PETA’s executive director, regarding the project’s goals).

city's rejection of its design was impermissible viewpoint discrimination.¹⁸⁴ In response, the city invoked the government speech doctrine.¹⁸⁵

The court ruled for the city, determining that the animal displays were government speech. Even though private citizens created the design, the city exercised "editorial discretion in the selection" of the designs, and this "compilation of the speech of third parties" was government speech.¹⁸⁶

In reaching its conclusion, the court went out of its way to stuff the public forum doctrine back into its original box of streets and parks. The court argued that "[p]ublic forums and designated public forums give private speakers an easement to use public property."¹⁸⁷ By calling public forums "easements," a term taken from the law of real property (like streets and parks), the court subtly reasserted the original limits of the public forum and indirectly rejected the doctrine's application to "metaphysical" forums (like the Student Activity Fund recognized in *Rosenberger*).¹⁸⁸

The clear message from cases like *Sumnum* and *PETA* is that where the government plays a role in picking and choosing what to display, the government speech doctrine has displaced the public forum doctrine.

5. Could Everything Be Government Speech?

The cases discussed above (license plates, ads, websites, and public displays) are merely examples of the wide variety of situations where the government can invoke the government speech doctrine to shield its actions from judicial scrutiny. To bring its actions within the government speech doctrine, the government only needs to exercise control over what is said and what is not said.¹⁸⁹ In other contexts, this type of control might be tarred as "censorship," but here that control is what marks the speech in question as belonging to the government.

Because government approval can transform a public forum case to a government speech case, small changes in government behavior can lead to significant differences in the extent of government's power. Take, for example, a bulletin board in a public school. Is the bulletin board a public forum where the government cannot censor postings based on their viewpoint or is the board an example of government speech where the government can broadcast favored viewpoints and suppress disfavored ones? The answer is it could be either, and it's entirely up to the government what the answer will be.

184. *Id.* at 27.

185. *Id.* at 27-28.

186. *Id.* at 28 (citing *Ark. Educ. Television Comm. v. Forbes*, 523 U.S. 666, 674 (1998)).

187. *Id.* at 29. For this analysis, the court relied heavily on Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

188. See *supra* notes 53-57 and accompanying text.

189. See discussion *supra* notes 110-116.

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In one case, a public school allowed faculty and staff members who supported gay rights to post on a bulletin board, while it took down postings opposed to gay rights.¹⁹⁰ By deliberately taking down the postings that the school district disapproved of, the school demonstrated that the bulletin board represented government speech and was not a public forum.¹⁹¹ In contrast, in a nearly identical case, one faculty member of a public university successfully sued another faculty member for violating his First Amendment rights by taking down his posters from a university bulletin board.¹⁹² Why the different result? In the second case, the court found that the university had “set aside [its bulletin boards] for common use by both university-related persons and the general public to communicate with students and others at the university.”¹⁹³

Reading these two cases together demonstrates that it is entirely up to the government whether it wishes to submit to the public forum doctrine or instead reserve the discretion inherent in the government speech doctrine. The reason is that the outcome in both cases turns on the government’s own policies over the degree of control that it is entitled to exert over the bulletin boards. This freedom of choice for the government has the potential to consign the public forum doctrine to its original confines of streets and parks and not much else.¹⁹⁴

V. LIMITS ON GOVERNMENT SPEECH

The government speech doctrine is displacing the public forum doctrine largely because of its elegant simplicity and the freedom of action it confers. If the government is promoting excellence, decency, or respect, the government speaks.¹⁹⁵ If the government is exercising “selective receptivity” or “editorial discretion” when it promotes favored speakers, the government speaks.¹⁹⁶ If the government requires

190. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

191. In *Downs*, the court went even one step further and held that it was irrelevant whether the district actually took down offending messages provided the district “had the authority to enforce and give voice to school district and school board policy. Inaction does not necessarily demonstrate a lack of ability or authority to act.” *Id.* at 1011.

192. *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001).

193. *Id.* at 1185 (quoting *Giebel’s Aff.*) (internal quotation marks omitted).

194. As Justice Scalia put it, “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.” *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 554 (2001) (Scalia, J., dissenting).

195. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (noting “NEA’s mandate . . . to make esthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support. . .”).

196. *Pleasant Grove City, v. Summum*, 129 S. Ct. 1125, 1133 (2009) (noting that “the general government practice with respect to donated monuments has been one of selective receptivity”); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (“[B]road rights of access for outside

the censorship of disfavored speakers but its purpose is to facilitate learning or research, the government speaks.¹⁹⁷

Despite the Supreme Court's clear decision that government speech is not constrained by the First Amendment, the Court has acknowledged the concern that the doctrine could "be used as a subterfuge for favoring certain private speakers over others based on viewpoint."¹⁹⁸ Yet, with government speech there is little need for subterfuge. The premise of government speech is that the government will favor its own viewpoint over contrary ones, and, as a result, the government has every power to take advantage of private speakers to help communicate its message.¹⁹⁹ The outer limit of the government speech doctrine, where the government's advocacy turns into a "subterfuge for favoring certain private speakers over others based on viewpoint," has not yet been defined, so we can only guess as to where the Court might draw a line, if a line is to be drawn at all.

A. *Some Tentative Limits*

In *Rust*, the Supreme Court identified three areas that might be exempt from the broad freedom of action that the government speech doctrine provides. First, government could not close the traditional public forum (or even a designated public forum) in the name of government speech.²⁰⁰ This means that the public forum doctrine is secure but only within the narrow confines for which it was originally conceived.

Second, the Court speculated that universities might present a special case because they have been "a traditional sphere of free expression" that is so important that government conditions are "restricted by the vagueness and overbreadth doctrines of the First Amendment."²⁰¹

Finally, "traditional relationships such as that between doctor and patient" might also "enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government."²⁰²

speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.").

197. *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003) (purpose of providing library resources is "to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality").

198. *Summum*, 129 S.Ct. at 1134.

199. As noted previously, *Rust* is the seminal case. See discussion *supra* Part III.C.1.

200. *Rust v. Sullivan*, Sec'y of Health & Human Servs., 500 U.S. 173, 199-200 ("For example, this Court has recognized that the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' or have been 'expressly dedicated to speech activity.'" (quoting *United States v. Kokinda*, 497 U.S. 720, 726 (1990))).

201. *Id.* at 200.

202. *Id.*

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The first two of these potential exceptions focus on specific locations where free expression plays an especially important role in our society.²⁰³ Despite the suggestion in *Rust*, to date the Supreme Court has not followed up on the possibility of designating special spaces where the government speech doctrine might not apply with full force. On the contrary, a plurality of the Court did not hesitate to apply the government speech doctrine in its strongest form to compulsory censorship in public libraries, an area that arguably is as traditional and as important a space for free inquiry as universities.²⁰⁴

The third possible exception to the government speech doctrine left open in *Rust* was “traditional relationships.”²⁰⁵ Although the doctor-patient relationship in *Rust* did not qualify for this extra layer of protection (because the relationship between patients and doctors in family planning clinics was not “sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice”),²⁰⁶ the Supreme Court did invoke this exception in a case involving attorneys and their clients.²⁰⁷

B. Government Entrenchment

At first blush, *Legal Services Corporation v. Velazquez*²⁰⁸ seemed indistinguishable from *Rust v. Sullivan*.²⁰⁹ Congress established the Legal Services Corporation “for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.”²¹⁰ Congress specifically excluded from the program any funding for attorneys “if the representation involves an effort to amend or otherwise challenge existing welfare law.”²¹¹ In *Rust*, the Court upheld a regulation that forbade government-funded family planning clinics from discussing abortions.²¹² Yet, in

203. This focus on place in *Rust* led one commentator to suggest exceptions to the Government speech doctrine in other important places with traditions of free inquiry and open debate, which he denominated “spheres of neutrality.” See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681-82 (1992).

204. See *United States v. American Library Ass’n*, 539 U.S. 194, 214 (2003).

205. *Rust*, 500 U.S. at 200.

206. *Id.*

207. See *infra* notes 210-213 and accompanying text.

208. 531 U.S. 533 (2001).

209. See discussion *supra* Part III.C.1.

210. *Velazquez*, 531 U.S. at 536 (quoting Legal Services Corporation Act, 42 U.S.C. § 2996b(a) (1994)).

211. *Velazquez*, 531 U.S. at 537.

212. See *supra* notes 72-73 and accompanying text.

Velazquez, the Court struck down the restriction prohibiting government-funded lawyers from arguing that welfare laws were unconstitutional.²¹³

By a five-to-four vote, the Court in *Velazquez* distinguished *Rust* on the grounds that the Legal Services Corporation program “was designed to facilitate private speech, not to promote a governmental message.”²¹⁴ The Court viewed the lawyers as private speakers and not government speakers in large degree because of the special role lawyers play as the representatives of their clients. The Court explained, “an LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government’s speaker.”²¹⁵ If the client’s lawyers were seen as speaking for the government, the Court reasoned, “the traditional role” of attorneys would be fundamentally altered and the legal system distorted.²¹⁶

The way the *Velazquez* majority distinguished *Rust* struck four of the justices as exceedingly weak and elicited a scathing dissent. The dissent heatedly argued that the concept of the First Amendment preventing government funding from distorting “traditional roles” had no precedent in the Court’s opinions.²¹⁷ While the dissent’s points are well-taken, the majority in *Velazquez* seemed motivated by a more profound concern that it did not fully articulate.

Democratic values lie at the heart of the government speech doctrine.²¹⁸ Elected governments must promote some points of view over others if they are to accomplish the goals for which they were elected. At the same time, there can come a point where the government’s vigorous promotion of its own policies can stifle and suppress opposition, with the result that the government has undermined the democratic process itself. The danger that concerned the *Velazquez* majority was that the government, through manipulative funding of which arguments lawyers could or could not raise against it, could entrench itself by insulating its policies and practices from judicial review.²¹⁹ Entrenchment is the antithesis of democracy, and where government speech starts to tread on democratic values, it undermines its own foundation, and at least in *Velazquez*, the Court would not allow that to stand.

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

214. *Id.* at 542.

215. *Id.*

216. *Id.* at 544.

217. *Id.* at 555 (Scalia, J., dissenting) (“[The majority decision] is wrong on the law because there is utterly no precedent for the novel and facially implausible proposition that the First Amendment has anything to do with government funding that—though it does not actually abridge anyone’s speech—‘distorts an existing medium of expression.’”).

218. See discussion *supra* Part III.B.

219. This is the concern that, in my view, the Court majority was alluding to when it referred to the “traditional role” of attorneys. *Velazquez*, 531 U.S. at 544.

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The principal check on excessive or inappropriate government speech is the power of the voters to vote out the government and vote in a new one.²²⁰ Even so, if all else fails, an independent judiciary is available to strike down laws that “aim[] at the suppression of dangerous ideas.”²²¹

The notion that, even at its outer limit, the government’s power does not include attempts to “suppress dangerous ideas” seems to be universally accepted by both conservative and liberal justices alike.²²² The government’s attempt to prevent the lawyers it funded from arguing that certain laws violated the Constitution smacked of suppression of ideas, and jeopardized the judiciary’s ability to effectively check excesses by the political branches of government. The *Velazquez* majority gave voice to this concern at the end of the decision when it wrote that “[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.”²²³

So the real difference between *Rust* and *Velazquez* may be that in *Rust* a majority of the Court was not worried that depriving indigent women of a full range of medical advice in family planning could entrench the government whereas in *Velazquez* a majority of the Court was concerned that preventing indigent welfare recipients from challenging the constitutionality of the laws that provide for their subsistence could lead to entrenchment.²²⁴

C. The Establishment Clause

The only clear limit on government speech is the Establishment Clause of the U.S. Constitution.²²⁵ The Establishment Clause, can itself be used to argue that, apart from religion, the government’s power to speak is unrestrained. Because the Establishment Clause expressly limits government speech, it could be argued that,

220. See *supra* note 68 and accompanying text.

221. *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (citing *Am. Commc’ns Ass’n. v. Douds*, 339 U.S. 382, 402 (1950)).

222. Among other places, the phrase is repeated in *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540, 550 (1983) (“Where governmental provision of subsidies is not ‘aimed at the suppression of dangerous ideas,’ [quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)], its ‘power to encourage actions deemed to be in the public interest is necessarily far broader.’ [quoting *Maher v. Roe*, 432 U.S. 464, 476 (1977)]”), and in Justice Scalia’s dissent in *Velazquez*, 531 U.S. at 552 (“The Court has found such programs unconstitutional only when the exclusion was ‘aimed at the suppression of dangerous ideas.’” (quoting *Speiser*, 357 U.S. at 519 (1958))).

223. *Velazquez*, 531 U.S. at 548.

224. It may be more precise to say that the difference between the two cases is the level of concern Justice Kennedy had between the two situations, since he provided the decisive fifth vote in both *Rust* and *Velazquez*.

225. U.S. CONST., amend. I (“Congress shall make no law respecting an establishment of religion...”); *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1127 (2009) (“[G]overnment speech must comport with the Establishment Clause.”).

because one limit is expressed and others are not, the Constitution implicitly rejects other restrictions that are not expressed.²²⁶

D. *The Limit of Limits*

Because government speech represents the will of the democratic majorities that elected the government in the first place, judicially crafted limits will likely remain limited.²²⁷

It is possible that the Supreme Court will follow up on the suggestion in *Rust* to develop a jurisprudence of “traditional roles” that the government cannot interfere with, but this line of thought doesn’t seem promising. In nearly all government speech cases the government is establishing a new program, which by definition does not have a tradition to guide it. Moreover, the government can respond to a claim of disruption by arguing that the government interference can be avoided if the government’s money is refused. This was the response to the doctors in *Rust* and to the libraries in *American Libraries Ass’n*.²²⁸ Although the Court was willing to draw a distinction between government-funded doctors, libraries, political candidates, and artists on the one hand and government-funded lawyers on the other, the Court’s reliance on the importance of independent judicial review and the danger of government entrenchment strongly suggests that lawyers will be a special case.

Other possible limits on the government speech doctrine would be difficult to apply in practice. For example, it has been argued that government speech should be curtailed if it “drowns out” private speech or if it engages in “partisan activities.”²²⁹ It is true that the danger of government “drowning out” private speech was one of the concerns that first brought government speech to the attention of legal academics.²³⁰ Because government speech necessarily occupies some public space that might have been occupied by a private speaker, it is not at all clear, how a line can be drawn between government legitimately promoting its own policies and government “drowning out” speech. The term “drowning out” itself defies consistent definition because it implies that a speaker is able to give voice to his or her opinions, but those opinions cannot be heard because of a louder voice in the same space. But heard by whom? Everyone? A majority of the country? The state? The speaker’s home town? What if the voice that was supposedly drowned out was so weak to begin with that

226. This is just an application of the familiar canon of interpretation of *expressio unius exclusio alterius*.

227. See discussion *supra* Parts III.A, III.B.

228. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991); *United States v. Am. Library Ass’n*, 539 U.S. 194, 212 (2003). The logic is that a person can always refuse a government “subsidy,” although the line between subsidies and penalties can be a blurry one. See *Sullivan*, *supra* note 106, at 1436.

229. See, e.g., *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1107 (E.D. Cal. 2003).

230. See *supra* note 62.

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any speech would overwhelm it? How could you tell? The fundamental problem with “drowning out” as a limit on government speech is that there simply is no way to administer the rule because there is no objective baseline from which to judge the amount of “volume” private speech should have.

As for a restriction on “partisan activities,” this also seems to be too elusive a concept for courts to apply as a constitutional rule. Could a President be curtailed in speaking for a bill that is favored by his or her political party? Clearly not. Recent case law has approved government speech that advocated against specific legislation.²³¹ Because the government is always advocating for some goal or another, whether it is the food pyramid, Surgeon General warnings, or a suggestion that beef is for dinner, courts would become hopelessly entangled in politics if they attempted to determine which government policies favored certain political parties over others.

In keeping with the government speech doctrine’s democratic principles, if restrictions are to be imposed on government speech, they will most likely have to be imposed by the people.²³² The Court noted that “[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice.”²³³ In other words, the government can limit itself by laws (that presumably the government could modify if desired).

If the government will not regulate itself, either through judicious practice or sensible legislation, then, “of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’”²³⁴ In other words, the people have the ultimate say in whether the government has gone too far. This limit may be little comfort to minorities that have little hope of gaining the reins of power, but it should be no surprise that a rule based on democratic values ultimately defers to the majority.

VI. CONCLUSION

Government speech and the public forum clash when the government chooses to support some viewpoints over others. In deciding these cases, courts are choosing between upholding the egalitarian principles of the public forum doctrine or democratic principles of the government speech doctrine. Increasingly, courts have been siding with democracy over equality by finding government speech where in the past they had found a public forum. Because it is a rule born of deference to democratic outcomes, the government speech doctrine is unlikely to be limited by the court, except in the most exceptional circumstances where there is an explicit

231. *See, e.g.*, Page v. Lexington County Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008).

232. *See* discussion *supra* Parts III.A, III.B.

233. Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1132 (2009).

234. *Id.* (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

constitutional limit on government speech like the Establishment Clause or an exercise of government speech that threatens the functioning of the democratic system itself. As a result, government must regulate itself, and that means that the voters who elect the government must police the government's actions at the ballot box rather than rely on judges to do that for them from the courthouse. Controlling government is the work of citizens, and so is controlling government speech.