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The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a “Jurisprudence of Labels”

*Barry P. McDonald**

I. INTRODUCTION

In the past couple of decades, the U.S. Supreme Court has created, and continues to develop the contours of, what it refers to as the “government speech” doctrine. In its current incarnation, this doctrine holds that whenever it can be said that the government is engaging in speech, then it is not subject to First Amendment limitations with respect to the impact its actions or message may have on private speakers associated with that speech. Under some iteration of this doctrine, the Court has sanctioned the imposition of normally prohibited viewpoint restrictions on private speakers who accept government funds¹ or on government employees speaking on matters of public concern;² the compulsion of private party funding for speech with which it disagrees;³ and the selective exclusion of speakers from traditional public fora based on the content of the speakers’ message.⁴ In other words, the government speech doctrine has become a First Amendment “escape hatch” for placing substantial restrictions or burdens on private speakers that would otherwise be subject to serious judicial scrutiny and constitutional doubt if traditional free speech principles were applied to these situations.

* Professor of Law, Pepperdine University School of Law. I would like to express my thanks to John Fee for conceiving of and spearheading the symposium at which I first presented these thoughts. I owe him additional thanks for inspiring the title of this Article. While thinking about “The Emerging Complexities of Government Speech,” as John had titled the symposium, it occurred to me that many of those conceded complexities are the product of the Court’s current oversimplification of the driving principles which animate the government speech doctrine.

1. *Rust v. Sullivan*, 500 U.S. 173 (1991).
2. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
3. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).
4. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

In this Article, I will briefly trace the development of the government speech doctrine and demonstrate that it has become unhinged from its original purpose of assisting in the ordering of governmental and private speech interests in cases where they intersect and conflict. Instead, the current Court has transformed the doctrine from a tool of substantive analysis into what Justice Breyer has recently termed “a jurisprudence of labels.”⁵ On this view, whenever the Court can label a message involving the interaction of both government and private speakers as primarily that of the government, it washes its hands of assessing the constitutionality of the burdens placed on the interests of the private speakers. I will contend that this modern development is misguided and urge a return to a formulation and application of the government speech doctrine as it was originally conceived.

II. ORIGINS AND TRANSFORMATION OF THE DOCTRINE

Although the Court has, thus far, applied the government speech doctrine in the context of four different types of cases—those involving compelled subsidies by private parties of another’s speech, restrictions attached to government subsidies of private speech, government employee speech, and speech on public property—it arose in the first category of cases: claims by private speakers that being compelled by the government to financially subsidize speech with which they disagree violates the First Amendment.

In *Abood v. Detroit Board of Education*,⁶ a group of public school teachers contended that the government violated their First Amendment rights by making them pay the equivalent of member dues to a private teachers’ union that espoused views on various issues.⁷ The Court disagreed with this to the extent the union used the payments to fund collective bargaining activities germane to its purpose, but agreed it was unconstitutional to compel funding for political or ideological activities with which the plaintiffs disagreed.⁸

5. *Id.* at 1140 (Breyer, J., concurring). It should be clear by now that the scope of my undertaking in this Article is very specific—to examine the Court’s recently-created government speech doctrine. Hence, I make no attempt to address the multitude of other First Amendment issues that may arise in connection with the government’s role as a speaker. For one classic exposition of such expanded issues, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

6. 431 U.S. 209, 215 (1977).

7. *Id.* at 211–17.

8. *Id.* at 217–37.

Justice Powell wrote separately to urge stronger First Amendment protections for the plaintiffs than the majority appeared to require.⁹ As part of his argument, he added a footnote explaining why ordinary taxpayers could be made to fund government, but not private, speech with which they disagreed.¹⁰ According to Powell, “the government is representative of the people,” while unions are “representative only of one segment of the population . . . with certain common interests.”¹¹ In other words, he appeared to be arguing that because in our democratic system the government is the appointed agent of at least the majority of the people who elect it, it is fair enough for those who disagree with its policies to also fund its speech. On this view, one could say dissenting taxpayers consent to such an arrangement under the democratic social contract we are presumed to accept.

Several years later, the Court was facing the question of the extent to which an integrated state bar association (i.e., one that lawyers of a state are required to join and pay member dues to) could use a member’s dues to fund political or ideological speech with which that member disagreed.¹² Drawing on Justice Powell’s footnote in *Abood*, the defendant State Bar of California argued that as a government entity, it was entitled to spend member dues on whatever speech it wished as long as it was pursuing legitimate government goals.¹³ This was so, it argued, because government bodies must take positions that some taxpayers will inevitably disagree with in order to perform their legitimate functions of governance.¹⁴ Indeed, this argument had persuaded the California Supreme Court in the decision below to reject the First Amendment claims of the dissenting bar members.¹⁵

Labeling this “the so-called ‘government speech doctrine,’” Chief Justice Rehnquist, writing for a unanimous Court, appeared to accept the logic of it but held that the California State Bar (“State Bar”) was not sufficiently like an ordinary government agency to avail itself of the doctrine.¹⁶ Pointing out that the State Bar received

9. *Id.* at 244–64 (Powell, J., concurring in the judgment).

10. *Id.* at 259 n.13.

11. *Id.*

12. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

13. *Id.* at 10–11.

14. *Id.*

15. *Id.* at 10.

16. *Id.* at 11–13.

its funding from member dues instead of legislative appropriations, lacked direct enforcement authority with respect to its rules, was created to provide “specialized professional advice” to the State Supreme Court, and consisted of lawyers rather than general citizens or voters, he reasoned that the State Bar was not like “traditional government agencies and officials” which “are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents.”¹⁷ Accordingly, Rehnquist concluded it would be inappropriate to shield the State Bar against compelled funding challenges pursuant to the rationale of the government speech doctrine. Moreover, he reasoned, since the regulatory purpose of the State Bar was analogous to that of a private union (i.e., to organize and regulate a group of laborers with common interests), the State Bar was also subject to the *Abood* rule allowing the use of dissenting member dues for activities germane to that purpose but not for engaging in non-germane political or ideological activities that they disagreed with.¹⁸

Hence, in *Keller*, a unanimous Court essentially blessed the notion that regular taxpayers do not have a First Amendment right to prevent *ordinary* government agencies from using their taxes to promote disagreeable views—thus giving the government speech doctrine its first official recognition by the Court beyond its humble beginnings in Justice Powell’s *Abood* concurrence. Conversely, the *Keller* Court held that if a subgroup within the polity is being compelled to pay into an association for a defined regulatory purpose, whether that association is called a government entity like the State Bar or a private entity like the *Abood* union, dissenting funders have a First Amendment right to prevent the association from using funds for disagreeable speech that is not germane to the regulatory purpose. Another way of saying this is that compelled associations have no right to use dissenting member funds to promote their viewpoints over that of the dissenters (i.e., engage in viewpoint discrimination against them) with respect to non-regulatory matters.

Chief Justice Rehnquist did not expend much intellectual effort to explain the theoretical basis for this distinction in First Amendment rights between an ordinary taxpayer and a person being compelled to associate with others for particular regulatory purposes.

17. *Id.*

18. *Id.* at 13–14.

He merely pointed out that general government representatives need to be able to advocate for policy decisions they are charged with making, and if citizens who disagree with such views were able to silence them, “debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”¹⁹ In other words, inherent in our system of democratic majority rule and representative leadership is a structural subordination, to the government’s need to govern, of an individual’s general “freedom of belief” on which the *Aboud* Court premised its First Amendment right against compelled funding of disagreeable views²⁰—at least when it comes to funding with general taxes basic governmental functions with which a citizen may disagree. One might even say that American citizens are presumed to consent to this subordination when they choose to live under our system of governance after reaching an age of maturity when opting out to live under the government of a different country might be feasible.

Such presumed consent provides the compelled payment of taxes to support general governance with a democratic legitimacy that obviously does not obtain in a more limited association (and its attendant funding) that is compelled to achieve special regulatory objectives. In the latter cases, it is solely the regulatory interests that justify the compulsion and consequent override of an individual’s freedom of belief, and such interests do not justify compelled funding for activities not germane to achieving them.

But, one might ask, what about compelled taxpayer funding for disagreeable activities that might be characterized as going beyond those necessary or germane to general governance? If an individual enjoys a general freedom of belief, the argument would go, surely it can only be subordinated to those necessary or germane activities that can fairly be said to lie within the scope of a citizen’s presumed democratic consent. For instance, is a legislative decision to fund abortions, or a president’s decision to call for the honoring of a national day of prayer, activities that are necessary or germane to general governance? The difficulty of such an inquiry perhaps explains Chief Justice Rehnquist’s implied suggestion that it would simply be impractical for our system of government to operate if

19. *Id.* at 12–13.

20. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977); *see also Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 471–72 (1997).

taxpayers had a constitutional right not to fund disagreeable government speech. By contrast, when funding is compelled to achieve defined regulatory purposes, it is easier to draw the germaneness line and ask whether a given activity falls on one side of the line or the other. We might refer to this difficulty of determining the germaneness of general government activities as the Impracticability Principle of *Keller*, which justifies the invocation of the government speech doctrine.

A second principle underlying that doctrine can be derived from Justice Powell's observation in *Abood*, which Chief Justice Rehnquist quoted in *Keller*,²¹ that the government can compel funding for disagreeable activities because it is "representative of the people" in a way that a compelled association such as a union is not. This observation seems to be invoking another aspect of democratic legitimacy—the notion that it is fair enough for dissenting citizens to fund government speech that represents the views of the majority since they have consented to this system. By contrast, such legitimacy does not obtain in a more limited, compelled association, and thus cannot serve as a salve for viewpoint discrimination outside of the association's core activities. In a later case in which Justice Kennedy was writing for the Court, he appeared to be elaborating on this principle by suggesting that the availability of the government speech doctrine to override First Amendment objections to it depends on whether the official or agency speaking is subject to "traditional political controls to ensure responsible government action."²² In other words, one can only be sure that government speech is imbued with democratic legitimacy to the extent that the government speaker is subject to democratic accountability for its speech. We can refer to this as the Accountability Principle justifying the application of the government speech doctrine.

A third principle underlying that doctrine which is derivable from *Keller* relates to the speech autonomy interests of the dissenting funder. In a general governance situation where an ordinary taxpayer is funding disagreeable government speech, the impingement on her speech autonomy interests seems fairly attenuated given that she is just one member of the entire polity contributing to it. On the other hand, when a select subset of the polity is being compelled to fund disagreeable speech not germane to the reason for the compulsion,

21. *Keller*, 496 U.S. at 11.

22. *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000).

the violation of their autonomy interests seems substantially greater. This seems to explain Chief Justice Rehnquist's focus on the fact that the State Bar was funded by individual member dues, rather than general legislative appropriations, as a basis for distinguishing that entity from an agency of general governance.²³ We can label this as the Autonomy Principle justifying the application of the government speech doctrine.

These three principles, then, the Impracticability, Accountability, and Autonomy Principles, help to explain the basis for the government speech doctrine as it was originally conceived and applied in *Keller*. Moreover, the Court's analysis clearly implied that the doctrine was not to be applied automatically to excuse infringements on a person's freedom of belief whenever it could be said that they occurred in the course of the government itself speaking. Rather, it suggested that First Amendment scrutiny had to first be applied to determine if the foregoing principles indicated that a given case involved the *type* of government speaker that justified impingements on that freedom. After all, the *Keller* Court never stated that the State Bar was *not* a government body—indeed, the Supreme Court of California had determined that it was a state agency under California law—but just that the State Bar was not the *type* of government body that justified the application of the government speech doctrine to excuse infringements upon the freedom of belief of dissenting members. Thus, in a later case where Justice Scalia asserted that the *Keller* Court deemed the State Bar to be a *private* speaker to help justify his recasting of the government speech doctrine as an absolute exemption from First Amendment scrutiny whenever *any* government entity infringes private beliefs in the course of speaking,²⁴ he was either mistaken or simply mischaracterizing that decision.

The next compelled speech subsidy dispute to come before the Court involved a state university student's challenge to a mandatory student activity fee that was used to fund speech of *student groups* with which he disagreed.²⁵ Thus, this case did not present the government speech issue addressed by *Keller*. Nonetheless, Justice Kennedy, writing for the Court, began his analysis by pointing out

23. *Keller*, 496 U.S. at 11.

24. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). This issue is discussed in more depth at *infra* notes 74–82 and accompanying text.

25. *Southworth*, 529 U.S. 217.

that if the objectionable speech had been that of the public university, different principles would govern and the issue would have been “whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself.”²⁶ Hence, in Kennedy’s view and consistent with *Keller*, whether the public university could avail itself of the government speech doctrine, if it had been the speaker, depended upon the type of government agency it was—and how politically responsive it could be said to be pursuant to the Accountability Principle discussed above. The Court did not intimate that the university’s speech would have been free from First Amendment scrutiny simply because a government body would have been the speaker. And as to the objectionable student group speech that was at issue in the case, the Court held that the funding students’ *Abood* and *Keller* rights were adequately protected by requiring that all funding decisions be made on a viewpoint-neutral basis since it would be impossible to identify speech that was germane to a university’s broad educational mission (a rationale similar to the Impracticability Principle applicable to objectionable government speech).²⁷

The Court’s latest compelled speech subsidy decisions involved three different cases raising a similar complaint—that the U.S. Department of Agriculture (USDA) was violating the First Amendment rights of food producers and handlers who objected to fees levied upon them to fund generic industry advertising promoting their respective food products. In the first such case, involving California tree fruit producers and handlers, a closely divided Court rejected the First Amendment claim on the grounds that (1) all of the subsidized advertising was germane to a legitimate regulatory program, was non-ideological in nature, and contained no messages with which the plaintiffs disagreed (hence satisfying the principles of *Keller*), and (2) the challenged law was better classified as a species of economic regulation than a law abridging speech which warranted heightened scrutiny.²⁸ The Court had no occasion to address the potential application of the government speech doctrine to justify the compelled subsidies because, as the principal

26. *Id.* at 229.

27. *Id.* at 229–35.

28. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 467–77 (1997).

dissenting opinion in the case pointed out, the government chose not to rely on that argument.²⁹

In the second such case, involving mushroom handlers, a divided Court reversed course and held that the compelled advertising subsidies violated the First Amendment under the principles of *Abood* and *Keller*.³⁰ It distinguished *Glickman* on the grounds that whereas the advertising fees imposed in that case were ancillary to a broader regulatory regime involving the production and sale of California tree fruits, in the case under review, the industry advertising was the sole regulatory goal.³¹ Hence, there was no legitimate regulatory purpose that justified the compelled association; forced association and subsidies for expressive purposes only implicated core freedom of belief concerns that outweighed the economic goals of the program.³² And although the USDA attempted to argue that the subsidies could be justified under the government speech doctrine, the Court ruled that the USDA had essentially waived this argument by failing to raise it in the court below.³³

Thus, presumably after taking the Court's hint that a properly raised government speech defense would be seriously considered, in the third case involving compelled subsidies for industry advertising of food products (here, beef products) the USDA pressed the argument and succeeded in winning over a bare majority of the Court.³⁴ Noting that the beef program was very similar to the mushroom program invalidated in *United Foods*, Justice Scalia, writing for five Justices, nonetheless held that viewing these programs as the speech of the government cured any First Amendment problems associated with them.³⁵ Further, viewing them

29. *See id.* at 483 n.2 (Souter, J., dissenting).

30. *United States v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001).

31. *Id.* at 413–16.

32. *See id.* at 415–416.

33. *Id.* at 416–17.

34. *Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550 (2005). Although the vote was 6–3, Justice Ginsburg declined to join Justice Scalia's government speech analysis and concurred on other grounds. *Id.* at 569–70 (Ginsburg, J., concurring in judgment)

35. *Id.* at 557–67 (majority opinion). This raises the question as to why the government failed to press the government speech defense in the first two cases. I submit it was something other than incompetence on the part of the government lawyers. Rather, it was because the USDA programs in all of the food cases looked more like the State Bar program to which the *Keller* court held that the government speech doctrine did not apply. They were defined regulatory programs administered by specific agencies where the dues used for disagreeable

as government speech was proper because the USDA ultimately controlled the message being communicated in the ads.³⁶ So an identical program that was a violation of a person's freedom of belief under *Abood* and *Keller* just four years earlier all of a sudden became constitutional under the theory that whenever speech can be attributed to *any* government speaker, that freedom must be subordinated to the state's interest in governing.

But how, one might ask, did Justice Scalia get beyond the teaching of *Keller* and *Southworth* that it was not the fact that any speaker claiming government status was entitled to automatically elevate its interests over the First Amendment interests of affected citizens, but only those "traditional government agencies and officials"³⁷ that "participate in the general government of the State,"³⁸ such as "a governor, a mayor, or a state tax commission?"³⁹ According to Scalia, in *Keller* and other cases "invalidating exactions to subsidize speech, the speech was, or presumed to be, that of an entity other than the government itself"⁴⁰—in other words, the speech of a private speaker. But as mentioned earlier, nowhere in *Keller* did Chief Justice Rehnquist refer to the State Bar as a private entity—in direct contravention of the ultimate authority on that issue, the Supreme Court of California—but rather as an entity that was not sufficiently like a "typical government official or agency"⁴¹ that required an exemption from freedom of belief constraints in order to properly function. Thus, with one glib mischaracterization of the Court's seminal government speech decision, Justice Scalia managed to transform that doctrine from one requiring a substantive analysis of the competing public-private speech interests to determine if it should apply in a given case, to a blank check for the government to impinge on citizens' freedom of belief whenever speech is characterized as coming from a government speaker. And

speech were levied only on those subject to the regulatory program. In other words, the Impracticability, Accountability, and Autonomy Principles that drove *Keller's* reasoning all pointed away from a government speech analysis. So it was quite a surprise in *Johanns* when the Court did a "180" from its prior decision regarding the virtually identical mushroom program in *United Foods* that it said violated the First Amendment, and held that the beef program did not even merit First Amendment scrutiny because it was government speech.

36. *Id.* at 561–62.

37. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (1990).

38. *Id.*

39. *Id.*

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

41. *Keller*, 496 U.S. at 12 (emphasis added).

this transformation encompassed all situations involving government speech, regardless of whether such impingements would be necessary for a given agency or program to function effectively (the Impracticability Principle discussed above), or whether the speech would be sufficiently subject to democratic control (the Accountability Principle), or whether the burden of the speech would be evenly distributed or placed on a select group (the Autonomy Principle).

However, while blithely assuming (contrary to *Keller*'s explicit example) that no government entities or programs can operate effectively subject to a right against compelled funding,⁴² Scalia at least addressed the Accountability and Autonomy Principles underlying the government speech doctrine. As to the former, while he acknowledged that “[s]ome of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability,”⁴³ he read that limitation as simply requiring that government actors control the message—i.e., that it indeed be government versus private speech—and not that those actors realistically be accountable to the public for the speech.⁴⁴ Indeed, in *Johanns* itself Scalia concluded that the fact Congress had created the beef ad funding program and given the USDA authority to oversee it provided adequate accountability even though the funded ads identified a private beef industry group (America’s Beef Producers) as their sponsor.⁴⁵ Although one might wonder how one can have *government* speech at all that is presented as that of a private speaker, as the three dissenting Justices in *Johanns* argued, how can there be true democratic accountability for speech if the public does not know it is that of the government?⁴⁶ Simple, Scalia answered. Just hold the politicians who authorized the speech accountable for it. But how, one might ask, can the public hold *them* accountable without knowing that they were responsible for the speech? Scalia offered little in response to this problem other than to

42. See *Johanns*, 544 U.S. at 559.

43. *Id.* at 563.

44. See *id.* at 563–64 & n.7.

45. *Id.*

46. *Id.* at 570 (Kennedy, J., dissenting); *id.* at 570–80 (Souter, J., dissenting, joined by Stevens, J., and Kennedy, J.).

note that the dissent cited no authority for the proposition that government speech identify the government as the speaker.⁴⁷

As to the Autonomy Principle, citing an inapposite Establishment Clause case for support, Justice Scalia boldly declared that a compelled subsidy analysis is “altogether unaffected” by whether the subsidy is broadly levied on all citizens or whether a discrete group of citizens is targeted to pay it.⁴⁸ And rather than address the problem with selective compelled subsidies—that they constitute a greater impingement on speech autonomy interests because of the unequal nature of the compulsion—Scalia dismissed the entire issue with a blithe rhetorical flourish, observing that “the injury of compelled funding . . . does not stem from the Government’s mode of accounting.”⁴⁹

Hence, the majority in *Johanns* transformed *Keller*’s meaningful approach to the government speech problem that balanced democratic functionality against freedom of belief interests into a vapid presupposition that the former concerns should automatically prevail even in situations not significantly implicating them. The irony of the bare majority that Justice Scalia received for the *Johanns* decision was that Justice Breyer, who later complained strongly about this approach,⁵⁰ reluctantly supplied the critical fifth vote for it. Writing separately, he stated that he would have preferred to reject the plaintiffs’ compelled subsidy claim on the grounds that the beef advertising program was a species of economic regulation a la the reasoning of *Glickman*, but that he would accept the government speech approach as a less desirable solution to the food advertising cases.⁵¹

All of this raises the question of why Justice Scalia was so eager to accomplish the *Keller* to *Johanns* transformation of the

47. *Id.* at 564 n.7 (majority opinion). Indeed, one could envision a very negative public reaction to the “Beef, It’s What’s For Dinner” ads that were at issue in *Johanns* if people perceived that the government was promoting beef consumption after the spate of recent studies connecting that consumption to an increased risk of cancer or heart attacks. At least the speech of the State Bar in *Keller* would have been recognized as such, even though that still did not satisfy the Court that the government speech doctrine should be applied to it.

48. *Id.* at 562. In dissent, Justice Souter cogently explained why the Establishment Clause case Justice Scalia cited for his assertion provided little support for it. *Id.* at 576 n.4 (Souter, J., dissenting).

49. *Id.* at 563 (majority opinion).

50. *See infra* notes 83–85.

51. *Johanns*, 544 U.S. at 569 (Breyer, J., concurring).

government speech doctrine.⁵² The answer can be found in one of his concurring opinions from a related case eight years earlier. There, a majority of the Court held that the First Amendment was not violated by a statute requiring the National Endowment for the Arts to take into consideration the values of decency and respect of the American people in making artistic grant decisions, provided such decisions did not amount to invidious viewpoint discrimination.⁵³ Justice Scalia, joined by Justice Thomas, concurred solely in the result and argued that the “Congress shall make no law *abridging* the freedom of speech” language of the First Amendment means that while the government cannot restrict directly the speech of private citizens, when it speaks itself or favors private speakers’ viewpoints through grants of money it is not abridging anyone’s speech.⁵⁴ In other words, under Scalia’s textualist reading of the First Amendment, that provision only protects private citizens against direct restrictions on their speech, and has *no application* when the government itself speaks or selectively sponsors the speech or viewpoints of citizens.

In his *Finley* concurrence, Justice Scalia was not thinking about situations involving compelled subsidies of disagreeable speech, but rather the selective government funding of private speakers. Yet he obliquely extended his textualist rationale to the former type of situation in *Johanns*,⁵⁵ and, four years later, Justice Alito completed this reworking of the justification for the government speech doctrine. Writing for the Court in an unrelated case and citing

52. See *infra* notes 58–72 and accompanying text for a discussion of certain intermediate doctrinal developments that undoubtedly abetted this transformation.

53. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580–87 (1998).

54. See *id.* at 598–99 (Scalia, J., concurring in the judgment) (“It is the very business of government to favor and disfavor points of view on . . . innumerable subjects And it makes not a bit of difference . . . whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly . . . or by giving money to others who achieve or advocate it None of this has anything to do with abridging anyone’s speech.”). Scalia acknowledged two limitations on his principle of viewpoint favoritism. First, where the government has created a limited public forum for private speech, all viewpoints must be treated equally. *Id.* at 599. Second, where a denial of public funding would have a significant coercive effect on the viewpoints of private speakers because no other funding was available, there might be a First Amendment problem. *Id.* at 596–97.

55. See *Johanns*, 544 U.S. at 553 (framing question presented as “whether the generic advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny”); *id.* at 559 (asserting that “[w]e have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns”).

Johanns, Alito asserted that when the government “engag[es] in [its] own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”⁵⁶ Hence, what began in *Keller* as a considered judgment about the situations in which it was appropriate to apply the government speech doctrine by focusing on the mix of governmental and private speech interests at stake, became a blanket exemption for the government to override any conflicting private speech interests in cases where it could be said to be the principal speaker. And this was accomplished on the back of Justice Scalia’s textualist theory, which several members of the Court (primarily the majority conservative bloc) appear to have fully bought into at this point.

But how convincing is this theory? Not very. In *Finley*, Justice Scalia reasoned that since the word “abridge” in the Free Speech Clause means “to contract, to diminish; to deprive of,” when speech restrictions are attached to government funding no such contraction occurs because people can decline the funding and remain free from them.⁵⁷ But one could just as plausibly argue that when the government passes a law attaching speech restrictions to government subsidies for expression, that is indeed a law “abridging the freedom of speech” since the funds are contingent upon such an abridgment. In other words, “make no law” means *no* law, including those containing contingent abridgments. Indeed, if one wants to take the purely textualist approach espoused by Scalia, his reading is *less* plausible than the latter reading, since the use of the word “abridge” signals that even slight impairments on the freedom of speech are unacceptable—including contingent abridgments. Had the Founders intended to limit free speech protection to direct restrictions on speech, one would have thought they would simply have said, “Congress shall make no laws restricting or prohibiting speech.”

Moreover, even if Scalia’s textualist argument was persuasive as to conditions placed on the receipt of government speech subsidies a la *Finley*, to simply transfer without analysis this interpretation to the compelled speech subsidies at issue in *Johanns* is misguided. It might be one thing to say that the freedom of speech remains unabridged in the former type of case because one can always decline the government funding, but this rationale is simply inapplicable to cases

56. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009).

57. *Finley*, 524 U.S. at 595–96.

where a *select* group of citizens are compelled to fund government speech with which they disagree. In the latter cases, there is clearly some abridgment of a citizen's freedom of belief under precedents such as *Abood* and *Keller*. The correct approach, then, is to consider whether that abridgment is justified by countervailing government interests in a given case, and not to simply pretend that there is no abridgment because a government entity or official is characterized as the main speaker.

In the end, the *Johanns* majority sanctions the government targeting a select group of taxpayers to fund speech no matter how disagreeable to them, as long as the government claims the speech or at least does not present it as being from the funders themselves. The potential problems are manifold. Could, for example, a democratic Congress pass a law levying a special assessment on doctors' groups or health insurers to fund an ad campaign urging the passage of health care reforms they perceive as detrimental to them? And better yet, could Congress permit citizens' groups to participate in the ad program and then issue the ads under the moniker "Citizens for Better Health Care?" There is no reason under the *Johanns* reformulation of the government speech doctrine that this could not be done consistent with the First Amendment. Suffice it to say that *Johanns* leaves much to be desired in terms of connecting the blanket First Amendment exemption for government speech it creates to the theories animating its original conceptualization.

In sum, the government speech doctrine was first recognized by the Court in *Keller* as part of an attempt to identify the circumstances under which it would be appropriate to elevate the interests of the government in expressing viewpoints in order to govern over impingements on the freedom of belief of dissenting funders of such speech. *Johanns* then morphed that doctrine into an approach that subordinates the rights of conscience of dissenting funders in all cases of government speech on flawed theoretical premises. To be fair to Justice Scalia, however, he did get some precedential support for this misguided approach from certain *government subsidy* speech cases authored by Justice Kennedy that were decided between *Keller* and *Johanns*. The next section will briefly analyze those cases and describe how they contributed to derailing the government speech doctrine from its intended purpose.

III. GOVERNMENT SUBSIDY DECISIONS

A year after *Keller*, the Court decided *Rust v. Sullivan*.⁵⁸ There, with Justice Souter having just replaced Justice Brennan, Chief Justice Rehnquist was able to muster four other votes for the position that the government could constitutionally ban the operators of family planning clinics from providing abortion counseling as a condition of receiving federal funding, rejecting the contention that such a ban amounted to viewpoint discrimination prohibited by the First Amendment.⁵⁹ The Chief Justice relied on a line of decisions that he interpreted as standing for the proposition that although the government must refrain from unduly interfering with the exercise of constitutional rights, it has no duty to subsidize them.⁶⁰ A corollary of this principle, according to Rehnquist, was that the government may fund certain activities, including speech, to the exclusion of others.⁶¹ The Court made no reference to *Keller* or the government speech doctrine.

Four years later, Justice Kennedy, writing for the Court, built on this theme from *Rust* in dictum in a case where a religious student publication contended that the denial of printing subsidies by a public university amounted to unconstitutional viewpoint discrimination because secular student publications were eligible to receive them.⁶² The Court agreed with the plaintiff on the grounds that the university had created a virtual public forum to encourage student speech with the funds, and any viewpoint discrimination in administering them was unconstitutional.⁶³ Kennedy rejected the university's reliance on *Rust* and related cases to argue that content-based funding decisions to accomplish educational objectives were constitutional. Instead, he characterized *Rust* as standing for the principle that when the government itself speaks or grants funds to private speakers to convey the government's own message, it is then entitled to control that message—including restricting fund

58. 500 U.S. 173 (1991).

59. *Id.* There is little doubt that if Justice Brennan had remained on the Court one more year, the decision would have gone 5–4 in the opposite direction. Indeed, one suspects from Justice Souter's later voting pattern that he would have been on the side of the dissenting justices if he had possessed a little more experience on the Court when *Rust* was decided.

60. *Id.* at 192–200.

61. *Id.*

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

63. *Id.* at 828–37.

recipients from expressing conflicting views.⁶⁴ But in the case under review, Kennedy reasoned, the government was facilitating the expression of a diversity of private views through the creation of a limited public forum.⁶⁵ Once again, the Court made no mention of *Keller* or the government speech doctrine.

Justice Kennedy clearly took some liberties with *Rust* since the Court never characterized the government as a speaker or promoter of a message in that case, but rather simply as a funder of a chosen set of activities which included certain private speech (i.e., family planning counseling that excluded discussions of abortion as a method of such planning). Kennedy later extended this reconceptualization of *Rust* in his opinion for the Court in the *Southworth* compelled speech subsidy case discussed earlier.⁶⁶ In dictum in that case, he set forth the central premise of the government speech doctrine articulated in *Keller*—that as a general rule, the government may use taxpayer money to support its expression of views that the taxpayer may disagree with—but oddly cited to *Rust*, rather than *Keller*, in support of it.⁶⁷ One year later, Kennedy again continued his morphing of *Rust* in a government speech subsidy decision where, writing for the Court, he cited to *Rust*, *Rosenberger*, and *Southworth* to support the proposition that the government can promote its own views through its speech or funding decisions.⁶⁸ But this time he was more candid about the remaking of *Rust*, pointing out that “[t]he Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to government speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”⁶⁹ (What he did not say was that they were all his own majority opinions that had done this.) And somewhat ironically, two years later in a plurality opinion that Justice Kennedy did not join, the Court seemed to return to the original meaning of *Rust* that the government can choose to fund certain speech while not funding other types, and explicitly rejected the

64. *Id.* at 832–34.

65. *Id.*

66. *See supra* notes 25–27 and accompanying text.

67. *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000).

68. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540–42 (2001).

69. *Id.* at 541.

characterization of *Rust* as being dependent upon the government speaking a message.⁷⁰

Thus we can see that Justice Kennedy contributed substantially to the decoupling of the government speech doctrine from *Keller*, a case that had a lot to do with that issue, and recoupling it to *Rust*—a case having little to do with it. This raises the questions of why Kennedy did this, and whether it matters. As to why, one suspects it had something to do with the specific results of *Keller* and *Rust*. *Keller* was the decision in which the Court validated the principle that as a general matter the government can take positions contrary to that of dissenting citizens, but the Court found it inapplicable to the agency speaking in that case (the State Bar) and decided against the government's position. By contrast, in *Rust* the Court sided on behalf of the government interests over those of the dissenting private speakers (the objecting staff of the family planning clinics). Thus, when Kennedy was seeking support in *Rosenberger* for the notion that the government can choose to fund its own messages through restrictions on private speakers in order to further its policies, he naturally turned to *Rust* rather than *Keller* since the government had won in that case, and *Keller* was a compelled subsidy case rather than a restricted funding decision. The irony is that in *Rosenberger*, *Southworth*, and *Velazquez*, where Kennedy uncritically lifted the government speech doctrine out of its *Keller* context, his discussions were all dicta since the government was not a speaker in them.

This raises the question of whether this uncritical translation of the *Keller* government speech doctrine to the restricted funding decisions mattered.⁷¹ I would argue that it did since what got lost in the translation was the principle that just as the government should not have carte blanche power to compel funding of disagreeable messages in every case where it speaks, so it should not have similar powers to impose speech restrictions on private speakers simply because they receive government money as part of a program that reflects a particular policy position. In other words, the Impracticability, Accountability, and Autonomy Principles also have

70. *United States v. Am. Library Ass'n*, 539 U.S. 194, 211–13 & n.7 (2003).

71. As noted earlier, at least in the compelled subsidy decision in *Southworth*, Kennedy acknowledged that, consistent with *Keller*, there were some constraints on the government's ability to escape constitutional scrutiny in those disputes, at least until Justice Scalia abandoned that notion in *Johanns*.

applicability in this context to limit the government's ability to attach viewpoint or other restrictions to its funding grants that embody a given policy choice.

Take *Rust*, for instance. Even though the Court did not analyze it as a government speech case, it might very well do so today despite its later waffling on that issue. And let us say that in addition to the abortion counseling restrictions required by the family planning grant program, it also contained a ban on criticizing those restrictions while operating within the program so as to protect the pro-life position being promoted.⁷² Under the current incarnation of the government speech doctrine, the ban on political criticism—speech at the core of First Amendment concerns—would not be subject to constitutional scrutiny. Were the *Keller* contextual approach deployed, one would ask whether the three conceptual pillars of that doctrine support such a result. First, as to Impracticability, would it be possible to ask whether such a ban was germane to a legitimate and identifiable regulatory or funding program? Clearly the family planning grant program would be amenable to such an analysis, pointing away from a “constitutional scrutiny exemption” for government speech.

Second, with respect to Accountability, how confident can one be that there would be meaningful public and political scrutiny of such a ban? Given that a speech *restriction* takes speech *out* of public discourse rather than affirmatively subjecting a government message to public scrutiny (as would be the case for compelled funding of government speech, for instance), any accountability would have to come from criticism of the ban itself outside of the grant program. While it is not impossible that this would occur, certainly there would not be near the public scrutiny of such an action as there would be if an affirmative government message were being propounded to the public and identified as such (thus revealing a substantial weakness in Kennedy's uncritical importation of the government speech doctrine into funding *restriction* cases, and particularly his reliance on the democratic accountability rationale he used to justify it). This factor would again point away from an exemption for our hypothetical funding restriction.

72. Presumably, a ban on criticizing the restrictions outside of the program would face serious constitutional problems under the “unconstitutional conditions” doctrine. See *Rust v. Sullivan*, 500 U.S. 173, 196–98 (1991).

Third, as to a restricted grantee's Autonomy interests, one might argue that any impingement on his or her speech interests are, like an ordinary taxpayer in the compelled funding context, fairly attenuated since a grantee presumably consents to the restriction as a condition of receiving funding. But how is one to know whether such consent is truly voluntary in a given situation? One can imagine that for things like family planning, which is typically provided to individuals on the lower end of the income and education continuum, government money would be an important source of funding where restrictions attached thereto would realistically be nonnegotiable. And even if consent were truly voluntary, such a direct viewpoint restriction on what a grantee could say would, by its very nature, seemingly constitute a greater impingement on one's autonomy interests than, say, having one's money used to fund disagreeable speech. The Autonomy Principle, then, arguably points away from a scrutiny exemption in our hypothetical as well.

The point is that not all, if any, speech restrictions attached to government funding programs that embody a particular policy position will merit a "constitutional pass" from having the government's interests weighed against those of the affected speakers. Indeed, in our hypothetical it is highly doubtful that the government's interest in promoting a pro-life position in the family planning context would warrant a ban on criticizing the abortion counseling restrictions—a core political right—in addition to the basic restrictions on abortion counseling itself. Hence, it seems clear that the separation of the government speech doctrine from the concerns which animated its original recognition in *Keller*—whether under Justice Kennedy's uncritical importation of that doctrine into the restricted funding environment based on a mischaracterization of *Rust*, or under Justice Scalia's attempt to justify that importation under a textualist rationale—is an unfortunate development in terms of protecting private speech interests that may be directly and substantially impacted by government speech activities.

IV. CEMENTING AND EXTENDING A JURISPRUDENCE OF LABELS

Since the compelled funding and government subsidy decisions culminated in the *Johanns* blanket First Amendment exemption for government speech in the last year of the Rehnquist Court (2005), the Roberts Court has been quick to extend that reformulated doctrine in two other areas of government-private speech conflicts.

The first concerns the speech of government employees, and the second consists of public fora speech. As to the former, the government speech doctrine seems to have become even further unhitched from its moorings in the Court's recent decision in *Garcetti v. Ceballos*.⁷³ There, writing again for a sharply divided Court, Justice Kennedy relied on the principles of the government speech doctrine to hold that a government prosecutor was not entitled to constitutional review of alleged retaliation against him by his supervisor for writing a memo accusing police officers of engaging in misconduct.⁷⁴ The majority's theory was essentially that when a government employee engages in speech pursuant to his or her job duties, such speech constitutes government speech that lies outside of First Amendment concerns rather than his or her own personal speech as a private citizen.⁷⁵

Prior to *Garcetti*, in speech disputes between the government and an employee, the Court had asked whether the employee's speech was on a matter of public concern or was a private employment dispute as the criterion for applying or withholding First Amendment scrutiny to alleged retaliation for such speech.⁷⁶ If the speech was of public concern, as it clearly was in *Garcetti*, the First Amendment interests of the employee and the listening public were deemed to merit constitutional scrutiny in the form of balancing the importance of those interests in a particular case against the government's interest in being able to effectively and efficiently perform its functions if compelled to tolerate such speech.⁷⁷

To simply eliminate this weighing as a blanket rule pursuant to a government speech theory seems unfounded and unwise. Certainly the three conceptual pillars of the original doctrine would not countenance such an approach. With respect to the Impracticability Principle, the fact that before *Garcetti* courts routinely engaged in an assessment of whether government discipline of employee speech on matters of public concern was necessary for the government to perform its responsibilities, eliminates any objection that it would be impracticable to tell whether or not the impingement was required

73. 547 U.S. 410 (2006).

74. *Id.* at 420–24.

75. *Id.* at 421–22.

76. *Id.* at 417–20.

77. *Id.*

to accomplish a legitimate regulatory objective. Indeed, as the Court recounted in *Garcetti*, the court of appeals had determined that the government had “failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office as a result of the memo.”⁷⁸

As to political accountability for government speech as a substitute for judicial scrutiny of impingements on private interests affected by it, like the case of speech subsidy restrictions it is difficult to see how the government can be held to account for speech *restrictions* imposed under the banner of the government speech doctrine. If the government as employer is allowed to “exercise . . . control over what the employer itself has commissioned or created” in order to allow the government “to say what it wishes,”⁷⁹ as Justice Kennedy would have it, then how is the public to assess the propriety of a message where the dissenting views of an employee have been squelched in the name of exercising that control? This turns the entire notion of democratic accountability for government speech on its head, particularly since the doctrine as applied in *Garcetti* has the effect of making the government *less* accountable for its potential misconduct. Imagine if the memo that the prosecutor in *Garcetti* had written to his supervisor accurately accused him or her of improperly covering up police corruption. Under the majority’s reasoning, since the memo would be government speech there would be no problem with the supervisor retaliating and suppressing the memo in order to shape the ultimate message heard by the public from the district attorney’s office.

With respect to the Autonomy Principle, it seems obvious that the impact on the speech autonomy interests of a government employee disciplined for his or her speech on matters of public concern would be at least as serious as a group targeted with an assessment to fund speech with which they disagreed. Accordingly, the three main principles that drove the recognition of a First Amendment pass for the government to infringe on private speech interests in the cause of facilitating its functioning seem inapplicable in the government employee speech cases. And once again, the uncritical transposition of the government speech doctrine into this area of the Court’s First Amendment jurisprudence seems misguided and fraught with the potential for mischief.

78. *Id.* at 416 (quotation omitted).

79. *Id.* at 422 (citation and quotation omitted).

The second type of speech disputes to which the Roberts Court has applied the government speech doctrine involves access to public property for the purpose of expressing a message, and in particular the right of citizens to install permanent monuments in parks where the government has previously accepted one or more monuments for display. In *Pleasant Grove City v. Summum*,⁸⁰ a religious group sought to install a permanent monument containing a religious message in a park where the government had accepted a Ten Commandments monument from a private donor years earlier.⁸¹ The Court rejected the argument that the park was a traditional public forum for the display of private monuments, holding that the Ten Commandments monument had become government speech when the city accepted it for permanent display and hence this action was exempt from First Amendment scrutiny or constraints (such as the requirement of viewpoint neutrality in maintaining a public forum).⁸²

Probably one of the least objectionable applications of the original government speech doctrine sanctioned by *Keller* to exempt governmental action from First Amendment scrutiny is its application to permanent monuments displayed in public parks under circumstances such as those presented in *Summum*. In the ordinary situation, a citizen desiring access to a park to install his own permanent monument is in much the same situation as a regular taxpayer who disagrees with general government speech. With respect to the Impracticability Principle, these cases will rarely involve defined regulatory programs or objectives by which a court could measure the germaneness or legitimacy of a speech impingement in terms of achieving those goals.

Under the Accountability Principle, all the Justices in *Summum* seemed to agree that when the government accepts a permanent monument for display, most people perceive that it is essentially adopting the message conveyed by it as its own—and citizens can therefore object to that message if they wish. Although this does not completely solve the problem of democratic accountability for the viewpoint *exclusion* permitted by the government speech doctrine in these cases, at least the government message contained on the selected monuments would be prominently open to public scrutiny.

80. 129 S. Ct. 1125 (2009).

81. *Id.* at 1129–30. The park contained other permanent monuments as well that collectively displayed a theme celebrating the city's pioneering tradition. *Id.*

82. *Id.* at 1131–38.

Hence, at least that message would presumably bear the imprimatur of democratic legitimacy. And as to the Autonomy Principle, the disappointed citizen whose permanent monument is rejected is not bearing any sort of special or selective burden to support the monuments that are displayed. Moreover, the private speech interests in being able to permanently display one's own monument or message in a public park hardly seems that substantial given the myriad alternative avenues one might use to engage in public expression.

Nonetheless, even here, there is reason to be concerned about categorically exempting these sorts of cases from First Amendment scrutiny. For instance, would a permanent memorial donated by Planned Parenthood celebrating *Roe v. Wade* be constitutional where fifty-one percent of a community's voters consisted of pro-choice advocates and supported its installation in the face of staunch opposition by the rest of the community? Or better yet, could a government backed by that fifty-one percent of voters also reject a pro-life monument sponsored by the remaining forty-nine percent of voters who wanted to place it in the park as well? Given the substantial impingement on the speech autonomy interests of the dissenting taxpayers in these situations, it seems difficult to believe that the current Court would countenance the majority's actions on a government speech theory.

Perhaps that is why Justice Breyer penned a concurring opinion in *Summum* where he joined the majority opinion "on the understanding that the 'government speech' doctrine is a rule of thumb, not a rigid category In my view, courts must apply categories such as 'government speech' . . . with an eye towards their purposes—lest we turn 'free speech' doctrine into a jurisprudence of labels."⁸³ Indeed, Breyer explicitly argued that had the city in that case discriminated in its selection of monuments on grounds other than the "celebration of pioneering" theme displayed in the park, such as the political grounds posited in my *Roe* monument hypothetical, such an action might very well have violated the First Amendment.⁸⁴

Justice Breyer's protest was quite ironic since he supplied Justice Scalia with the critical fifth vote (albeit while holding his nose) to give him a majority opinion for his bright line textualist reformation

83. *Id.* at 1140 (Breyer, J., concurring).

84. *Id.*

of the government speech doctrine in *Johanns*—the main case relied on by Justice Alito’s majority opinion in *Summum* to hold that the First Amendment was simply inapplicable to the monument dispute. Breyer’s belated warning⁸⁵ would not be so unfortunate but for the mischief that the government speech doctrine will be capable of accomplishing in a wide breadth of cases—especially through its application by lower courts looking for a way to expediently deal with conflicts involving overlapping public and private speech interests that frequently arise. To take one of many available examples, a divided panel of a federal court of appeals recently ruled that the Secret Service could claim immunity for physically ejecting three citizens from a presidential speech that was open to the public simply because their car had an anti-war bumper sticker on it.⁸⁶ The court ruled that a right against being subjected to such viewpoint discrimination by the government was not clearly established in significant part because the government speech doctrine permits such discrimination against citizens.⁸⁷ Such is the dubious place where that revamped doctrine is taking the courts, precisely because it has not been “appl[ied] with an eye towards [its] purpose[.]” in the Court’s post-*Keller* jurisprudence.

V. CONCLUSION

This Article has traced the recent establishment and evolution of the government speech doctrine in the Court’s decisions. I have argued that a concept originally intended to represent an analytical determination that government impingements on private speech interests merit an exemption from First Amendment scrutiny in a limited set of circumstances, has more recently devolved into a meaningless jurisprudence of labels that unduly subordinates those interests without inquiry into the merits of competing public interests. It is my view that this will result in a substantial diminishment in free speech protections for private speakers in the myriad of cases where government expression intersects and overlaps with formerly protected private speech interests. After Justice

85. Justice Breyer’s warning in *Summum* reminds me of the good Friar Lawrence who supplies Juliet with a harmless “death potion,” but then sounds the alarm too late for poor Romeo. After more of these government speech cases, Justice Breyer may also bury his head in his hands and ask himself, “O, what haveth I wrought?”

86. *Weise v. Casper*, 593 F.3d 1163 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010).

87. *Id.* at 1165, 1170, 1169 n.1.

Breyer's belated epiphany on this issue, it may once again be up to Justice Kennedy—who refused to join Justice Scalia's recasting of the government speech doctrine in *Johanns* but unqualifiedly joined Justice Alito's reaffirmation in *Summum* of the basic premise of *Johanns*—to determine whether he will join his more liberal colleagues on the Court in an effort to rediscover and reinvigorate the government speech doctrine's original purpose.