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### Justice Souter on Government Speech

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## Justice Souter on Government Speech

*Sheldon Nahmod\**

### I. INTRODUCTION

Justice David Souter, who replaced Justice William Brennan, was seated on October 3, 1990, and retired on June 29, 2009. As it turns out, Justice Souter's tenure coincided exactly with the birth and development of the government speech doctrine<sup>1</sup> in the Supreme Court. *Rust v. Sullivan*<sup>2</sup> was handed down in 1991, and the most recent case, *Pleasant Grove City v. Summum*,<sup>3</sup> was handed down in 2009.

Justice Souter provided the fifth vote in *Rust*, generally regarded as the seminal government speech case,<sup>4</sup> and was thus present at the creation of the government speech doctrine. He joined the majority in *Rust*, a decision he may have come to regret,<sup>5</sup> but did not write an

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\* Copyright, 2010. Distinguished Professor of Law, Chicago-Kent College of Law. A.B., U. of Chicago; J.D., Harvard Law School; M.A. Religious Studies, U. of Chicago Divinity School. I thank Moshe Marvit, Chicago-Kent College of Law, Class of 2010, for his invaluable assistance on an early draft of this Article and for our many conversations on government speech. I also thank the Brigham Young University Law Review for inviting me to participate in this symposium on government speech.

1. When speech falls within the category of government speech, it is immunized from any meaningful First Amendment free speech scrutiny, as the cases discussed in this Article illustrate. The government becomes a "market participant" in the marketplace of ideas rather than a regulator of that marketplace, analogous to the dormant Commerce Clause immunity of state and local governments when they are market participants. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809–10 (1976).

2. 500 U.S. 173 (1991). Later, I suggest that the self-government rationale of the First Amendment might do a better job of accounting for Justice Souter's concerns with the government speech doctrine than the marketplace of ideas rationale. See discussion *infra* pp. 2110–11.

3. 129 S. Ct. 1125 (2009).

4. The term "government speech" does not appear in *Rust*. However, as pointed out in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citations omitted), discussed *infra* p. 2107, "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."

5. Interestingly, his predecessor, Justice Brennan, came to regret his early opinion and vote in *Roth v. United States*, 354 U.S. 476 (1957), dealing with obscenity doctrine. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting) ("I am convinced that the approach initiated 16 years ago in *Roth* . . . , and culminating in the Court's decision

opinion. In contrast, in almost every subsequent government speech-related case, Justice Souter wrote concurrences or dissents that demonstrated a deep engagement with the doctrine. Over the course of his tenure on the Court, his views evolved along with those of the Court as he became increasingly sensitive to the Court's expanding use of the doctrine.

His position ultimately reflected several major concerns that lower courts and academic commentators continue to explore: the definition and scope of government speech, the closely related question of political accountability, and the interplay between the government speech doctrine and the Establishment Clause. For example, who decides whether it is the government that is speaking and what it is saying? What standards does the decision maker use for that decision? Why should government speech be immunized from First Amendment free speech scrutiny? And isn't there the potential of considerable tension between the government speech doctrine and the Establishment Clause?

This Article is modest in scope and primarily descriptive. I propose to address each of the nine Supreme Court decisions in which government speech is discussed either by the Court or by Justice Souter, with an emphasis on Justice Souter's often differing and cautionary observations about the doctrine. I do not engage here at a normative level with the government speech doctrine, even though I am worried about the Court's increasing use of the doctrine to avoid difficult First Amendment issues.

## II. BIRTH AND UNCERTAIN BEGINNINGS: *RUST* AND *ROSENBERGER*

Oral argument in *Rust v. Sullivan* was held on October 30, 1990, which made *Rust* one of the first cases that Justice Souter heard.<sup>6</sup> In a 5-4 vote that almost certainly would have gone the other way had Justice Brennan still been on the Court, the Court, in an opinion by Chief Justice Rehnquist, upheld federal regulations that prohibited doctors from engaging in abortion counseling as part of a federally funded Title X project.<sup>7</sup>

The ruling rested on the distinction between a subsidy and a restriction. The Court began with the premise that government may

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today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values." (citations omitted)).

6. See *Rust*, 500 U.S. at 173.

7. *Id.* at 177.

choose to fund one activity to the exclusion of another, even if the latter involves the exercise of a fundamental right.<sup>8</sup> It then determined that *Rust* was not an “unconstitutional conditions” case because Title X focused on the project rather than the grantee.<sup>9</sup> Title X did not absolutely restrict the recipients of funding from engaging in pro-abortion activities; it merely mandated that Title X projects not include such activities.<sup>10</sup> Therefore, if a doctor wished to go beyond the scope of a Title X program, he or she remained free to do so. Title X merely required that the funds for Title X projects be segregated from funds used to support activities beyond the scope allowed by Title X.<sup>11</sup>

Four justices dissented.<sup>12</sup> “Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds.”<sup>13</sup> For Justices Blackmun, Marshall, and Stevens, what distinguished *Rust* from *Regan v. Taxation with Representation of Washington*,<sup>14</sup> which dealt with funding coupled with conditions, was that Title X was in part aimed at the suppression of “dangerous ideas.”<sup>15</sup> Because the counseling and referral provisions in Title X were both content- and viewpoint-based, they violated the First Amendment.<sup>16</sup> These three dissenters further argued that the majority’s mantra that government is free to fund one activity to the exclusion of another was overly simplistic and not correct.

Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its decision to support an activity upon considerations of race. As

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8. *Id.* at 182.

9. *Id.* at 196.

10. *Id.*

11. *Id.*

12. Justice Blackmun dissented, joined by Justice Marshall and by Justice Stevens in part and by Justice O’Connor in part. *Id.* at 203–04 (Blackmun, J., dissenting). Justice O’Connor separately dissented, arguing that it was not necessary for either the Court or the other dissenters to reach the First Amendment issues. *Id.* at 223–24 (O’Connor, J., dissenting).

13. *Id.* at 207 (Blackmun, J., dissenting).

14. 461 U.S. 540 (1983). The Court here upheld a content-neutral provision of the Internal Revenue Code that disallowed tax-exempt status to organizations that attempted to influence legislation while at the same time giving such status to veterans’ organizations regardless of their lobbying activities. *Id.* at 546–48.

15. *Rust*, 500 U.S. at 210 (Blackmun, J., dissenting).

16. *Id.*

demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.<sup>17</sup>

A further problem with the Title X restrictions, according to these three dissenters, was that the women counseled would view the speech as originating with their doctors rather than as speech from the government.<sup>18</sup> Most people assumed that, when they spoke with their doctors concerning private medical issues, the views and advice offered were the doctors' own and not those of the government or another third party.<sup>19</sup>

Justice Souter's agreement with the *Rust* majority, rather than with the dissenters, can serve as an important starting point that shows just how much his views of government speech changed over the next eighteen years. An issue raised by the *Rust* dissenters—that a reasonable patient in a Title X program would not view the speech as government speech—subsequently became one of Justice Souter's primary concerns with the doctrine. As the doctrine developed, and as Justice Souter focused more on the political accountability necessary to control government speech, the reasonable observer test became increasingly central in his approach to the doctrine.<sup>20</sup>

For example, in *Johanns v. Livestock Marketing Ass'n*, Justice Souter's focus on how the speech was viewed by a reasonable observer led him to conclude that the speech at issue there did not constitute government speech.<sup>21</sup> And in *Pleasant Grove City v. Summum*,<sup>22</sup> Justice Souter concurred in the judgment that the permanent Ten Commandments statue in the park of Pleasant Grove City constituted government speech because a reasonable observer

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17. *Id.* at 210–11 (citations omitted).

18. *Id.* at 217.

19. *Id.* With regards to unconstitutional conditions, the dissent argued that the Court in *Rust* embraced a principle that had been discarded with the rights-privileges distinction, namely, that “the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace.” *Id.* at 213. The dissent applied heightened scrutiny that the Title X regulations did not pass.

20. The reasonable observer test is a variation of Justice O'Connor's Establishment Clause endorsement test as set out initially in *Lynch v. Donnelly*, 465 U.S. 668, 688 (O'Connor, J., concurring), which dealt with government display of religious symbols.

21. 544 U.S. 550, 577–78 (2005) (Souter, J., dissenting), discussed *infra* pp. 2108–10.

22. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), discussed *infra* pp. 2113–16.

would know that the monument's moral and religious message was the government's own.<sup>23</sup>

In 1995, four years after *Rust*, the Court held in *Rosenberger v. Rector & Visitors of the University of Virginia*<sup>24</sup> that a public university's refusal to fund a student magazine with a Christian theme<sup>25</sup> at the same time it was funding other student organizations was a violation of the First Amendment. The Court found that the student activity fund from which the Christian magazine was applying for funds was a "metaphysical" limited public forum that was intended to enable private speech and, as such, could not discriminate according to viewpoint.<sup>26</sup> Though the university argued that it was discriminating according to content (permitted in a limited public forum), the Court rejected this argument and effectively held that religious belief was a viewpoint.<sup>27</sup>

*Rosenberger* is often cited for its broad language describing the government speech doctrine implicit in *Rust*,<sup>28</sup> even though *Rosenberger* was not a government speech case: the university had expressly stated that it was not its own speech that was at issue.<sup>29</sup> In fact, one of the requirements imposed on student organizations for receiving funding was signing a disclaimer that distanced the university from the speech of the recipients.<sup>30</sup>

Justice Souter's dissent, therefore, focused primarily on the Establishment Clause and why a government's financial contributions to a Christian magazine violated the central

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23. *Id.* at 1141.

24. 515 U.S. 819 (1995). Justice Kennedy wrote for the Court, with Justices O'Connor and Thomas writing separate concurring opinions. Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 822.

25. The Court described the group at issue as a student news organization with a Christian editorial viewpoint rather than as a religious organization in response to the university's argument that the group was a religious organization, and that funding such organizations was therefore inconsistent with the guidelines of the school's funding program. *Id.* at 840.

26. *Id.* at 830–31.

27. *Id.* at 833.

28. "We recognized [in *Rust*] that when 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." *Id.* at 833 (citations omitted).

29. *Id.* at 830.

30. *Id.* at 823–24.

prohibition of the Establishment Clause.<sup>31</sup> However, in an important footnote, Justice Souter articulated for the first time his concern with properly identifying government speech.<sup>32</sup> While he agreed that *Rosenberger* did not involve government speech, he pointed to a problem that would arise later for the Court: what speech should be analyzed in assessing whether it is the government speaking.<sup>33</sup> Was the speech at issue the initial funding because funding has a communicative element analogous to speech? Or was it the ultimate speech that was being funded?

In other words, Justice Souter questioned how far beyond pure speech the government speech doctrine extended. If it applied to the initial funding, then the exception would swallow the rule, making forum analysis and other First Amendment analysis exceptionally narrow. As government had funded most of the forums that were at issue, it could argue that this initial funding immunized the matter from First Amendment review, with the result that government could discriminate on the basis of viewpoint in almost any case. On the other hand, if the doctrine related only to pure speech such that the government was communicating directly through official channels—for example, legislation—then the doctrine said nothing new. The difficulty was in drawing the line between these two extreme positions, and in this footnote Justice Souter put the Court on notice. In so doing, he anticipated the possible intrusion of the government speech doctrine on forum analysis.

At this juncture, it is worth making an analytical observation. In retrospect, *Rust* and *Rosenberger* represent two very different and important categories in government speech jurisprudence. *Rust* was a case in which the Court determined that it was the government that

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31. *Id.* at 863–64 (Souter, J., dissenting).

32. *Id.* at 892–93 n.11 (Souter, J., dissenting) (“The Court draws a distinction between a State’s use of public funds to advance its own speech and the State’s funding of private speech, suggesting that authority to make content-related choices is at its most powerful when the State undertakes the former. I would not argue otherwise, but I do suggest that this case reveals the difficulties that can be encountered in drawing this distinction. There is a communicative element inherent in the very act of funding itself, and although it is the student speakers who choose which particular messages to advance in the forum created by the University, the initial act of defining the boundaries of the forum is a decision attributable to the University, not the students. In any event, even assuming that private and state speech always may be separated by clean lines and that this case involves only the former, I believe the distinction is irrelevant here because, as is discussed *infra*, this case does not involve viewpoint discrimination.” (citations omitted)).

33. *See id.*

was speaking, with the result that the First Amendment prohibition on viewpoint discrimination was inapplicable.<sup>34</sup> In contrast, *Rosenberger* was a case in which the Court determined that the government itself was not speaking; rather, it was enabling private speech.<sup>35</sup> Here, the result was that conventional First Amendment forum doctrine was indeed applicable. The decision of which category the particular challenged governmental act fell into was thus to become outcome-determinative, as it was, for example, in *Legal Services Corp. v. Velazquez*.<sup>36</sup>

### III. ADOLESCENCE: *GLICKMAN, FINLEY, SOUTHWORTH, AND LEGAL SERVICES CORP.*

In the 1997 case *Glickman v. Wileman Brothers & Elliott, Inc.*,<sup>37</sup> the Court held that an assessment imposed by the Secretary of Agriculture on fruit growers for generic advertisements did not violate the First Amendment.<sup>38</sup> The Court explained:

First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.<sup>39</sup>

Justice Souter dissented,<sup>40</sup> arguing that the *Central Hudson*<sup>41</sup> test applied to such compelled commercial speech and that the assessment failed the test.<sup>42</sup> Again in a footnote, Justice Souter raised the government speech doctrine only to say that the government had never argued that it was applicable in *Glickman*.<sup>43</sup> Perhaps indicative of his growing discomfort with the government speech doctrine, however, Justice Souter did not describe the doctrine in expansive

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34. *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1990).

35. *Rosenberger*, 515 U.S. at 821.

36. 531 U.S. 533 (2001), discussed *infra* pp. 2107–08, where *Rosenberger* controlled, not *Rust*.

37. 521 U.S. 457 (1997).

38. *Id.* at 469–70.

39. *Id.* (citations omitted).

40. *Id.* at 477 (Souter, J., dissenting). Justice Souter was joined by Chief Justice and Justice Scalia, and joined in part by Justice Thomas. *Id.*

41. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

42. *Glickman*, 521 U.S. at 491–92 (Souter, J., dissenting).

43. *Id.* at 482 n.2.



terms, but rather said that the doctrine meant only that “the Government may have greater latitude in selecting content than otherwise permissible under the First Amendment.”<sup>44</sup>

One year later, in *NEA v. Finley*,<sup>45</sup> the Court, in an opinion by Justice O’Connor, held that a federal statute requiring that grants made by the National Endowment for the Arts take into consideration whether a project was “indecent” or “disrespectful” did not facially violate the First Amendment.<sup>46</sup> One of the issues taken up by Justice Souter in dissent was his vigorous disagreement with the broad proposition set out in Justice Scalia’s concurrence that this case involved government subsidies of speech that were beyond the scope of the First Amendment because, according to Justice Scalia, such subsidies could never constitute an abridgement of anyone’s speech.<sup>47</sup>

More to the present point, Justice Souter went on to observe in *Finley* that the government had disavowed any claim that it was speaking through its NEA grants.<sup>48</sup> In his view, the government was not a market participant either as speaker or as buyer—both of these roles receive special treatment under the First Amendment—but rather was a patron “financially underwriting the production of art by private artists and impresarios for independent consumption.”<sup>49</sup> Accordingly, for Justice Souter, *Rosenberger* controlled this case and the government was thus engaged in impermissible viewpoint discrimination.<sup>50</sup>

In 2000, two years after *Finley*, *Board of Regents of the University of Wisconsin System v. Southworth*<sup>51</sup> presented a fact pattern similar to

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44. *Id.* (citations omitted).

45. 524 U.S. 569 (1998). As noted, Justice O’Connor wrote for the majority. Justice Ginsburg joined in part, while Justice Scalia, joined by Justice Thomas, concurred in the judgment. Justice Souter alone dissented. *Id.* at 571.

46. *Id.* at 572–73.

47. *Id.* at 598–99 (Scalia, J., concurring).

48. *Id.* at 611 (Souter, J., dissenting).

49. *Id.*

50. *Id.* For Justice Souter, then, when government acts as patron, it is not engaged in government speech and is thus not immune from the generally applicable First Amendment rule prohibiting viewpoint discrimination. *Id.* at 611–12.

Recall that in *Rosenberger*, Justice Souter spoke tentatively about the question of whether or when initial government funding could be characterized as government speech. See discussion *supra* pp. 2101–02. For Justice Souter, this issue was unavoidable in *Finley* because government, in funding artistic projects, acts as a patron financially underwriting private speech intended for independent consumption. *Finley*, 524 U.S. at 611–12 (Souter, J., dissenting).

51. 529 U.S. 217 (2000). Justice Kennedy wrote for the Court. Justice Souter, joined

the one the Court had addressed in *Rosenberger*. This time, though, the First Amendment issue was raised by students who were being “taxed” to fund the speech of student organizations.<sup>52</sup> In *Southworth*, the Court, in an opinion by Justice Kennedy, held that a mandatory student activity fee assessed on students to support student organizations did not violate the First Amendment rights of students who objected to the political and ideological speech of certain funded organizations.<sup>53</sup> *Southworth* was essentially a compelled speech/subsidy case, because the university had expressly declared that its disbursement of funds was not government speech. The Court therefore did not engage in government speech analysis.<sup>54</sup>

Nevertheless, Justice Kennedy did discuss the government speech doctrine and its possible justification. He suggested that had *Southworth* involved government speech, it would have been outside the bounds of First Amendment scrutiny because political accountability, rather than judicial review, served to limit the government.<sup>55</sup> “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.”<sup>56</sup>

Justice Kennedy’s brief discussion of political accountability in *Southworth* represents an early instance—perhaps the first—in which a member of the Court attempted to ground the government speech doctrine jurisprudentially.<sup>57</sup> In subsequent cases, as will be seen, this concern with political accountability would become central for Justice Souter.

Concurring in the judgment in *Southworth*, Justice Souter agreed that the case did not implicate government speech.<sup>58</sup> But, he was uncomfortable with the Court’s apparent deference to, and reliance on, the university for that determination.<sup>59</sup> Interestingly, his

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by Justices Stevens and Breyer, concurred in the judgment. *Id.* at 236.

52. *Id.* at 220.

53. *Id.*

54. *Id.* at 234–35.

55. *Id.* at 235.

56. *Id.*

57. *Id.*

58. *Id.* at 239–43 (Souter, J., concurring).

59. *Id.* at 241 n.8 (“Unlike the majority, I would not hold that the mere fact that the University disclaims speech as its own expression takes it out of the scope of our jurisprudence

reluctance in *Southworth* to rely exclusively on government assertions for government speech purposes is reminiscent of that of Justice Kennedy himself, the author of *Southworth*, in connection with designated public forums. Justice Kennedy, concurring in *International Society for Krishna Consciousness v. Lee*,<sup>60</sup> maintained that in deciding whether government property is a designated public forum, the Court should not merely rely on the government's statement of its purpose, but rather on how the government has actually treated the space.<sup>61</sup> "In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property."<sup>62</sup> Justice Kennedy worried that government has incentives to claim that its property is not a designated public forum because of the costs of compliance with the First Amendment.<sup>63</sup>

Here is how Justice Kennedy put it there:

If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.<sup>64</sup>

In *Southworth*, Justice Souter applied analogous concerns to government speech because here, too, there were comparable incentives for government to avoid First Amendment scrutiny.<sup>65</sup> For him, whether the First Amendment applies should not turn simply on whether the government has identified the speech as its own or disclaimed it; that is, what the government says about the speech

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on government directed speech.").

60. 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

61. *Id.* Justice Souter joined the first part of this concurrence, the part relevant to the present discussion.

62. *Id.*

63. *See id.* at 695–99.

64. *Id.* at 698–99.

65. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. at 241 n.8 (Souter, J., concurring).

*after the fact* should not be dispositive.<sup>66</sup> However, Justice Souter did not explain in any detail in *Southworth* how the Court should determine whether the government was in fact the speaker. Subsequently, in making this determination, he would shift the focus from the government's assertions to the perspective of the reasonable observer.<sup>67</sup>

In the Term following *Southworth*, the Court held in *Legal Services Corp. v. Velazquez* that a federal statute violated the First Amendment because it broadly restricted recipients of Legal Services Corporation funds from providing legal representation that involved an effort to amend or challenge existing welfare laws, even if that legal representation was separately funded.<sup>68</sup> Writing for the Court (including Justice Souter), Justice Kennedy explained and then distinguished *Rust*:

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. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government “used private speakers to transmit specific information pertaining to its own program.”<sup>69</sup>

However, according to the Court, not every government subsidy creates a government speech scenario.<sup>70</sup> Where, as in *Legal Services Corp.*, government subsidizes individuals and groups for the purpose of facilitating private speech, forum analysis is appropriate just as it was in *Rosenberger*.<sup>71</sup> In these situations, when there is no “programmatically message,” the government may not discriminate on the basis of viewpoint.<sup>72</sup> In the course of its opinion, the Court also emphasized the distorting effects of the funding condition on the

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66. *Id.*

67. *See, e.g.,* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 577 (Souter, J., concurring).

68. 531 U.S. 533, 536–37 (2001). Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Thomas, dissented. *Id.* at 549.

69. *Id.* at 541 (citations omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

70. *Id.* at 542.

71. *Id.* at 542–44.

72. *Id.* at 548.

adversary system and the legal process.<sup>73</sup> For these reasons, the statute violated the First Amendment.<sup>74</sup>

#### IV. COMING OF AGE: *JOHANNIS*, *GARCETTI*, AND *SUMMUM*

*Johannis v. Livestock Marketing Ass'n*,<sup>75</sup> handed down in 2005, generated important doctrinal developments in government speech doctrine. Here, the Court, in an opinion by Justice Scalia, ruled that mandatory assessments on beef producers that were used to disseminate the advertisement, “Beef, it’s what’s for dinner,” did not violate the First Amendment because the advertisement constituted government speech.<sup>76</sup> *Johannis* was very similar factually to an earlier case, *United States v. United Foods*,<sup>77</sup> which had held that a government assessment on mushroom growers for generic advertisements was compelled speech forbidden by the First Amendment.<sup>78</sup> But, unlike in *United Foods*, in *Johannis* the government argued that the advertisements were government speech since the Secretary of Agriculture exercised final control over the message.<sup>79</sup>

*Johannis* presented the Court with its first real opportunity to consider the free speech implications of the government speech doctrine when it involved compelled speech.<sup>80</sup> The Court held that the federal statute authorizing the speech, accompanied by government control of the message, rendered the advertisement government speech.<sup>81</sup> As a result, the compelled nature of the speech did not make a significant difference in the analysis because government has the right to tax and spend.<sup>82</sup> Furthermore, it did not

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73. *Id.* at 544.

74. *Id.* at 549.

75. 544 U.S. 550 (2005). Justice Breyer concurred, Justice Ginsburg concurred in the judgment, Justice Kennedy dissented, and Justice Souter, joined by Justices Stevens and Kennedy, dissented.

76. *Id.* at 557–67.

77. 533 U.S. 405 (2001).

78. *Id.* at 415–16.

79. *Johannis*, 544 U.S. at 560–62.

80. While the *Glickman* case, set out *supra* Part III, similarly involved an assessment and dealt with compelled speech, government speech was not addressed because the government did not make a government speech argument.

81. *Johannis*, 544 U.S. at 560–62.

82. *Id.* at 559.

matter for First Amendment purposes whether the speech was facilitated through a general tax or through a targeted assessment.<sup>83</sup>

Justice Souter dissented on the ground that this was not an instance of government speech at all.<sup>84</sup> In his view, “the Court ha[d] it backwards.”<sup>85</sup> The First Amendment focus should be neither on whether government stated that the speech was government speech, nor on government control of the speech.<sup>86</sup> Rather, it should be on whether a reasonable observer viewed it as government speech.<sup>87</sup> In *Johanns*, there was no way for a reasonable observer to know that it was the government speaking.<sup>88</sup>

To the contrary, two factors indicated to Justice Souter that it was not the government speaking when the advertisement was distributed. First, the advertisements included the tagline, “funded by America’s Beef Producers.”<sup>89</sup> A reasonable observer who read this tagline would conclude that a group of private parties was behind the advertisement.<sup>90</sup> Second, the government’s Dietary Guidelines for 2005 (which surely constituted government speech) carried the message that Americans should eat less beef.<sup>91</sup> Here the government would be advancing seemingly contradictory messages if the advertisement constituted government speech.<sup>92</sup>

Justice Souter, referring to “the requirement of effective public accountability,” emphasized the importance of government clearly holding itself out as the speaker; the primary justification for exempting government speech from First Amendment scrutiny is that the political process keeps the speech in check.<sup>93</sup> “Democracy, in other words, ensures that government is not untouchable when its

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83. *Id.* at 562.

84. *Id.* at 580 (Souter, J., dissenting).

85. *Id.* at 578.

86. *Id.* at 578–80.

87. *Id.*

88. *Id.* at 577–78.

89. *Id.* at 577.

90. *Id.* at 577–78.

91. *Id.* at 578 n.7.

92. Justice Scalia responded to Justice Souter’s latter argument by maintaining that the messages were not in fact contradictory: government could promote beef for dinner while at the same time encouraging Americans to limit their overall beef consumption. “The beef promotions are perfectly compatible with the guidelines’ message of moderate consumption—the ads do not insist that beef is also What’s for Breakfast, Lunch, and Midnight Snack.” *Id.* at 561 n.5 (majority opinion).

93. *Id.* at 577–78 (Souter, J., dissenting).

speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.”<sup>94</sup>

Justice Souter went on to offer a philosophical grounding of his own for the government speech doctrine. Citing the dissenting opinion of Justices Holmes, joined by Justice Brandeis, in *Abrams v. United States*,<sup>95</sup> he suggested that it was the “marketplace of ideas” rationale that made the government speech doctrine necessary.<sup>96</sup> Under this rationale, government has an important role as a participant in the marketplace of ideas in which there is a “free trade in ideas.”<sup>97</sup> It would not be able to participate in that marketplace if citizens could use the First Amendment as a “heckler’s veto.”<sup>98</sup> For these reasons, it was essential, according to Justice Souter, that the Court ensure that it was in fact the government speaking.<sup>99</sup>

Here, one might wonder why Justice Souter, so concerned with government “subterfuge” and misleading of taxpayers “by concealing its sponsorship of expression,” relied on the marketplace of ideas rationale for the government speech doctrine.<sup>100</sup> This rationale, at least in its pure form, assumes that every buyer and seller in the marketplace of ideas has the same opportunity to participate and that no single participant monopolizes that marketplace or distorts it by drowning out the ideas of others.<sup>101</sup> Under this rationale, a significant role of government in the marketplace of ideas is that it be neutral. But government neutrality in the marketplace of ideas seems inconsistent with the government’s expression of its own views in that marketplace. Furthermore, government can potentially monopolize or distort the marketplace more readily than most private sellers of ideas.<sup>102</sup>

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94. *Id.* at 575.

95. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

96. *Johanns*, 544 U.S. at 574 n.3 (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)). The famous dissent in *Abrams* also articulated the “clear and present danger test” for speech that incites. *Abrams*, 250 U.S. at 627–28 (Holmes, J., dissenting).

97. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

98. *Johanns*, 544 U.S. at 574 (Souter, J., dissenting).

99. *Id.* at 572–80.

100. *Id.* at 578–79 n.8.

101. See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); see also JOHN STUART MILL, ON LIBERTY (1859) (articulating the search for truth rationale).

102. Indeed, the Court found government distortion of the relevant marketplace of ideas in *Legal Services Corp.* See *supra* Part III.

In contrast, the self-government rationale of the First Amendment espoused by Alexander Meiklejohn<sup>103</sup> perhaps more persuasively addresses the importance of political accountability, particularly where government enlists the private sector in communicating its messages. This rationale, of necessity, confronts head-on the issue of government monopolization and distortion of the political process.<sup>104</sup> It also strengthens Justice Souter's argument about the crucial importance of government's identifying itself as the speaker.

In the next term, the Court, in *Garcetti v. Ceballos*,<sup>105</sup> an exceptionally important public employee free speech case, held that a deputy district attorney's First Amendment rights were not violated when he was allegedly retaliated against by his supervisors for writing a memo to them alleging problems in the prosecution of a criminal case.<sup>106</sup> Writing for the Court, Justice Kennedy indicated that there was a government speech element present whenever public employees spoke pursuant to their official duties:

The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.<sup>107</sup>

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103. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (2000).

104. Note, however, that the Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), was not seriously concerned with monopolizing and distorting of the electoral marketplace by unlimited expenditures by corporations and unions for (or against) candidates for federal office.

105. 547 U.S. 410 (2006). Justice Kennedy wrote for the Court, while Justices Stevens and Breyer dissented separately, and Justice Souter, joined by Justices Stevens and Ginsburg, also dissented.

106. *Id.* at 425–26.

107. *Id.* at 421–22 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”)). *Garcetti* modified the balancing test of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). This test triggered First Amendment scrutiny whenever a public employee's speech was on a matter of public concern. See *Connick*, 461 U.S. at 140. In contrast, *Garcetti* imposed the threshold requirement that the speech must *not be* part of the employee's duties. *Garcetti*, 547 U.S. at 426. If the speech is part of the employee's duties, the First Amendment is simply inapplicable, even where the speech is of the greatest public concern. *Id.* at 418–26. For an assessment of *Garcetti*, see Sheldon Nahmod, *Public Employee Speech, Categorical Balancing*



Here, as in *Johanns*, the Court was again willing to agree that the government's message was whatever it said it was. In this case, the "policy" that the government was promoting determined the official duties of the employees it hired.

In a vigorous dissent in which he attacked every aspect of the Court's decision, Justice Souter criticized the Court's reliance on the government speech rationale:

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.<sup>108</sup>

In order for the deputy district attorney's memo to be government speech, Justice Souter argued that it would have had to set out a specific and substantive government message.<sup>109</sup> *Rust* "is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job."<sup>110</sup> It was in this context that Justice Souter also expressed concern about academic freedom and the unintended effect that *Garcetti* could have on it.<sup>111</sup>

In *Garcetti*, Justice Souter clearly saw the category of government speech colonizing more and more First Amendment jurisprudence: "The fallacy of the majority's reliance on *Rosenberger's* understanding of the *Rust* doctrine . . . portends a bloated notion of controllable government speech going well beyond the circumstances of this case."<sup>112</sup> His fear was that the Court in *Garcetti* had allowed the government speech doctrine and its consequent First Amendment immunity to extend to whatever the government said was its speech, without any requirement

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and § 1983: *A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008).

108. *Garcetti*, 547 U.S. at 437 (Souter, J., dissenting).

109. *Id.*

110. *Id.*

111. See Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMENDMENT L. REV. 54 (2008).

112. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

imposed on government to announce in advance what that speech was.<sup>113</sup>

Finally, in 2009, in *Pleasant Grove City v. Summum*,<sup>114</sup> the Court, in an opinion by Justice Alito, held that government's acceptance of a privately donated monument of the Ten Commandments for permanent display in a public park, while rejecting a monument offered by the Summum sect years later, did not violate the First Amendment as impermissible viewpoint discrimination since the Ten Commandments monument was government speech.<sup>115</sup> In what seemed to parallel conventional public forum analysis,<sup>116</sup> the Court looked to tradition and history to determine that the Ten Commandments monument was indeed government speech:

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.<sup>117</sup>

Then, in order to find that a reasonable observer would know that a monument on government land was necessarily representative of the government's message, the Court analogized public property owners to other property owners:

It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. In this

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113. *See id.* at 437–38.

114. 129 S. Ct. 1125 (2009). Justice Alito wrote for the Court. Justice Stevens, joined by Justice Ginsburg, concurred, as did Justice Scalia, joined by Justice Thomas. Justice Breyer also concurred, while Justice Souter concurred in the judgment.

115. *Id.* at 1129.

116. *See Hague v. CIO*, 307 U.S. 496 (1939).

117. *Pleasant Grove City*, 129 S. Ct. at 1132–33.

context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.<sup>118</sup>

Finally, the Court observed that a monument could be government speech even if it did not communicate a particular message. It said:

This argument fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one like “Beef. It’s What’s for Dinner.” Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is “the message” of the Greco-Roman mosaic of the word “Imagine” that was donated to New York City’s Central Park in memory of John Lennon? Some observers may “imagine” the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may “imagine” a world without religion, countries, possessions, greed, or hunger.

Or, to take another example, what is “the message” of the “large bronze statue displaying the word ‘peace’ in many world languages” that is displayed in Fayetteville, Arkansas?<sup>119</sup>

In what would be his last judicial opinion dealing with government speech, Justice Souter concurred in the judgment in *Summum*.<sup>120</sup> He agreed with the Court that government need not formally declare that particular expression was its own.<sup>121</sup> But he was reluctant to maintain, as the Court apparently did, that monuments were categorically government speech.<sup>122</sup> In his view, there were situations, such as sectarian identifications in Arlington Cemetery, where government acceptance and maintenance of monuments on

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118. *Id.* at 1133.

119. *Id.* at 1135 (citations omitted).

120. *Id.* at 1141–42 (Souter, J., concurring in judgment).

121. *Id.* at 1141.

122. *Id.*

public space would not “look like” government speech.<sup>123</sup> In addition, because the government speech doctrine was “recently minted” the Court should move slowly in this area.<sup>124</sup>

Furthermore, the government speech doctrine could interact in unexpected ways with the Establishment Clause.<sup>125</sup> Justice Souter imagined a situation in which government erected a religiously themed monument and, to avoid violating the Establishment Clause, quickly surrounded it with other monuments.<sup>126</sup> Though this would dilute the religious character of the initial monument, it would at the same time create so many messages that it was less obvious that government was speaking.<sup>127</sup> In this situation, applying the government speech doctrine could potentially allow a government to discriminate among religious groups by favoring some over others, thereby evading the Establishment Clause:

[T]he government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause’s stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by the choice of monuments to accept.<sup>128</sup>

Consequently, rather than adopting a rule that monuments accepted by government always constitute government speech, Justice Souter yet again suggested applying the reasonable observer test on a case-by-case basis when making the determination that it was the government speaking and communicating a particular message.<sup>129</sup> Under this test, the question was “whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”<sup>130</sup> In *Summum*, according to Justice Souter, the Ten Commandments monument passed this test and thereby constituted

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123. *Id.* at 1142.

124. *Id.* at 1141.

125. *Id.*

126. *Id.*

127. *Id.* at 1141–42.

128. *Id.* at 1142.

129. *Id.*

130. *Id.*

government speech: it was “an expression of a government’s position on the moral and religious issues raised by the subject of the monument.”<sup>131</sup> Thus, he concurred in the judgment.

#### V. CONCLUSION

Justice Souter could not have imagined in his first year on the Court that *Rust*, which he joined, would be transformed into *the* paradigmatic government speech case; nor could he have imagined where it would lead. As his views on government speech evolved, they became increasingly thoughtful, even if not daring and path-breaking like the dissents of Justices Holmes and Brandeis in the “clear and present danger test” years. Justice Souter was concerned with the adverse effects of expanding the scope of the government speech doctrine and consequently immunizing more and more government-directed speech from First Amendment scrutiny. Of particular interest here was his attempt, incomplete as it may have been, to ground the government speech doctrine on the marketplace of ideas rationale.

More noteworthy doctrinally, though, was Justice Souter’s emphasis on political accountability and the related need to know that it is indeed government that is speaking and that there is a particular message. Finally, he warned of the need to reconcile the government speech doctrine and the Establishment Clause to ensure that the former did not swallow up the latter.

For his contributions to, and wise cautionary observations about, the government speech doctrine, Justice David Souter deserves our appreciation.

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131. *Id.* at 1141.