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GOVERNMENT MAY NOT SPEAK OUT-OF-TURN

STEVEN H. GOLDBERG†

*“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”*¹

Rust v. Sullivan
Rehnquist, C.J.

*“The so called ‘government speech’ doctrine is not so much a doctrine as it is an evolving concept that the government may compel the use of coerced financial contributions for public purposes.”*²

Livestock Marketing Association v. United States
Department of Agriculture
Kornmann, District Judge

*“[T]he dispositive question is whether the generic advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny.”*³

Johanns v. Livestock Marketing Association
Scalia, J.

*“The Free Speech clause . . . does not regulate government speech. A government entity has the right to ‘speak for itself’ . . .to select the views that it wants to express.”*⁴

Pleasant Grove City, Utah v. Summum
Alito, J.

I. INTRODUCTION

*Johanns v. Livestock Marketing Association*⁵ was about whether government could compel individual beef producers to pay for general beef advertising credited to “America’s Beef Producers;” even if they disagreed with

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1. 500 U.S. 173, 193 (1991).

2. 207 F. Supp.2d 992, 1003 (D.S.D. 2002).

3. 544 U.S. 550, 557 (2005).

4. 555 U.S. 460 (2009) (citing *Johanns*, 544 U.S. 550 and *Sullivan*, 500 U.S. 173).

5. 544 U.S. at 557.

the message and wanted to spend their advertising money to distinguish their certified Angus or Hereford beef. That “compelled subsidy” case became the unlikely authority for a doctrine invented in *Pleasant Grove City, Utah v. Summum*⁶ that government could discriminate, based on viewpoint, on a subject for which it had no power to act. Each case has been criticized in its own right, but the attempt to make *Johanns* precedent for the result in *Pleasant Grove* is especially strange. While I think *Johanns* did not involve government speech and was wrongly decided, that is not the focus of this essay. Even if the speech was the government’s, my concern is with the *Pleasant Grove* attempt to use *Johanns* as authority for the idea that government speech is “exempt from First Amendment scrutiny.”⁷

Livestock Marketing Association v. United States Department of Agriculture,⁸ must have seemed routine, if not easy, when Judge Kornmann wrote his decision one year after the Supreme Court of the United States decided in *United States v. United Foods, Inc.*⁹ that a compelled subsidy from mushroom growers for advertising with which they disagreed violated their rights under the First Amendment. The Livestock Marketing Association amended its complaint to include the First Amendment claim, and Judge Kornmann observed that “[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff: producers and importers are required to pay an assessment, which assessments are used by a federally established board or council to fund speech.”¹⁰ Neither the Court of Appeals nor the Supreme Court disagreed with that observation, but in the Supreme Court *Johanns* came out differently from *United Foods*.

The Court distinguished *Johanns* from *United Foods* by endorsing the government’s claim that the beef advertising was government speech – an argument not advanced in a timely fashion in *United Foods*.¹¹ Justice Scalia, noting the Court had previously sustained First Amendment challenges in both “compelled speech” and “compelled subsidy” cases, said the Court had never “considered the First Amendment consequences of government-compelled subsidy of the government’s own speech.”¹² Unfortunately, for what became a pernicious “government speech” doctrine in *Pleasant Grove*, Justice Scalia began the opinion more broadly. The “dispositive question,” he said, “is whether the generic advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny.”¹³

Any trial lawyer paying attention would object that Justice Scalia’s dispositive question is compound and not necessarily susceptible to a single answer. Whether the beef ads were government speech is a very different

6. 555 U.S. 550.

7. *Johanns*, 544 U.S. at 553.

8. 207 F. Supp.2d 992 (D.S.D. 2002).

9. 533 U.S. 405 (2001).

10. *Livestock Marketing*, 207 F. Supp. 2d at 1002.

11. *United Foods*, 533 U.S. at 416-17.

12. *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 557 (2005).

13. *Id.* at 553.

question from whether government speech is exempt from First Amendment scrutiny.

II. THE GOVERNMENT AS SHILL: “BEEF, IT’S WHAT’S FOR DINNER!”

The *Johanns* decision, although it provides no support for the proposition that government speech is exempt from First Amendment scrutiny, does illuminate one of the significant flaws with the viewpoint-enabled government speech doctrine Justice Alito invented in *Pleasant Grove*. That doctrine allows the government, through a fiction, to promote one side’s view about a societal dispute over a contrary view, though the subject is one over which government has no power of action.

No one knew the *Johanns* advertisements were the government speaking. The “America’s Beef Producers” mask allowed the government to promote the view of the ordinary beef producers over that of the Angus and Hereford breeders. To make matters worse, the latter had to contribute to the ads while the government hid its role in the charade.

Justice Souter’s *Johanns* dissent, joined by Justices Stevens and Kennedy, made a point of the problem raised if speech was labeled the government’s, but no one knew it was the government speaking. Citing dicta from *Board of Regents of Univ. of Wis. System v. Southworth*,¹⁴ Justice Souter acknowledged a “relatively new and correspondingly imprecise”¹⁵ government speech doctrine and quoted *Southworth*’s observation that if such a doctrine existed, it was “inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”¹⁶ He then emphasized the *Southworth* view that if any such doctrine existed, it would be justified by democratic accountability:

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.¹⁷

Justice Scalia’s opinion is dismissive of a democratic accountability justification for a government speech doctrine that permits government viewpoint. He admits that “[s]ome of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability,” but goes on to say “beef advertisements are subject to political safeguards more than adequate to set them apart from private messages” because they are subject to government control.¹⁸ He concludes the argument by asserting that, in any event, the requirement of the subsidy for the speech does not depend upon “whether or not the reasonable viewer would identify the speech as the government’s.”¹⁹

14. 529 U.S. 217 (2000).

15. *Johanns*, 544 U.S. at 574.

16. *Id.* (citing *Southworth*, 529 U.S. at 229).

17. *Id.* (citing *Southworth*, 529 U.S. at 235).

18. *Id.* at 563.

19. *Id.* at 563-64 n.7.

Whatever the First Amendment might stand for, there is nothing in its history or purpose to suggest it exists to allow government to act as a shill for one private opinion as opposed to another. Shill, a harsh term, is not used lightly. A shill is “a decoy or accomplice, especially one posing as an enthusiastic or successful customer to encourage other buyers, gamblers, etc.,”²⁰ and that is exactly what the *Johanns* decision facilitated.

The result of the *Johanns* decision is that the charade of government speech, not identified as the government’s, allows some beef producers to persuade consumers that “beef is beef” to the consternation of those producers who think their certified Angus or Hereford beef is superior and would like to use their money to say so. Instead, they have to pay for a contrary message that makes it seem as if they agree that their beef is not special. Steak lovers unite! It is not just the producers of great beef that suffer from the government shilling for those who sell canners and cutters as if they could be slaughtered for quality beef.

My affection for a good Angus steak notwithstanding, I do not here intend to start a quarrel with Professor Post’s assertion that *Johanns* was a “welcome development” in beginning to solve the “complex First Amendment questions” about compelled subsidization of speech that were created in *United Foods* and “which the Court has been unable to master.”²¹ I do hope to demonstrate that *Johanns* provided no authority for the invention in *Pleasant Grove* of a doctrine that empowers government to speak without First Amendment scrutiny.

III. JOHANNIS DICTA IS WRONG: THE CONSTITUTION DOES NOT EMPOWER THE GOVERNMENT TO SPEAK

All of the empowering of government in the Constitution is about acts, not speech. None of the eighteen clauses of Article I, §8 empower Congress to legislate speech, and nowhere in Article II, §2 does the Constitution empower the President *qua* President to speak Article II §3, to be sure, not only empowers, but requires, the President “from time to time to give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient;” but that’s it for constitutionally empowered or required government speech.²² There is, of course, the First Amendment, that whatever else it meant, told the new federal government not to meddle with speech.²³

Before *Johanns* there is no example of the Court traversing a free speech challenge by labeling the speech as the government’s and holding that government can say anything it wishes without concern for the free speech

20. OXFORD ENGLISH DICTIONARY.

21. See Post, Robert C., “Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association*” (2005). *Faculty Scholarship Series*, available at http://digitalcommons.law.yale.edu/fss_papers/175.

22. U.S. Const. Art II, § 3.

23. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

clause. Indeed, two “compelled subsidy” of speech cases before *Johanns* demonstrate that the government power to speak, as suggested in the *Southworth* dicta, is only an adjunct to government’s power to act.

*Glickman v. Wileman Brothers & Elliott, Inc.*²⁴ rejected a First Amendment challenge to a mandated subsidy from California fruit tree producers. Four years later, *United Foods* upheld a First Amendment challenge to a mandated subsidy from mushroom producers. Although *Glickman* and *United Foods* reached different results, they reflected the unanimous view on the Court that a government mandated speech subsidy was unconstitutional unless it was ancillary to a government program.

In his *United Foods* opinion upholding the First Amendment challenge to the subsidy, Justice Kennedy, joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, and Thomas, explained the difference in the two cases:

In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.²⁵

That difference, he held, was the reason the *United Foods* subsidy failed: “We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.”²⁶ Justice Breyer, joined by Justices Ginsburg and O’Connor, although dissenting from the result, did not disagree that a subsidy could not withstand a First Amendment challenge if the “principal object” of the program was “the speech itself.” They disagreed that *United Foods* was different from the economic regulation that justified the *Glickman* subsidy.

Justice Thomas wrote a short concurrence “to reiterate my views that ‘paying money for the purposes of advertising involves speech,’ and that ‘compelling speech raises a First Amendment issue just as much as restricting speech.’ Any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny.”²⁷

What happened in four years to have the *Johanns* Court uphold the beef version of the mushroom subsidy rejected in *United Foods*? The *United Foods* speech unanimity masked disagreement on the Court about the status of commercial speech as well as disagreement about the extent to which the commerce clause empowers Congress to regulate the economy.

Justice Scalia, the *Johanns* author, and Chief Justice Rehnquist changed their *United Foods* votes because the beef advertising in *Johanns* was characterized as government speech. Justice O’Connor, who had been willing to approve the *United Foods* subsidy because it funded speech that was ancillary to an economic regulation, joined the judgment without comment. Justice Ginsburg concurred in the judgment that the beef subsidy was constitutional, but

24. 521 U.S. 457 (1997).

25. U.S. v. *United Foods*, 533 U.S. 405, 412-13 (2001).

26. *Id.* at 414.

27. *Id.* at 418-19 (Thomas, J., concurring).

was unwilling to agree to Justice Scalia's label solution of "government speech." She maintained her *United Foods* position that the subsidy was for a permissible economic regulation. Justice Breyer also concurred in the judgment. Unlike Justice Ginsburg, he bemoaned that a majority of the Court did not agree with his commerce clause based "economic regulation" approach, but accepted the "government speech theory . . . as a solution to the problem presented by these cases," complaining, nevertheless, that his *United Foods* approach was "preferable."²⁸

Justice Souter's dissent rested primarily on his discussion of democratic accountability as a safeguard for government speaking in support of its programs and policies. Democratic accountability, he said, could not exist if the fact of the government role "is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them."²⁹ Justice Kennedy, in a short, separate dissent was even more skeptical of the Court's result. He agreed with Justice Souter's anonymity reasoning, but was not ready to decide that the *Johanns* result would hold even if the government publicly embraced the speech.³⁰

It is not my purpose to re-argue the result in *Johanns*. Among other factors, it is impossible to predict how the case might come out if another advertising subsidy should find its way to the Supreme Court. Chief Justice Rehnquist, who was ill at the time of the *Johanns* argument, died four months after the *Johanns* decision. Justice O'Connor, whose family issues dominated her concern at the time of the *Johanns* decision, left the Court seven months after the decision. Justices Stevens and Souter, on the other side of the decision, have also left the Court.

A fair reading of *Johanns* is that it does nothing to change the rationale of *Glickman* and *United Foods*, that a compelled subsidy passes First Amendment muster only if the speech is "ancillary" to a broader program of government regulation. Justice Scalia's decision is pinned on his assertion that "America's Beef Producers" advertising is part of such a broader program.³¹ Not exactly a foundation for Justice Alito's *Pleasant Grove* government speech doctrine and his pronouncement that *Johanns* is authority for the proposition that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."³²

IV. GOVERNMENT DOES NOT NEED THE *PLEASANT GROVE* GOVERNMENT SPEECH DOCTRINE IN ORDER TO SPEAK

There was a good argument to be made before *Pleasant Grove* that there was no "government speech" doctrine. None of the cases mentioned as hinting

28. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 560, 569 (2005).

29. *Id.* at 578 (Souter, J., dissenting).

30. *Id.* at 570.

31. 544 U.S. 550, 560-61 (2005).

32. 555 U.S. 640 (2009).

at a “government speech” doctrine, or those relied upon in *Pleasant Grove*, save *Johanns*, ever spoke of a doctrine that allowed government *qua* government to express a viewpoint without raising a First Amendment problem. All of the other cases specifically said they did not involve government speech. Moreover, each of *Columbia Broadcasting System v. Democratic National Committee*,³³ *Rust v. Sullivan*,³⁴ *Rosenberger v. Rector and Visitors of University of Virginia*,³⁵ *National Endowment for Arts v. Finley*,³⁶ *Board of Regents of University of Wisconsin v. Southworth*,³⁷ and *Legal Services v. Velazquez*³⁸ disclaimed considering whether a government speech doctrine existed.³⁹ A majority of the *National Endowment for Arts* court was specifically invited to say that the government could engage in speech that discriminated based on viewpoint and rejected the invitation despite a complaining concurrence by Justice Scalia:

The operation was a success, but the patient died.” What such a procedure is to medicine, the Court’s opinion in this case is to law... unlike the Court, I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, *it establishes content and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.*⁴⁰

In *Pleasant Grove* Justice Alito chose to characterize *National Endowment for Arts* for the proposition that as to speech, “[i]t is the very business of government to favor and disfavor points of view,”⁴¹ the majority’s specific unwillingness to adopt that position notwithstanding.

The “government speech” doctrine, according to *Pleasant Grove* allows the government to express a viewpoint without any worry about the free speech clause of the First Amendment:

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) (“[T]he Government’s own speech... is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n. 7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression”). A government entity has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). “[I]t is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833,

33. 412 U.S. 94 (1973).

34. 500 U.S. 173 (1991).

35. 515 U.S. 819 (1995).

36. 524 U.S. 569 (1998).

37. 529 U.S. 217 (2000).

38. 531 U.S. 533 (2001).

39. See Steven H. Goldberg, *The Government Speech Doctrine: “Recently Minted,” but Counterfeit*, 49 U. LOUISVILLE L. REV. 21, 24-31 (2010).

40. 524 U.S. at 590 (emphasis added).

41. 555 U.S. at 468.

115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and to select the views that it wants to express. See *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (Scalia, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”).⁴²

I have previously argued that the authorities and the discussion advanced by Justice Alito are flawed and that neither they nor the history and purpose of the First Amendment support the *Pleasant Grove* decision.⁴³ It does not follow from that critique; however, that government is rendered speechless. The idea that it takes a government speech doctrine to allow the government to place a monument to fallen soldiers on land it owns is ludicrous. The doctrine is needed for monuments only if the government wants to speak when it should not. To contend that government is powerless to place a religious monument in a public park – the only topic *Pleasant Grove* addressed – does not mean that government cannot advocate and defend its programs and policies. The point was well made and its rationale succinctly stated in *Southworth’s* aside about the nature of government speech, had the case involved it:

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.⁴⁴

The key phrases are “[i]t is inevitable that government will adopt and pursue programs and policies within its constitutional powers” and “it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” If the general view among scholars is correct – that the speech clause of the First Amendment is an anti-government provision, limiting rather than enabling the government⁴⁵ – government’s power “to advocate and defend its own policies” must come from elsewhere. The Constitution, though it does not give government the power to speak, is all about giving the government power to act and about defining that power among the three branches it created. It is not remarkable, then, that government can speak about what it enacts and the actions it takes.

The Supreme Court’s First Amendment jurisprudence has long established

42. *Id.* at 467-68.

43. Goldberg, *supra* note 39, at 55-57.

44. 529 U.S. at 229.

45. See Blasi, *supra*, note 23: Thus, the colonial pamphleteers, like the opposition leaders in England whom they so admired, organized much of their political thought around the need they perceived to check the abuse of governmental power. The First Amendment was an outgrowth of this body of thought, as can be discerned from a brief examination of the most important eighteenth-century American writings on freedom of speech and freedom of the press.

that expressive conduct is symbolic speech protected by the speech clause.⁴⁶ Just as conduct can be speech; speech can be conduct. West Virginia's flag salute law, required school children to make a demonstration of patriotism that included reciting the Pledge of Allegiance. *West Virginia Bd. of Ed. v. Barnette*,⁴⁷ held that the First Amendment prohibited schools from requiring the conduct of the flag salute – a part of which was the Pledge. The words of the Pledge did not create the First Amendment problem in *Barnette*; it was the required ceremony of the flag salute to demonstrate patriotism that violated the speech clause.⁴⁸ Just as the educational study of the Bible does not violate the First Amendment, the school might well have required students, without running afoul of the free speech clause, to study the words of the Pledge in an educational context exploring the differing ways various societies attempt political indoctrination.

The *Southworth* Court dicta correctly identified that government conduct based on its constitutional power to adopt and pursue programs necessarily includes the government speaking about those programs. If nothing else, there is no way to pass a law without speaking it and writing it down. Words ancillary to the government's action pursuant to its constitutional powers are only limited by the First Amendment to the extent the government action is limited.

The appropriate "government speech" question is whether the structure of the Constitution and the First Amendment prohibit government to convey a viewpoint about a subject for which the government is prohibited from acting – as for example, placing the Ten Commandments on government property.⁴⁹ Everything in the history and purpose of the First Amendment says the amendment limits rather than empowers government. To contend that the government may advocate where it cannot act flies in the face of both the amendment's history and its purpose.

V. DOES *PLEASANT GROVE* REALLY CREATE A DOCTRINE, OR IS IT A ONE-OFF SET IN STONE?

The shaky legal foundation for Justice Alito's government speech doctrine and the way that the *Pleasant Grove* case arose might give some the hope that the case is limited to the proposition that government has some control over what

46. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (a message may be delivered by conduct that is intended to be communicative).

47. 319 U.S. 624 (1943).

48. The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude. *Id.* at 630-31.

49. *McCreary County v. ACLU*, 545 U.S. 844 (2005).

is permanently placed on government property. But those who have watched the inconsistencies and unexpected consequences of the Court's First Amendment jurisprudence would be well advised to be cautious in thinking *Pleasant Grove* is a one-off for stone monuments on government land.

Unlike the *Johanns* result, which could be characterized as a case of speech that is merely an adjunct to a permissible economic regulation, *Pleasant Grove* allows government speech where government acted beyond its power. Whether one views the case as involving government censorship of a particular set of words in a public forum (Summum's), or as government speaking a religious set of words (Judaism/Christianity) in a public forum, the First Amendment does not allow the result – at least not until Justice Alito's opinion.

One might surmise (or hope) that all of the justices in *Pleasant Grove* were flummoxed by the “concrete” problem advanced by the municipality amici: “What do we do if you make us take down all of the concrete (and other hard material) monuments we have erected or allowed to be erected in our public fora?” Four of the concurring justices must have at least sniffed the danger in Justice Alito's opinion, because they went out of their way to say that they were not creating or expanding a government speech doctrine. But two of the concurring justices knew better. Justice Scalia, writing for himself and Justice Thomas, understood the opinion to be an answer to his prayers – no play on words intended:

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the First Amendment. . . . But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called “wall of separation between church and State,” (citation omitted); respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently “adopted” its message.

....

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment.⁵⁰

The potential danger of the *Pleasant Grove* doctrine is its ability to allow the government to speak where it cannot act; to gratuitously, or for politically expedient reasons, take sides in the part of society's business in which the government has no business. At least two justices have indicated a desire to have it do just that.

VI. THE DANGER WHEN GOVERNMENT SPEAKS OUT-OF-TURN

If a government speech label allows the government to speak on subjects for which it has no power to make law, government is nothing more than a skill

50. 555 U.S. at 482-83 (Scalia, J., concurring).

for private opinion. If government can surreptitiously facilitate one side of such an argument, as in *Johanns* – or use its influence, land, wealth or power to promote it – as in *Pleasant Grove* – the effect is as destructive of First Amendment values as censorship.

The damage to First Amendment values when government speaks without warrant is hardly a novel insight or a new idea. In *Pleasant Grove* itself, Justice Alito acknowledged the government speech doctrine might “be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”⁵¹

I have argued that the most obvious – and maybe the most pernicious – example is the danger of government speech about religion.⁵² Inexplicably, in view of the *Pleasant Grove* result, Justice Alito said as much:

This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.⁵³

Justice O'Connor, concurring in *McCreary County v. ACLU*,⁵⁴ warned about the power of government speech to marginalize the views of others, particularly regarding religion:

In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs.⁵⁵

Justice O'Connor's observation about the megaphone effect of government speech is not limited to speech about religion. The “vast resources and special status” of the government in the marketplace of ideas turns the First Amendment on its head if the resources and status can be used to marginalize competing speech or ideas regardless of the subject.

Justice Alito's understanding, unfortunately, did not stop him from approving either the censorship of Summum's Seven Aphorisms or the placement of the centerpiece of the Jewish religion in a public park. Justice O'Connor, twenty years earlier in *Lynch v. Donnelly*,⁵⁶ approved government display of a crèche, an important Christian symbol, so long as it was surrounded by a plastic Santa Claus and reindeer. To date, there have been no sightings of government displays of Buddhist, Hindu, or Muslim religious symbols, and no apparent government support for Deists, atheists, and agnostics. That might reflect nothing more than legislative agreement with Justice Scalia's ideas that the First Amendment's mandates about religion do not prohibit “disregard of polytheists and believers in unconcerned deities, just as it permits the disregard

51. *Id.* at 473.

52. See Goldberg, *supra* note 39, Part V, The “Elephant in the Room.”

53. *Id.* at 468.

54. 545 U.S. 844 (2005).

55. *Id.* at 883.

56. 465 U.S. 688 (1984).

of devout atheists,”⁵⁷ and are not concerned that the “political process will place at a relative disadvantage those religious practices that are not widely engaged in.”⁵⁸ Or, just maybe, that is the danger.

If the insidiousness of the *Pleasant Grove* government speech doctrine was limited to stone monuments, or if it affected only the one in five Americans who do not believe in any religion,⁵⁹ it would be bad enough, but at least there would be some restriction on its reach. But there is nothing in the government speech doctrine as it is explained and justified by Justice Alito that limits its sweep to religious symbols. If the government can take the side of those who wish to put a stone monument of the Ten Commandments in a public park, but deny the same to other religions with other ideas, it is difficult to imagine why government viewpoint speech, without concern for First Amendment scrutiny, would not reach subjects beyond religious symbols.

The New York legislature, in response to pressure from the dairy industry, passes a law banning the sale of margarine – a cheaper substance that looks and tastes like butter, but has nothing to do with cows. Six weeks later, the New York Court of Appeal holds the law unconstitutional. This might seem far-fetched in today’s world of “buttery spreads,” but it happened in 1884.

Now assume the New York legislature passes a law funding an advertising campaign deriding margarine and urging New Yorkers not to buy it. The margarine industry, as important to the state’s economy as the dairy industry, challenges the law as violating its rights under the speech clause. Hard to argue the advertisements are not government speech and equally hard to find authority for New York’s government to produce them, unless Justice Alito’s “government speech” label is sufficient. If government decided not to spend its own money, but to fund advertising that said “Butter, it’s what you put on bread,” sponsored by the “America’s Spread Producers,” it is difficult to understand why that would make it better, except, of course, for the *Johanns* decision. But does that really make it better?

Substitute Congress and the Supreme Court of the United States for the New York institutions, it is still difficult to argue that the commerce clause would provide the power for the ads. Justice Breyer could not get a majority for that proposition in *United Foods* and gave up the argument in *Johanns*. And with the buttery spread industry in this scenario being as economically important as the dairy industry, it would be hard to meet even the lowest scrutiny of the rational basis test to justify the government action.

Iowa’s highest court holds an Iowa statute restricting marriage to couples of opposite sex violates the state and federal constitutional guarantees of equal protection and due process. Suppose the Iowa legislature, in response to pressure from lobbying groups opposed to same-sex marriage, passes a statute

57. 545 U.S. at 893.

58. *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

59. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 3 (2009).

appropriating states funds to produce advertisements claiming same-sex marriage undermines Iowa's moral strength and urging citizens to shun same-sex married couples in every avenue from apartment rental to employment. The governor signs the legislation. The television spots urging the isolation and ridiculing of married same-sex couples are very effective. As a result of the year-long campaign, the children of same-sex married couples are bullied at school and same-sex married couples are systematically denied rentals, sales of housing, and employment. Same-sex married couples sue to enjoin the advertising campaign as a violation of the speech clause. The speech is the government's. The advertising is urging action by citizens that the government could not take. The legislature's advertising is unconstitutional, except for Justice Alito's government speech doctrine claiming it raises no First Amendment problem. Maybe he's wrong!

To put same-sex marriage and the government speech issue on the other foot, assume a constitutional amendment defining marriage as between a man and a woman on the ballot in a state in which the Obama administration is extremely unpopular. Wanting to defeat the amendment that restricts marriage to couples of opposite sex, the administration uses taxpayer funds to pay a well-respected radio and television commentator who is very popular in the state to do a series of ads decrying the amendment as bigotry that will create hardship for many. The administration spends enough to dominate the airwaves. It appears the amendment is losing popularity and polling shows it is the work of the popular commentator that is turning the state around and threatens to defeat the amendment. Assuming someone with standing to sue discovers that the administration is paying for the television spots, is there any chance to enjoin the administration from buying more time for more ads? The speech is controlled by elected officials, so Justice Scalia's *Johanns* opinion is precedent for the proposition that the failure of attribution does not deny the speech the label of government speech; and Justice Alito's *Pleasant Grove* government speech doctrine makes the speech exempt from First Amendment scrutiny. Maybe they're both wrong!

Government hiring a popular shill when government is not popular has not happened since 2007, when the Bush Administration paid Armstrong Williams a quarter of a million dollars to make commentary against same-sex marriage without divulging that he was a paid shill for President Bush's views. It would be unseemly had Williams been paid by the President, individually, to speak against same-sex marriage without divulging the payment, but it would not be a First Amendment problem. The President, as an individual, has as much right as any individual to say what he thinks, or have someone else say it for him, the First Amendment says so. If his administration pays for the speech, shouldn't that be another matter?

South Carolina approved "Choose life" specialty license plates and refused to authorize "Save Choice" specialty license plates. In *Planned Parenthood of*

S.C., Inc. v. Rose,⁶⁰ the Fourth Circuit upheld a First Amendment challenge, but after characterizing the speech as a hybrid between private and government speech, decided the case on forum analysis. If another state does what South Carolina did, will *Pleasant Grove's* government speech doctrine change the result, allowing the state to provide mobile billboards for one side of a debate over which the state has no power to act?

South Dakota's abortion informed-consent law requires, among other things, a statement in writing providing the following information:

- (a) The name of the physician who will perform the abortion;
- (b) That the abortion will terminate the life of a whole, separate, unique, living human being;
- (c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
- (d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
- (e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
 - (i) Depression and related psychological distress;
 - (ii) Increased risk of suicide ideation and suicide;

The law has been in the courts for five years. In September of 2011, a panel of the Eighth Circuit Court of Appeals ruled that the provision requiring doctors to advise a woman seeking an abortion that "the abortion will terminate the life of a whole, separate, unique, living human being" did not facially violate doctors' First Amendment rights; the provision requiring doctors to advise a woman seeking an abortion that "she has an existing relationship" with an unborn human being that "enjoys protection under the United States Constitution and under the laws of South Dakota" was not facially unconstitutional; but the provision requiring doctors to describe "all known medical risks" of abortion, including "increased risk of suicide ideation and suicide," was unconstitutional.⁶¹ The matter is now set for hearing en banc.

Assume the Eighth Circuit decides the "suicide advisory" portion of the South Dakota abortion law is unconstitutional and the Supreme Court of the United States affirms. Could South Dakota replace "Great Faces, Great Places" on its license plates with "Women who abort before viability commit murder, and then suicide."⁶²

If Wisconsin is going to have a recall election of a sitting governor, could the Wisconsin legislature (if it had a veto proof majority of the governor's political opponents) pass a law over the governor's veto to fund an advertising

60. 361 F.3d 786 (4th Cir. 2004).

61. *Planned Parenthood v. Rounds*, 653 F.3d 662 (8th Cir. 2011).

62. It has long been decided that an individual can refuse to display the state's motto on its license plate and can cover it up without suffering a criminal penalty. *Wooley v. Maynard*, 430 U.S. 705 (1977).

campaign aimed at recalling the governor? Before *Pleasant Grove v. Summum*, the answer must have been a resounding “no.” The speech, however, is government speech exempt from First Amendment scrutiny under Justice Alito’s construct, unless his definition is modified in the future to make it clear that the government may not speak where it cannot act – may not speak out-of-turn.

VII. SPEAKING IN TURN

The municipality amici told the *Pleasant Grove* court that if the city lost, governments would have to take down all the monuments in all the parks honoring members of armed forces who gave their lives to make us safe, heroes who won our great battles, and people who made their mark on our lives. The argument of the municipalities and the scholarly critique⁶³ in the same vein ignores the general rule that the government may place what it wants on the property it owns, irrespective of its source – unless, of course, it chooses to put up a religious monument or something else that no speaker could erect, such as an obscene statue. Forum analysis worked perfectly well for cities and their monuments until religion became the topic, the Court’s disclaimer, notwithstanding, that *Pleasant Grove* was not about religion.

In a similar vein, there is no reason to think that *Pleasant Grove*’s government speech doctrine is needed for government to say the things that most people think are “good things” such as advertisements to attract tourists, admonitions against drinking and driving, warnings about the health risk from obesity, the dangers of smoking, etc. The *Southworth* Court, in its aside about when the government could speak, said something so obvious it is a wonder that Justice Alito thought it necessary to create a First Amendment-proof speaking power for the government. The *Southworth* wisdom – if government can act, it can speak in turn – is so clearly correct as a legal matter and so satisfactory as a practical matter, that it is worth repeating:

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that *funds raised by the government will be spent for speech and other expression to advocate and defend its own policies*.⁶⁴

Consider, for example, the early winter 2011 television advertisements by the gulf coast states whose tourism industry was so devastated by the BP oil spill in April, 2010. In the ads, the gulf states are showing off their recoveries and reminding people who will soon be freezing in the North to visit and spend their money on the Gulf. It is undeniable that the states have the power to act to improve their economies. Using the *Southworth* rationale, it follows that they

63. See Dolan, Mary Jean, *Why monuments are government speech: The hard case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7-58 (2008).

64. 529 U.S. at 229 (emphasis added).

can advertise to encourage tourism and need no *Pleasant Grove* exemption from First Amendment scrutiny to run the ads.

On the same subject of tourism, the *Southworth* rationale is equally useful in demonstrating the circumstances under which government has no warrant to speak. Consider a state that suffered a similar blow to its economy and wants to keep its people at home spending money rather than going to the Gulf to spend it. It is unlikely the state could sustain against a constitutional challenge a law that 1) required citizens of the state to file a detailed road, train, or flight plan upon leaving the state; 2) be required to keep verified records of expenditures on food and entertainment out-of-state; and 3) upon return to the state be required to spend an equal amount on food and entertainment within the state over a similar time spent out-of-state, or to pay an equal amount to the state treasury.⁶⁵

When the Court rules the state cannot maintain its “pay here, what you paid there” law, the state pays for an advertising campaign that will run right after the gulf states ads. The ads say:

Don’t go to the Gulf States! Pollution lingers and can hurt you. And if you are not white, remember your history; you could not get served a meal there a few years ago, if you survived.

Gulf state businesses hurt by the effectiveness of the ads, bring a First Amendment challenge to stop the ad campaign, alleging that the state’s ads, by dominating the dialogue and invoking the power of the state, have effectively extinguished the businesses’ First Amendment right.⁶⁶ It makes no sense that because the speech is the government’s it is exempt from First Amendment scrutiny. If the First Amendment is a limitation on government, why wouldn’t it limit government from hurting an individual by advocating something it has no power to accomplish? Except as speech ancillary to its legitimate activity, government’s First Amendment role is listener, not speaker.

After the decision in *District of Columbia v. Heller*,⁶⁷ holding unconstitutional a law that makes it virtually impossible to possess a handgun in the home, New York City maintains its less restrictive gun regulations, believing they do not violate the Second Amendment. Hoping to cut down on the deaths from handguns, the city embarks on a television advertising campaign that demonstrates some of the common accidental shootings and shows some of the precautions that a gun possessor might take to diminish the risk of an accidental shooting. The ads end with: “Keep your handguns and your friends safe.” The speech is in support of the city’s policies and is undoubtedly permissible.

It is quite a different matter if New York City’s handgun law is virtually identical to the D.C. law and is found to violate the Second Amendment despite

65. See *Saenz v. Roe*, 526 U.S. 489 (1999); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

66. It is possible, but not likely, that a Gulf state might sue and invoke the dormant commerce clause. A citizen of the state, who does not go to the Gulf because friends who were to accompany were dissuaded by the state’s ads, might try to sue; but it is hard to imagine how the ad makes a real deterrent to that person’s right to travel.

67. 554 U.S. 570 (2008).

the city's argument that handguns have not been used for self-defense, an issue of importance in the *Heller* decision. Unhappy with the decision, and reflecting on a decade of home shooting deaths of loved ones, friends, or others not endangering the shooter in any way, the city pays for an advertising campaign. It says in essence: "Don't visit your friends or family if they have a handgun in the home, the odds are that if anyone is shot by the gun it will be you. Just because it was an accident will not bring you back to life."

The ads are very effective and as a result, people in New York City, in significant number, stop visiting their friends and relatives. A gun advocate who has a handgun, but has not been visited by anyone for a long time, and the National Rifle Association sue to enjoin the ads. Their First Amendment challenge claims that because government cannot prohibit the handguns, it cannot try to accomplish, through speech for which it has no warrant, the same result by making people dispose of their handguns in order to have their friends and relatives visit. The ads, they claim, diminish the gun owner's right of association and, further, allow government to dominate the marketplace of ideas and diminish their advocacy upon a subject for which government has no constitutional warrant. Shouldn't that argument prevail?

The schools in an urban area are well-integrated. Old line real estate developers, deploring the integration and sensing an opportunity for great profit, build expensive housing just beyond the city limits that will be attainable in the main – because of income disparities in the city – by whites. The city government fears that white flight, should it take hold, will destroy the community, destroy the tax base, and re-segregate the schools. It begins an advertising campaign extolling the benefits of living in the city and the disadvantages of living the suburbs. The city needs no special government speech doctrine to make the advertising permissible.

In the suburbs, however, the developers are elected to the government. Concerned that their homes will not be bought and their suburbs will not flourish, they vote suburb funds to produce an advertising campaign aimed at city residents. It says: "Want your children in schools with children of their own race, move to your new home in the suburbs." There can be no doubt that the developers can build the homes and create the suburbs. There is, also, no doubt the speech is the government's. Is the government really able, because its speech is not subject to First Amendment scrutiny, to advocate segregated schools that it cannot legally create or maintain?

The proper level of the government's commerce clause power to interfere with or referee what people can purchase, ingest, or use where the government either cannot (uncontaminated peaches, for example) or will not (sale of cigarettes) ban the substance or activity, is an issue beyond the scope of this essay. But understanding the current level of commerce clause power is important for understanding government power to tell us not to eat too much fat or to smoke.

Congress' commerce clause power has been interpreted very broadly since

the depression era decision in *West Coast Hotel Co. v. Parrish*.⁶⁸ In 1995, *United States v. Lopez*,⁶⁹ in a rare five-to-four decision, found for the first time in more than half a century a piece of legislation beyond Congress' commerce power. The holding, that Congress had no power to regulate the carrying of firearms near a school, was the first time since the *West Coast Hotels* unleashing of the commerce power, that the police power deriving from the commerce clause had been questioned. A decade later, the Court upheld in *Gonzales v. Raich*⁷⁰ the Controlled Substances Act, Schedule 1 designation of marijuana as a prohibited drug. The six-to-three holding included a concurrence by Justice Scalia in which he explained the switch from his *Lopez* vote that Congress did not have police power deriving from the commerce clause to control intrastate activity of gun toting near a school:

The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power.⁷¹

Justice O'Connor, the Court's staunchest supporter of state sovereignty – particularly with respect to police power – laments in dissent that the result of the *Raich* decision was to make *Lopez* nothing more than a drafting exercise.⁷² To date, the commerce clause remains broadly interpreted to give Congress virtually plenary power over commerce and federal law affecting public health and safety.

Obesity is an acknowledged national health problem. There might be disagreement over what action, if any, government should take to attack the problem; but there is no doubt government has the power to act, including the power to create speech that urges people to be aware of their weight. A recently passed federal law requires chain restaurants to display calorie information on menus and menu boards. Government interest in improving public health is certainly legitimate, and if the calorie information is rationally related to

68. 300 U.S. 379 (1937).

69. 514 U.S. 549 (1995).

70. 545 U.S. 1 (2005).

71. *Id.* at 36.

72. *Id.* at 46. "Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," (citation omitted) the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez stands for nothing more than a drafting guide*: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"–thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. (emphasis added).

achieving that goal it meets minimal scrutiny; even if that rational basis is not the almost-impossible-to-fail hypothetical rational basis of *Williamson v. Lee Optical of Okla., Inc.*;⁷³ but Justice Kennedy's version of rational basis that would require "a tangible link to commerce, not a mere conceivable rational relation."⁷⁴

The established dangers from cigarette smoking and our current understanding of congressional commerce power regarding public health,⁷⁵ leave little doubt that Congress has the power to ban the sale and smoking of cigarettes in the United States. Congress has not, for whatever reason, chosen that course. It has, however, since 1964 regulated on an ever broadening scale the advertising, sale, and warnings about tobacco products, especially cigarettes. Today, the extent of the Food and Drug Administration's authority under the Family Smoking Prevention and Tobacco Control Act of 2009 to regulate warnings on cigarette packages is being challenged by the cigarette companies.

The FDA has issued a regulation that requires display of graphic color images (aimed at shocking smokers about the health risks of smoking) over a significant portion of a cigarette package. The images include a dead person with a toe tag, blackened lungs, and a woman blowing smoke into her baby's face. The tobacco companies have challenged the proposed regulation, claiming it amounts to compelled speech that violates their First Amendment speech right. Federal District Judge Richard J. Leon, of the D.C. district court, has granted the companies' request for a preliminary injunction to delay implementation of the FDA regulation, ruling the companies were likely to prevail on their claim that the regulation forces them to persuade potential customers not to buy their cigarettes.⁷⁶

The companies' claim that the regulation amounts to compelled speech is technically distinct from the compelled subsidy in *Johanns*, but a technical distinction that suggests *Johanns* attempt to use "government speech" to distinguish compelled subsidy from compelled speech was not a substantive difference. It seems beyond argument that the graphic images are the government's speech, no matter where they are displayed or who has to pay for putting them there. Given the long history of broad government regulation of cigarette sales and marketing, it seems at first blush that the FDA requirement of graphic images is not different in kind from the familiar health warnings on cigarette packs. There is no doubt the current warnings are well within the government's ability to speak in support of its regulation of public health.

Judge Leon seems to believe that the images are different from the warnings in a manner that might violate the free speech rights of the cigarette companies.⁷⁷ If that is the case, could government use funds from general

73. 348 U.S. 483 (1955).

74. *United States v. Comstock*, 130 S.Ct. 1949, 1967 (2010) (Kennedy, J. concurring).

75. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

76. *R.J. Reynolds Tobacco Company et al v. United States Food and Drug Administration et al*, Civil Case No. 11-1482 (RJL), Memorandum Opinion, Nov. 7, 2011 (Dkt. #11).

77. The FDA conveniently refers to these graphic images as "graphic warnings." While

taxation to persuade people not to smoke by creating television ads that said, “If you smoke, your baby smokes,” and putting the exact same images on the screen?

Government has all the power it needs to speak in pursuit of its own programs and policies without the Court creating a First Amendment monster that has the potential to allow the government to dominate the marketplace of ideas with the ideas of others or with its own view about a subject for which it has not power to act. I have argued that there is much to disparage about the *Pleasant Grove* invention of a doctrine of government speech exempt from First Amendment scrutiny. The city’s act of government censorship was used as an excuse to create a doctrine about government speech; the doctrine was built on cases that did not support it; and the doctrine has the potential for mischief in a number of areas. The most serious problem, however, is the Court’s basic misunderstanding about the purpose of the First Amendment.

Among its various values, the original driving force for the First Amendment was political – a barrier against a new government of unknown shape and power. The textual limitation to congressional power has been abandoned over the years and the original anti-new government nature of the amendment has expanded to limit all governmental units. The framers of the First Amendment feared parliamentary power as much as they feared King George and they crafted the First Amendment to make clear the roles of the people of a democracy and its government. It was the people who had the freedom of speech, religion and association. It was the government that was the listener, that could not adopt the power of the church, and that could not ban the associations that would overthrow it when the people found the government more dangerous than helpful. While the limitation of the prohibition to Congress has been abandoned, the anti-government base for the amendment has not.

VIII. CONCLUSION

Government censorship is the *sine qua non* of the limitation on government, but censorship of citizens’ speech is no more destructive of First Amendment values than government speech that can overwhelm or marginalize citizen speech. When government speaks in support of the acts it has the power to perform, the speech is part of its power and duty. Government is then speaking in turn. If it speaks on subjects for which it has no power or willingness to act, either as a shill for private parties or representing its own view, it is speaking out-of-turn. That is a bad idea, will cause nothing but mischief, is contrary to the purpose of the First Amendment, and the Court should say so.

characterizing the mandatory textual statements as “warnings” seems to be a fair and accurate description, characterizing these graphic images as “warnings” strikes me as inaccurate and unfair. *Id.* at n.1, p. 2.