PLEASANT GROVE CITY v. SUMMUM: GOVERNMENT SPEECH TAKES CENTER STAGE

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INTRODUCTION

In *Pleasant Grove City v. Summum*,[1] the U.S. Supreme Court ruled that the city's decision to display permanent monuments in a public park is a form of government speech, which is neither subject to scrutiny under the Free Speech Clause of the First Amendment, nor a form of expression to which public forum analysis applies.[2] This unanimous and quite remarkable decision provides some clarity about the role government speech plays in First Amendment jurisprudence, but fails to define government speech or explain whether or not there are any limitations to governmental invocation of the doctrine.

The purposes of this article are to examine the development of the doctrine of government speech in U.S. Supreme Court decisions, to scrutinize *Pleasant Grove* carefully to ascertain whether it contributes in a meaningful way to the understanding of government speech, and to illustrate the difficulties created by the lack of a coherent definition of government speech.

Part I of this article will review the development of the government speech doctrine in U.S. Supreme Court decisions crossing a wide array of First Amendment expression. Part II will carefully review *Pleasant Grove* and the adroit manner in which the Court disposed of the intersection of government speech, First Amendment guarantee of free speech, and the public forum analysis. Part III will examine the challenges presented by the lack of a clear definition of government speech in resolving First Amendment issues.

I. DEVELOPMENT OF GOVERNMENT SPEECH DOCTRINE

The source of the doctrine of government speech traces to Justice Stewart's concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National*

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[1] Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).
[2] *Id*. at 1129.

Committee,[3] in which the U.S. Supreme Court ruled that neither the First Amendment nor the public interest standards of the Federal Communications Act required broadcasters to accept editorial advertisements from the National Democratic Party and the Business Executives' Move for Vietnam Peace.[4] In his concurring opinion, Justice Stewart observed that broadcasters should not be considered communication agents of the government, because to do so would strip them of all First Amendment protections.[5] "The First Amendment," Justice Stewart maintained, "protects the press from governmental interference; it confers no analogous protection *on* the government."[6] He buttressed this argument with two propositions: (1) "[g]overnment is not restrained by the First Amendment from controlling its own expression," and (2) nothing in the First Amendment prevents the government from controlling its own expression or that of its agents.[7] Justice Stewart's observation, then, supports the generally accepted propositions that the First Amendment protects only private expression from government regulation, and that government expression is neither protected by nor restrained by the First Amendment.[8]

The government speech doctrine was first employed to resolve a First Amendment challenge in *Rust v. Sullivan*.[9] In *Rust*, the U.S. Supreme Court rejected a First Amendment attack on regulations issued under Title X of the Public Health Service Act,[10] which provided federal funding for family planning, but prohibited health care providers from counseling patients about abortions as a method of family planning, referring patients for abortions, or encouraging abortion as a means of family planning.[11] These regulations attempted to separate the use of federal funding by family planning clinics from any abortion-related activities.[12] If asked questions about abortions, physicians were required to give one response: Title X "does not consider abortion an appropriate method of family planning."[13]
Claiming these prohibitions violated their First Amendment rights, doctors and health care counselors challenged the facial validity of the regulations and sought injunctive and declaratory relief.[14] The District Court rejected the constitutional challenge to the regulations,[15] and a panel of the Second Circuit affirmed, ruling the government has no obligation to subsidize the exercise of speech and the health care

[3] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973).
[4] *Id.* at 121, 131.
[5] *Id.* at 139.
[6] *Id.*
[7] *Id.* n.7.
[8] *See generally* David Fagundes, *State Actors As First Amendment Speakers*, 100 NW. U.L. REV. 1637 (2006) (exploring the limits to the conventional view and maintaining that First Amendment protections may be applied to government speech in some settings).
[9] Rust v. Sullivan, 111 S. Ct. 1759 (1991).
[10] 42 U.S.C. 300 – 300(a)-(6); 42 C.F.R. 59.8(a)(1) (1989).
[11] 42 C.F.R. 58.8(1) and 59.10(a) (1989); *Rust,* 111 S. Ct. at 1765.
[12] 42 C.F.R. 59.9 (1989); *Rust*, 111 S. Ct. at 1765.
[13] 42 C.F.R. 59.8(b)(5) (1989).
[14] *Rust*, 111 S. Ct. at 1766.
[15] *Id.*

workers "remain free to say whatever they wish about abortion outside the Title X project."[16]

The U.S. Supreme Court affirmed the decision of the Second Circuit,[17] and determined that restrictions on communications by health care providers and counselors about abortion did not violate the First Amendment. The majority opinion, authored by Chief Justice Rehnquist, decided that the regulations in question did not constitute viewpoint discrimination,[18] but merely reflected the government's decision to fund one program to attain certain permissible goals and not to fund another program which seeks to handle the problem in a different way,[19] even if the funded program discourages the attainment of the goals sought by the unfunded program,[20] just as the government's decision to subsidize one protected right does not require it to "subsidize analogous counterpart rights."[21] By upholding the restrictions on counseling, referral, and advocating abortion as a means of family planning, the Court's decision significantly protects the right of the government to engage in speech when implementing a permissible governmental policy without risk of violating the First Amendment, because it is the government's own speech which is neither restrained nor protected by the First Amendment and which trumps the claims of individuals that government speech violates their First Amendment rights.

The next major decision in which the U.S. Supreme Court addressed government speech was *Rosenberger v. Rector and Visitors of the Univ. of Va.*[22] In *Rosenberger*, the U.S. Supreme Court ruled that the University of Virginia violated the First Amendment by withholding payment authorization to an outside contractor for printing a student newspaper promoting Christian values and viewpoints.[23] The newspaper was produced by Wide Awake Productions, a student organization recognized and sanctioned by the university.[24] Under university guidelines, recognized student organizations were permitted to submit disbursement requests to pay outside contractors for expenses related to student news, information, and opinion; however, expenses related to religious activities were excluded from the

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[16] *Id*. at 1767.
[17] *Id*. at 1764.
[18] *Id*. at 1773.
[19] *Id*. "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." *Id*.
[20] *Id*.
[21] *Id*. In making this determination, the Court relied heavily on Regan v. Taxation with Representation of Wash., 103 S. Ct. 1997 (1983), in which the Court ruled the Internal Revenue Service did not violate the First Amendment by denying tax exempt status to a nonprofit organization engaged in lobbying, because the government is not obligated to subsidize activities it does not choose to support.
[22] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).
[23] *Id.* at 845-46.
[24] *Id.* at 825-26.

disbursement request program.[25] Wide Awake Publications submitted a disbursement request to pay its printer $5,862 for the cost of printing its newspaper,[26] but the university denied the request because of the religious perspective of the newspaper.[27]

The U.S. Supreme Court ruled that the University of Virginia's refusal to pay the publication costs of the student newspaper because it promoted Christianity constituted government-imposed viewpoint discrimination in violation of the First Amendment.[28] Having established a "limited public forum" for the expression of various student viewpoints through its disbursement request procedures,[29] the university was prohibited by the First Amendment from excluding Wide Awake Publications because it advocated a Christian perspective.[30] Furthermore, Court determined the use of student fees to pay publication costs for a student newspaper promoting a Christian perspective does not violate the Establishment Clause, because the university's student activities fee, unlike taxes levied for direct support of a church or group of churches, was "neutral toward religion."[31]

While *Rosenberger* determined the university's disbursement of funds to support student expression was a limited public forum and upheld the students' First Amendment challenge, the decision also included language strongly supportive of government speech free of First Amendment restraints:

> [W]hen the state is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in [*Rust*] we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized 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

[25] *Id*. at 824. A "religious activity" was defined as any activity that "primarily promotes or manifests a particular belief about a deity." *Id.* at 825.
[26] *Id*. at 827.
[27] *Id*.
[28] *Id*. at 828-29, 837.
[29] *Id*. at 829.
[30] *Id*. at 830-31. "The Guideline invoked by the University to deny third-party contractor payments on behalf of [Wide Awake Publications] effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications." *Id*. at 836.
[31] *Id*. at 840, 841.

> and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee (citations omitted).[32]

In *National Endowment for the Arts v. Finley*,[33] the U.S. Supreme Court rejected a First Amendment facial challenge to criteria employed by NEA and its advisory panels in reviewing and selecting applications for funding.[34] Congress implemented the criteria in 1990, when it amended the National Foundation on the Arts and Humanities Act[35] to require that NEA funds be awarded on the basis of "artistic excellence and artistic merit . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[36] Congress mandated the amended criteria in response to a public outcry over NEA's funding a retrospective of Robert Mapplethorpe's homoerotic photographs and "artist Andres Serrano's work *Piss Christ*, a photograph of a crucifix immersed in urine."[37]

Four artists applied for NEA funding before the revised selection criteria were enacted. An advisory panel recommended approval of their projects, but the National Council of the Arts recommended disapproval. The NEA accepted that recommendation, and notified the four artists they were denied funding.[38] The artists filed suit, requesting the restoration of funding for their proposals and challenging the funding criteria as impermissible viewpoint discrimination under the First Amendment.[39]

Initially emphasizing the "heavy burden" imposed on litigants who pursue facial constitutional challenges,[40] the Court accepted NEA's assurances that the

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[32] *Id.* at 833. *Rust* and *Rosenberger* appear to have created an interesting polarization of First Amendment jurisprudence. As one commentator noted:

> Rosenberger has now become the standard bearer for one of two poles in the Court's government speech jurisprudence. At one pole, the Court says, when the government makes a decision to create a forum for individual speech, the government is stuck with it. The government may not pick and choose among speakers because it prefers some messages over others. At the opposite pole, represented by [*Rust*] . . . the Court says that the government may favor one message over another because the favored message is the government's own message, and because the government has not created any forum for the expression of individual views.

Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1407 (2001).

[33] NEA v. Finley, 524 U.S. 569 (1998)

[34] *Id.* at 573.

[35] 20 U.S.C. 954-955 (1994).

[36] 20 U.S.C. 954(d)(1) (1994). NEA v. Finley, 524 U.S. at 576.

[37] NEA v. Finley, 524 U.S. at 574.

[38] *Id*. at 577.

[39] *Id*. at 578.

[40] *Id*. at 580 ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort. To prevail, respondents must demonstrate a

funding criteria were merely "hortatory" and that, because no weight was accorded the criteria in the review process, the NEA was not restricted in selecting funded projects.[41] Taking decency and respect for diverse beliefs and values into consideration, the Court insisted, does not equip the NEA with "a tool for invidious viewpoint discrimination."[42] Likewise, the Court noted, the decency and respect criteria neither silence speakers by threatening censorship nor endanger First Amendment values, and mere reference to the criteria is insufficient to sustain the artists' burden in pursuing a facial challenge.[43]

Significantly, the Court rejected the artists' reliance on *Rosenberger* as mandating viewpoint neutrality in awarding NEA funds because of the nature of arts funding.[44] The Court observed that, having limited resources, the NEA must employ a competitive process in screening grant applications and necessarily makes content-based judgments about the aesthetic value of the application.[45] That NEA employs the challenged criteria in approving some applications and rejecting others does not constitute a violation of the First Amendment, the Court stated, because under *Rust* the decision to fund some programs and not to fund alternative programs does not constitute viewpoint discrimination. By introducing *Rust* into the equation, the Court implicitly equates NEA's decision to fund some projects and reject funding for others as government speech employed in the implementation of permissible governmental policy that is insulated from First Amendment challenge. While it is not clear what message the government seeks to communicate in selecting some applications for funding and rejecting others, it is nonetheless government speech,[46] which trumps the First Amendment interests of the objecting artists.

In *Board of Regents of the University of Wisconsin System v. Southworth*, [47] the U.S. Supreme Court again confronted the government speech/public forum dichotomy. In *Southworth*, students enrolled in the University of Wisconsin objected to paying a mandatory, nonrefundable student services fee that was used in part to support extracurricular student speech with which they disagreed, and, relying on cases restricting the use of mandatory union dues and bar association fees for ideological purposes to which members objected,[48] insisted that they be given the choice not to fund student activities involving political and ideological expression offensive to their personal beliefs.[49] The U.S. Supreme Court disagreed and decided that the "First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the

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substantial risk that application of the provision will lead to the suppression of speech.") (citations omitted)

[41] *Id*. at 580-81.

[42] *Id*. at 582.

[43] *Id*. at 583.

[44] *Id*. at 586.

[45] *Id*.

[46] *See* Bezanson & Buss, *supra* note 32, at 1457-62.

[47] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

[48] Abood v. Detroit Bd. of Educ., 97 S. Ct. 1762 (1977), and Keller v. State Bar of Cal., 110 S. Ct. 2228 (1990).

[49] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. at 220-221, 227.

program is viewpoint neutral."[50] The Court also determined, however, that the "student referendum mechanism" employed by the University to allocate the student fees might violate the "viewpoint neutrality principle," and remanded the matter for further proceedings.[51]

In reaching its decision, the Court preliminarily addressed the issue of government speech when it determined the speech in question was not the speech of the University.[52] The court noted that the government may, without violating the First Amendment, levy taxes and impose mandatory fees to support its speech, stating:

> 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.[53]

Just as *Rosenberger* determined that the University of Virginia's funding of student expression constituted a public forum and that the university violated the principle of viewpoint neutrality in declining to fund the newspaper promoting Christianity, *Southworth* found that the University of Wisconsin's funding of student organization expression constituted a public forum requiring viewpoint neutrality in its administration and that the procedure employed to approve the allocations may have violated that principle. Likewise, both *Rosenberger* and *Southworth* contain *dicta* supportive of the doctrine of government speech. Unlike *Rosenberger*'s upholding the students' First Amendment claim for funding for their publication, however, *Southworth* rejected the students' First Amendment claim for a refund of

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[50] *Id.* at 221, 223 ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others . . . . Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected.").

[51] *Id*. 221, 235 ("[I]t appears that by majority vote of the student body a given RSO may be funded or defunded. It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here. A remand is necessary and appropriate to resolve this point; and the case in all events must be reexamined in light of the principles we have discussed.")

[52] *Id*. at 229.

[53] *Id*.

student fees used to support student organization expression with which they disagreed.

In *Johanns v. Livestock Marketing Ass'n,*[54] the U.S. Supreme Court upheld a mandatory assessment of one dollar per head of cattle sold or imported to finance market and food science research into the nutritional value of beef and promotional campaigns to market beef domestically and overseas.[55] Two beef producer associations and several beef ranchers objected to the assessment because the promotional campaigns focused on beef as a generic product which impeded their efforts to promote the superiority of American beef, grain-fed beef, or certified Angus or Hereford beef.[56] The U.S. Supreme Court ruled that U.S. Department of Agriculture did not violate the First Amendment rights of beef producers and ranchers by requiring them to contribute funds to support generic advertisements for beef,[57] because the generic advertisements in question constituted the Government's own speech.[58] The Court reasoned that, by enacting and implementing the beef marketing program, Congress and the Secretary of Agriculture authored, controlled, and disseminated the message of the beef promotional program in its entirety.[59] Hence, the doctrine of government speech applied and eviscerated the beef producers' First Amendment objections to the beef assessment program.[60] Quite simply, the generic advertisements in question constituted the Government's own speech,[61] and the beef producers and ranchers have no First Amendment right against compelled financing of government speech,[62] just as other "[citizens] have no First Amendment right not to fund government speech."[63]

Livestock Marketing falls squarely into the *Rust* camp. Having determined the expression in question constitutes government speech, the government's expression cannot be restrained by other First Amendment considerations and trumps the competing First Amendment claims of those objecting to the government speech. *Rust* restricted health care counselors from discussing abortion with their clients as a means of family planning and required the counselors to eschew abortion as an appropriate method of family planning. Because those restrictions constituted government speech, they trumped the competing First Amendment claims of the health care counselors. Similarly *Livestock Marketing* upheld mandatory contributions to beef promotional campaigns and forced those beef producers to be associated with marketing promotions to which they objected. Because the government's beef marketing program constituted government speech, it trumped the compelled speech claims of the beef producers.

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[54] Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005).
[55] *Id*. at 2059, 2066.
[56] *Id*. at 2060.
[57] *Id*. at 2066.
[58] *Id*. at 2058
[59] *Id*.
[60] *Id*. at 2066
[61] *Id*. at 2058
[62] *Id*. at 2066. *See* United States v. American Library Ass'n, Inc., 539 U.S. 194, 211-12 (2003) (requiring public libraries receiving federal funding to install internet filtering software to block obscene material does not violate the First Amendment).
[63] Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. at 2064.

In *Garcetti v. Ceballos*,[64] Richard Ceballos, a deputy district attorney in the Los Angeles County District Attorney's Office was advised by a defense attorney that he would file a motion to challenge a search warrant, because inaccuracies appeared in an affidavit submitted to obtain a search warrant.[65] Ceballos reviewed the affidavit, inspected the location it described, and determined that the warrant contained serious misrepresentations.[66] Ceballos subsequently spoke to the deputy sheriff whose averments appeared in the affidavit, and was not satisfied with the explanations provided.[67] Ceballos notified his supervisors of his concerns and drafted a memorandum in which he recommended that criminal charges in a case be dropped, because he suspected the deputy sheriff's averments used to obtain a search warrant were untrue.[68] Ceballos' superiors rejected his advice, and decided to move ahead with the case pending the outcome of defense counsel's motion challenging the search warrant.[69] During the hearing on the motion to challenge the warrant, Ceballos provided testimony favorable to the defendant, but the court rejected the challenge to the warrant.[70] Ceballos contended that the District Attorney's office subsequently engaged in retaliatory conduct for his testifying at the hearing by demoting him to a trial deputy position, transferring him to another courthouse, and denying him a promotion.[71] Ceballos then pursued a claim for lost wages and compensatory damages under 42 U.S.C. § 1983 for adverse employment actions committed in retaliation for his engagement in speech protected by the First Amendment.[72]

Ruling that Ceballos was not entitled to First Amendment protection for the contents of the memorandum, because he wrote his memorandum as part of his official duties, the district court granted summary judgment in favor of the defendants.[73] The Ninth Circuit Court of Appeals reversed, deciding that Ceballos' actions constituted protected speech under the First Amendment, even though the speech in question was expressed pursuant to his duties of employment.[74]

The U.S.Supreme Court reversed the Ninth Circuit, ruling that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[75] In reaching this decision, the Court emphasized that the government as employer can exert control over the

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[64] Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).
[65] *Id*. at 1955.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 1956.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*. at 1960.

speech the government "has commissioned or created."[76] In other words, government funded speech is the equivalent of government speech and government speech is not protected by the First Amendment.[77] Hence, because Ceballos' speech was required as part of his job responsibilities as a prosecuting attorney and because Ceballos' salary was paid by a government agency, he engaged in government speech and cannot claim First Amendment protection.[78]

Like *Finley* and *Livestock Marketing*, *Garcetti* falls into the *Rust* camp. Once the court determined that the expression in question is government speech, it cannot be restricted by First Amendment considerations and trumped competing First Amendment claims. The marketing program in *Livestock Marketing* was deemed to be government speech, because Congress and the Secretary of Agriculture authored, controlled, and disseminated the message of the beef promotional program in its entirety. It did not matter that it was funded by a mandatory assessment on each head of cattle sold, because, as noted in *Rosenberger*, the government may appropriate funds to convey its message, and, as noted in *Southworth*, the government may generate support for it programs by levying taxes on protesting parties. Having determined the beef marketing program was government speech, it trumped the competing First Amendment claims of the beef producers.

Similarly, the speech in *Garcetti* constituted government speech, because the assistant district attorney conveyed his message as part of his duties as a government employee and because the government paid his salary for performing those responsibilities. Having determined Ceballos communications were government speech, that speech trumped the competing First Amendment claims of Ceballos.

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[76] *Id.* citing Rosenberger v. Rector and 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.")

[77] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. at 229 ("funds raised by the government will be spent for speech and other expression to advocate and defend its own policies"). Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. at 2062 ("'Compelled support of government' -- even those programs of government one does not approve of -- is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. '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.' We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns."). Legal Serv. Corp. v. Valasquez, 531 U.S. 533, 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"). U.S.v. Am.Library Ass'n, Inc., 539 U.S. at 211-12 (requiring public libraries receiving federal funding to install internet filtering software to block obscene material does not violate the First Amendment).

[78] In contrast, in Legal Serv. Corp. v. Valasquez, 531 U.S. at 542, the U.S. Supreme Court ruled that an attorney employed by Legal Services engages in private speech when advocating on behalf of an indigent client. Hence, government restrictions prohibiting legal services attorneys from challenging the validity of welfare laws infringed on private speech subsidized by the government, and public forum analysis applied. The legal services attorney's advocacy was not deemed to be government speech.

From its humble beginnings as an explanatory comment in a concurring opinion, the doctrine of government speech has emerged as a necessary and powerful tool helping governments govern and coincidentally squelching First Amendment objections to those governing processes. It is a relatively new theory, which, because its meaning and limitations have not been defined, and can be both scary and elusive.

II. *PLEASANT GROVE CITY V. SUMMUM*

The City of Pleasant Grove, Utah, maintained a two and one half acre park called "Pioneer Park" containing fifteen permanent displays, eleven of which were donated by private groups.[79] The displays were quite varied, and included "an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971."[80] Summum, "a religious organization founded in 1975 and headquartered in Salt Lake City, Utah," made three separate requests for the permission of Pleasant Grove City to install a monument containing the "Seven Aphorisms" of Summum and designed to look similar to the Ten Commandments monument.[81] Pleasant Grove City denied the requests, explaining that it limited monuments to those that directly related to its history or were donated by groups with longstanding ties to the community.[82]

Summum filed an action in federal district court, claiming Pleasant Grove City violated its First Amendment Rights by displaying the Ten Commandments monument but refusing to accept the Seven Aphorisms monument, and seeking injunctive relief directing Pleasant Grove City to permit Summum to erect its monument in Pioneer Park.[83] The district court denied Summum's request for an injunction, and Summum appealed to the Tenth Circuit Court of Appeals.[84] Applying public forum analysis, the Tenth Circuit reversed the district court.[85]

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[79] Pleasant Grove City v. Summum, 129 S. Ct. at 1129.

[80] *Id*.

[81] *Id*. "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which modifies human perceptions, and transfigures the individual. *See* The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnosticism.shtml (last visited Aug. 15, 2008). Central to Summum religious belief and practice are the Seven Principles of Creation (the 'Seven Aphorisms'), http://www.summum.us/philosophy/principles.shtml (last visited Feb. 13, 2010). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. *See* The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (last visited Aug. 15, 2008). *Id*. at n. 1 (quoting from the Respondent's brief).

[82] *Id*. at 1130.

[83] *Id*.

[84] *Id*.

[85] *Id*.

Having previously ruled that the Ten Commandments display in Pioneer Park was private not government speech,[86] and declaring Pioneer Park to be a public forum, the Ninth Circuit determined that Pleasant Grove City could not reject the Seven Aphorisms display without a compelling justification that could not be attained by more narrowly tailored means.[87] Concluding the denial of Summum's request to display its monument could not survive the strict scrutiny test, the panel directed Pleasant Grove City to allow Summum to erect its monument immediately.[88]

The U.S. Supreme Court began its analysis by describing the role and importance of government speech and explaining why the First Amendment does not regulate or restrict government speech. Without government speech, the Court observed, the government could not function,[89] debate and discussion of "issues of great concern to the public" would be confined to the private sector, and the process of government would be "radically transformed." [90] In short, without government speech, the public would have no understanding of what the government seeks to accomplish and why. In order to preserve the government's right to engage in speech, the First Amendment cannot be permitted to limit government speech.[91] Otherwise, the government could be restrained by a "First Amendment heckler" from expressing its views, and thereby prevented from informing society about the policies it seeks to adopt or opposes and indeed how it governs.[92] In other words, in the absence of protected government speech, the government cannot govern.[93] Further, the Court emphasized, given the critical importance of government speech, it should make no difference whether the delivery of a "government controlled message" is facilitated by private sources and resources.[94]

Having underscored the importance of government speech, the Court addressed the public forum implications of Pleasant Grove City's refusal to permit the erection of the Summum monument. Observing that, because public streets and parks have traditionally been used for citizens' assembly, debate, and discussion, the government's right to restrict such speech in those locations is significantly restrained.[95] Government restrictions of speech in these traditional public forums are unconstitutional, unless they meet the strict scrutiny test, under which the restriction must be narrowly tailored to accomplish a compelling government interest.[96] While reasonable time, place and manner restrictions are permitted, restrictions based on

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[86] *Id.* citing Summum v. Ogden, 297 F.3d 995 (10th Cir. 2002).
[87] Pleasant Grove City v. Summum, 129 S. Ct. at 1130.
[88] *Id.*
[89] *Id*. at 1131.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* ("Indeed, it is not easy to imagine how government could function if it lacked this freedom.").
[94] *Id*. ("A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government controlled message. [The government] is not precluded from relying on the government speech doctrine merely because it solicits assistance from nongovernmental sources.") (citations omitted).
[95] *Id*. at 1132.
[96] *Id.*

viewpoint are not.[97] These same restrictions on government regulation of speech also apply to government property, which, while not traditionally considered to be a public forum, has been designated or permitted to serve as public forum.[98]

Recognizing the First Amendment intersection of government speech and public forum presented by Summum's application to display its monument, the U.S. Supreme Court quickly concluded that, although it is sometimes difficult to determine "whether a government entity is speaking on its own behalf or is providing a forum for private speech," "[p]ermanent monuments displayed on public property typically represent government speech."[99] It explained:

> Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statutes 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.[100]

Moreover, the government's acceptance and display of "privately financed and donated monuments . . . on government land" are readily recognized by observers as government speech,[101] and throughout the Nation's history "a great many" monuments "financed by private funds or donated by private parties" have adorned federal and state parks, permitting the government to acquire monuments they otherwise could not have afforded,[102] while exercising the right to determine what monuments will be displayed, what locations are appropriate, and what identity or message the government seeks to convey.[103]

So too Pleasant Grove City uses selected monuments to define and control the identity and image it seeks to convey to Pioneer Park visitors, city residents and the outside world, and in that process engages in government speech.[104] Further, Pleasant Grove City can do so without engaging in the process advocated by Summum of identifying, embracing and proclaiming the message it seeks to convey.[105] On the contrary, the city's display of a monument conveys a message and that message is not necessarily a single or simple message, but may be interpreted or

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[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 1132-33.
[101] *Id.* at 1133.
[102] *Id.*
[103] *Id.* 1133-34
[104] *Id.* at 1134.
[105] *Id.* at 1134-35. The Court rejected Summum's argument that the city's message cannot qualify as government speech unless the city expressly and formally define, articulate and endorse the meaning it seeks to convey.

understood by observers in multiple ways, just as the display of "the Greco-Roman mosaic of the word 'Imagine' that was donated to New York City's Central Park in memory of John Lennon" encourages observers to imagine his music if he had not been killed or perhaps to recall the lyrics of the Lennon song or possibly to picture the world as described in the lyrics.[106] In displaying the selected monument, the city neither endorses the multiple interpretations people can take from the display nor yields the right to alter its message by changing the display or adding subsequent monuments.[107] Indeed, because the meaning attributed to a monument can also change over time, requiring the government to declare its message may mandate a futile exercise.[108]

Returning to the collision between government speech exercised by Pleasant Grove City and the public forum analysis advocated by Summum, the Court aptly described the important differences between transitory messages delivered, and permanent monuments displayed, in government parks. In the former situation, "government-owned property or a government program [is] capable of accommodating a large number of public speakers without defeating the essential function of the land or the program."[109] In the latter situation, because of the permanency of monuments and limitations of physical space, public land can accommodate only a fixed number of monuments. As the court explained:

> Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators--often, for all who want to speak--but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.[110]

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[106] *Id.* at 1135. The Court quoted the lyrics as follows: "Imagine there's no heaven It's easy if you try No hell below us Above us only sky Imagine all the people Living for today . . . Imagine there's no countries It isn't hard to do Nothing to kill or die for And no religion too Imagine all the people Living life in peace . . . You may say I'm a dreamer But I'm not the only one I hope someday you'll join us And the world will be as one Imagine no possessions I wonder if you can No need for greed or hunger A brotherhood of man Imagine all the people Sharing all the world . . . You may say I'm a dreamer But I'm not the only one I hope someday you'll join us And the world will live as one. J. Lennon, Imagine, on Imagine (Apple Records 1971)." *Id.* at n.2.

[107] *Id.* at 1136.

[108] *Id.* at 1136-37.

[109] *Id.* at 1137. The examples used by the Court to make the point are the enormous number of speeches, parades and demonstrations that can be accommodated in public parks over time, the multiplicity of activities and speakers that can be provided through student activity fees, and the plethora of messages that can be conveyed by the internal communication facilities of a school system.

[110] *Id.*

Nor, the Court emphasized, can the issue be resolved by "content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays," as advocated by Summum.[111] Otherwise, the Court explained,

> [W]hen France presented the Statute of Liberty to the United States in 1884, the United States has the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (e.g., a Statute of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).[112]

Indeed, the Court noted, compelling Pleasant Grove City to apply public forum analysis to public display of monuments would surely result in "an influx of clutter" or the removal of "longstanding and cherished monuments" and, ultimately, the refusal to accept any donations of public monuments.[113] Surely, the Court concluded, "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."[114]

Having concluded that the decision of Pleasant Grove City not to display the Summum monument was government speech and that public forum analysis did not apply to Pioneer Park, the U.S. Supreme Court reversed the decision of the Court of Appeals.[115] In doing so, the Court accentuates three government speech principles: (1) government speech is a critically important tool that shapes debate and discussion of public issues and informs the public of what the government seeks to accomplish and why; (2) the government engages in speech when it permits the display of monuments whether donated or purchased on public property without any requirement that the government endorse the message the display evokes; and (3) the government's display of monuments does not create a public forum in which its role is restricted to administering content-neutral "time, place, and manner" restrictions.

III. FIRST AMENDMENT CHALLENGE OF GOVERNMENT SPEECH DOCTRINE

The above noted discussion of U.S. Supreme Court decisions underscores the major challenge in understanding how the government speech doctrine will be employed in First Amendment cases: creating a cohesive definition of government speech. First, the U.S. Supreme Court has decided that disparate types of speech qualify as government speech: restricting health care counselors from suggesting abortion in discussing family planning (*Rust*); selecting artists' grant applications for funding (*Finley*); compelling beef producers to subsidize a marketing program to which they objected (*Livestock Marketing*); an assistant district attorney's testimony and statements prepared in the course of his employment (*Ceballos*); and selecting

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[111] *Id*. at 1137-38.
[112] *Id*. at 1138.
[113] *Id.*
[114] *Id*.
[115] *Id*.

monuments for display in Pioneer Park (*Pleasant Grove*). Hence government speech cannot be defined on the basis of the content of the speech.

Similarly, government speech does not depend its source. In *Rust*, the source was administrative regulation permitting the government to select one program over another to achieve it policy objective. In *Finley*, the source was a statute altering the criteria employed in the selection and funding of grant applications. In *Livestock Marketing*, the source was a statutorily-based, self-contained, government-sponsored program to promote the marketing of beef. In *Ceballos*, the source was a government employee attempting to fulfill his employment responsibilities. In *Pleasant Grove*, the source was the decision of the city to accept monuments for display in a public park. Hence the source of the speech cannot be said to dictate what constitutes government speech.

Nor does government speech depend on the purpose of the speech. In *Rust*, the government did not want its family planning programs linked to the availability of abortion as a means of family planning. In *Finley*, the government did not want to be associated with the funding of indecent art. In *Livestock Marketing*, the government wanted to promote the sales of beef products. In *Ceballos*, the government wanted to withhold information about its litigation strategy and weaknesses. In *Pleasant Grove*, the city wanted to create an image for the visitors to Pioneer Park.

Moreover, while the extensive degree of direct editorial control over the government's message was an important factor in determining the beef marketing program in *Livestock Marketing* was government speech, the degree of editorial control and its impact in making the expression government speech was not a factor in the other decisions. Indeed, as the Court stated in *Pleasant Grove*, government expression may qualify as government speech even if the government agency does not formally define, articulate or endorse the meaning it seeks to convey.[116]

Hence there is a significant void in understanding the application and limitations of the government speech doctrine. Legal scholars have recommended different approaches to assess what constitutes government speech. Professors Benzanson and Buss identify intent and effect as important considerations in defining government speech: "purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be government's message."[117] Professor Gielow Jacobs recommends that accountability for speaking, the existence of an identifiable and constitutionally valid message, and the non-speech-suppressing impact of the message should constitute the framework for determining the existence of government speech.[118] Professor Gia Lee identifies transparency as the key element in defining government speech, so that "a reasonable recipient understands that the government bears responsibility for a communication."[119] Professor Helen Norton identifies the government's role as the

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[116] *Id*. at 1134-35.
[117] Bezanson &Buss, *supra* note 32, at 1384.
[118] Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 113 (2002).
[119] Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 992 (2005).

formal and functional source of the message is the key element in identifying government speech.[120]

The lack of a cohesive definition of what constitutes government speech has caused confusion in the lower courts over what is government speech and what is private speech in a public forum.[121] In *ACLU v. Bredesen*,[122] the Sixth Circuit upheld a Tennessee decision to issue a "choose life" specialty license plate and reject the request for a "pro-choice" license plate as a valid exercise of government speech.[123] Tennessee issued the "choose life" license plates pursuant to a statute authorizing the state to share the sales proceeds with New Life Resources, Inc., which designed and promoted sales of the plate.[124] New Life Resources' share of the profits were dedicated to providing counseling, medical and financial support to pregnant women, and the state's share was split between the Tennessee arts commission and highway fund.[125] Pro choice proponents lobbied for the passage of a statute authorizing the issuance of "pro choice" specialty plates, but that measure was defeated.[126] The American Civil Liberties Union filed suit on behalf of pro choice organizations challenging the constitutionality of the program under the First Amendment.[127] The court held that Tennessee's issuance of specialty license plates, even though facilitated by private volunteers, did not create a public forum and did not require content neutrality.[128]

In contrast, in *Planned Parenthood of South Carolina v. Rose*,[129] the Fourth Circuit concluded the same license plates constituted a mixture of government and private expression,[130] and upheld a Planned Parenthood's First Amendment challenge to South Carolina's issuance of a "choose life" but not a "pro-choice" license plate.[131] The court determined that the statute authorizing the pro life specialty plates was adopted because of the State's agreement with the pro-life message,[132] and, by promoting the pro life viewpoint over the pro choice viewpoint, improperly engaged in viewpoint discrimination."[133] Fearing that the application of the government speech doctrine to mixed private and government speech would

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[120] Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. Rev. 587, 631 (2008).
[121] *See* Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1 (2007).
[122] ACLU v. Bredesen, 441 F.3d 370 (6th Cir. 2006).
[123] *Id.* at 371.
[124] *Id*. at 372.
[125] *Id.*
[126] *Id*.
[127] *Id*.
[128] *Id*. at 375-79.
[129] Planned Parenthood of S.C. v. Rose, 361 F.3d 786 (4th Cir. 2004).
[130] *Id*. at 794. The court applied a four-factor test in reaching this conclusion: "(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech." *Id*. at 792-93.
[131] *Id* at 799.
[132] *Id.* at 795.
[133] *Id*.

constitute an "unwarranted extension of the government speech doctrine and of the State's power to promote some viewpoints above others,"[134] and concluding the state's engagement in specialty license plate promotions constituted a limited public forum,[135] the court ruled that South Carolina's promotion of the pro-life specialty license plate violated the First Amendment.[136]

In *Robb v. Hungerbeeler*,[137] the Eighth Circuit held that the refusal of Missouri to recognize a Missouri chapter of the Klu Klux Klan as a sponsor in the state's Adopt-a-Highway program and to erect a sign acknowledging the chapter's participation in the program violated the First Amendment.[138] Missouri refused to admit the chapter to the program, because the statute prohibited participation by any organization with a "history of violence," and the chapter is associated with similar organizations found to have a history of violence.[139] The court ruled that the regulation was unconstitutionally broad, and conceivably could be used to bar football and hockey teams and labor unions which previously engaged in heated labor disputes from participation.[140] Agreeing with the district court that Missouri's Adopt-a- Highway was a limited public forum,[141] the Eighth Circuit concluded that the criteria for participation permitted the state to engage in viewpoint discrimination, and rejected the state's argument that the program was government speech.[142]

In contrast, in *Knights of the Klu Klux Klan v. Curators of the University of Missouri,*[143] the Eighth Circuit decided that the University of Missouri's public radio station did not have to accept and acknowledge financial support from the Klan under the First Amendment, because the station's underwriting acknowledgments were government speech.[144] The court noted that public forum analysis was inapplicable to public broadcasting, because "substantial discretion is accorded to broadcasters with respect to the daily operation of their stations,"[145] and that, because the radio station was required by law to advise its listeners the source of funds contributed to support its broadcasts, those public announcements were government speech.[146]

In a similar vein, the federal district court in South Carolina court upheld a public school district's refusal to include pro-voucher promotional materials on the district's webpage, which conveyed the school board's opposition to voucher

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[134] *Id.*
[135] *Id*. at 788.
[136] *Id*. at 799.
[137] Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004).
[138] *Id.* at737-38.
[139] *Id.* at 741-42.
[140] *Id.* at 742.
[141] *Id.* at 743.
[142] *Id.* at 744.
[143] Knights of the Klu Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000).
[144] *Id*. at 1091-96 (8th Cir. 2000).
[145] *Id.* at 1093.
[146] *Id*.

programs.[147] The court concluded, "[i]t is beyond doubt that the District's communication of its own position, as stated in its own words, is government speech, regardless of whether that communication was disseminated through its website, email network or newsletters."[148] The Fourth Circuit affirmed, holding that the inclusion of links on the school district's website to other websites and private parties' statements did not created a limited public forum, because the defendant retained sole control over its message when it decided what links and private party messages to include. Thus, the school district's speech was government speech and not a limited public forum which plaintiff was entitled to access.[149]

In contrast, in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,[150] the federal district court ruled that the public library created a limited public forum when it provided access to the internet through its computers to members of the public.[151] In reaching its decision, the court considered three factors: government intent, government designation, and the nature of the forum. Because the county government intended to create a public forum when it authorized its public library system and designated the library for the use of the public, and because the internet is compatible with facilitating expressive communication, the court determined that public library access to the internet constituted a limited public forum.[152]

The above described confusion in the lower courts as to what is government speech, mixed private and government speech, or private speech in a public forum underscores the need for a coherent definition of government speech. As Professor Helen Norton noted, "[c]onflicts like these illustrate the need for a coherent government speech doctrine that parses the government's impermissible censorship of private speech from its own legitimate expressive interests."[153]

Even more worrisome, the lack of a cohesive definition of government speech has triggered the application of the government speech doctrine to faculty members in public supported universities. While the U.S. Supreme Court noted in *Ceballos* that the government speech doctrine may have an effect on academic freedom and declined to indicate how the doctrine would affect scholarship or teaching,[154] lower

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[147] Page v. Lexington County Sch. Dist., 2007 U.S. Dist. LEXIS 3886 (2007).
[148] *Id*. at 54.
[149] Page v. Lexington County Sch. Dist., 531 F.3d 275, 283-285 (2008). *Accord*, AFSCME v. Maricopa County, 2007 U.S. Dist. LEXIS 18356 (U.S.D.C. AZ 2007), and Sutliffe v. Epping Sch. Dist., 584 F.3d 314 (1st Cir. 2009).
[150] Mainstream Loudoun v. Bd. of Tr. of the Loudoun County Library, 24 F. Supp. 2d 552 (1998).
[151] *Id*. at 563.
[152] *Id*. *Contra*, Crosby v. S. Orange Cmty. Coll. District, 172 Ca. App. 4th 433, 443 (2009) (because the county college did not intend to provide public access to the internet through its library computers, the library computers were not deemed to be a designated public forum).
[153] Norton, *supra* note 120, at 591.
[154] Garcetti v. Ceballos, 126 S. Ct. at 1962 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

courts have applied *Ceballos* to university professors. In *Renken v. Gregory*,[155] Kevin Renken, a tenured Professor of Engineering, claimed the University of Wisconsin-Milwaukee reduced his pay and terminated his National Science Foundation (NSF) grant in retaliation for his exercising his First Amendment rights in complaining about the University's use of NSF grant funds. Professor Renken pursued an action against the University under 43 U.S.C. § 1983.[156] Concluding Renken's comments were made as part of his official duties as a professor rather than as a private citizen, the district court granted the University's motion for summary judgment.[157] The Sixth Circuit agreed, ruling that, because Renken complained about the University's use of the NSF funds "pursuant to his official duties as a University professor, his speech was not shielded by the First Amendment."[158]

Similarly, in *Gorum v. Sessoms*,[159] Allen Sessoms, the president of Delaware State University, fired a tenured professor, Wendell Gorum, for improperly changing forty-eight students' failing grades to passing grades.[160] Professor Gorum pursued an action against the University for wrongful dismissal, claiming that the University committee which investigated the matter recommended he be suspended not dismissed and that the university president acted in retaliation for his exercise of his First Amendment rights in voicing opposition to Sessoms' selection as president, in objecting to disciplinary action taken against a student athlete, and in rescinding the invitation to Sessoms to address a fraternity's Martin Luther King, Jr. Prayer Breakfast.[161] The district court rejected Gorum's claims, concluding his three speech-related claims occurred within the scope of his duties as a university professor and were not protected by the First Amendment.[162] The Third Circuit affirmed, ruling the speech in question was undertaken as part of his professional duties rather than as a private citizen, and hence was not protected by the First Amendment.[163]

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[155] Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008). *See* Peter Schmidt, *Professors' Freedoms Under Assault in the Courts*, CHRON. HIGHER EDUC., February 27, 2009, p. A1, *available at* http://chronicle.com/weekly/v55/i25/25a00103.htm?utm_source=at&utm_medium=en.

[156] *Renken*, 541 F.3d at 770.

[157] *Id*. at 773.

[158] *Id*. at 775. In Urofsky v. Gilmore, 216 F.3d 401, 404 (4th Cir. 2000), professors employed by public colleges and universities in Virginia challenged a Virginia statute prohibiting state employees access to sexually explicit material on the grounds it violated their First Amendment rights. The Fourth Circuit ruled the regulation of state employees' access to sexually explicit material in their capacity as employees on computers owned or leased by the state is consistent with the First Amendment, because it did not affect the professors' rights as private citizens, but regulated their conduct as government employees. *Id.*

[159] Gorum v. Sessoms, 561 F.3d 179 (3rd Cir. 2009).

[160] *Id*. at 183.

[161] *Id*. at 183-184.

[162] *Id*. at 184.

[163] *Id*. at 186. *See* Peter Schmidt, *Court Broadly Defines Job-Related Speech in Upholding Delaware Professor's Dismissal*, CHRON. HIGHER EDUC., Mar. 30, 2009, *available at* http://chronicle.com/daily/2009/03/14677n.htm?utm_source=at&utm_medium=en.

As a consequence of these decisions, the American Association of University Professors (AAUP) initiated a campaign to protect the academic freedom in public colleges and universities and to promote the adoption of "policies broadly protecting faculty speech dealing with academic matters, institutional governance, teaching, research, and issues outside the workplace."[164] The AAUP also issued a report expressing alarm at recent federal court decisions which ominously threaten academic freedom and insisting on the restoration of the deference traditionally rendered to speech within the academic setting.[165]

CONCLUSION

While *Pleasant Grove* enhances our understanding of the role of government speech by upholding the right of city officials to accept donations of monuments for display in public parks and thereby craft the image they wish to present to the visiting public without fear of violating the First Amendment, the *Pleasant Grove* decision, like its antecedents, fails to address the critically important need to craft a workable definition of government speech. Even though the development of the government speech doctrine in First Amendment cases is in its infancy, the difficulty in distinguishing between private and government speech, between the government's establishment of public speech forums and the government's engagement in communicating its own speech, and between those situations in which the government must maintain viewpoint neutrality or may engage in its own propaganda, points to the need to focus judicial attention on the development of a more cohesive definition of government speech.

What is clear is that, when invoked, government speech trumps competing First Amendment claims, freeing the government to pursue the art of governing by

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[164] Peter Schmidt, *AAUP Announces Effort to Shore Up Academic Freedom at Public Colleges*, CHRON. HIGHER EDUC., Nov. 10, 2009, *available at* http://chronicle.com/article/AAUP-Announces-Effort-to-Shore/49100/?sid=at&utm_source=at&utm_medium=en.

[165] *Id*. *See Protecting An Independent Faculty Voice: Academic Freedom After* Garcetti v. Ceballos, report of subcommittee of AAUP's Committee A on Academic Freedom and Tenure, November-December 2009, http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf; *see also* Adams v. Trs. of the Univ. of N. C.-Wilmington, filed to No. 7:07-CV-64-H, on March 15, 2010 (E.D. NC 2010), *available at* http://www.telladf.org/UserDocs/AdamsOrder.pdf. in which the court rejected the claim of Associate Professor Michael Adams that the University denied his promotion to the rank of Full Professor, because it engaged in viewpoint discrimination by disapproving his Christian and politically conservative publications, and thereby violated his First Amendment rights under 42 U.S.C. § 1983. The court rejected Adams's First Amendment claim, because he willingly submitted his publications for review by the promotion committee and because his publications were undertaken as part of his employment as a university professor and hence constituted government speech not protected by the First Amendment. This decision sullies the traditional notion of academic freedom associated with the research and publications undertaken by university faculty members. *See* Peter Schmidt, *Court Denies Conservative Pundit-Professor's Bias Claim Against University*, CHRON. HIGHER EDUC., Mar. 17, 2010, *available at* http://chronicle.com/article/Court-Denies-conservative/64702/?sid=pm&utm_source=pm&utm_medium=en.

informing the public of what it seeks to accomplish and why. What is far less clear is exactly what constitutes government speech. While legal scholars have recommended that factors such as authorship, purpose, nature, speaker identity, and control are determinative in deciding whether or not the speech in question is government speech, it is unclear which of those factors should be applied and the weight to be accorded them. Because these issues are unresolved, lower courts struggle to resolve what qualifies as government speech. Even more ominously, lower courts have begun to apply the doctrine of government speech to university professors by determining that their publicly stated criticisms of the university are undertaken as part of their official duties as state employees and do not constitute private speech under the First Amendment. None of the lower court decisions discussed above having been appealed, time and future litigation may tell.