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## (Mis)Attribution

# (MIS)ATTRIBUTION

ABNER S. GREENE<sup>†</sup>

In this Essay, I evaluate three issues of attribution and misattribution that arise in the so-called area of “government speech.”<sup>1</sup> First, I explore when an individual might have a constitutional claim for misattribution by the state. Second, I discuss the citizen’s interest in proper attribution by the government when it is speaking. Third, I consider the government’s interest in avoiding expression being improperly attributed to it. This concern arises less often than is commonly assumed; what many scholars (and governments) claim to be a state interest in avoiding attribution or endorsement is in fact a state interest in not providing a platform for certain types of private speech. As such, the matter cannot be resolved according to the categories of “public forum” or “government speech,” and instead we must decide how much content-based decision-making is appropriate for the state when creating speech opportunities that fall into neither of these more doctrinally understandable forms.

## I. IS THERE A CONSTITUTIONAL RIGHT AGAINST MISATTRIBUTION BY THE STATE?

### A. Paul, Johanns, and Grange

In *Paul v. Davis*,<sup>2</sup> the U.S. Supreme Court held that defamation by the state does not constitute deprivation of liberty or property—and thus does not buttress a due process claim—unless the state action also alters or extinguishes a “right or status previously recognized by state law.”<sup>3</sup> Davis had made out a prima facie case for defamation but could show no other harm, in part because he had not been fired from his private job as a result of the state’s defamatory publications.<sup>4</sup> The Court distinguished *Wisconsin v. Constantineau*<sup>5</sup> as permitting a due process claim because

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<sup>†</sup> Leonard F. Manning Professor of Law, Fordham Law School. Many thanks to Richard Collins and Helen Norton for putting on such a splendid conference and to Caroline Corbin for posing hard questions as the responder. For helpful comments on my paper, thanks to Leslie Gielow Jacobs, John Nagle, Helen Norton, Fred Schauer, and Steve Shiffrin. I am also grateful to Alissa Black-Dorward of the Fordham Law School library for much-needed research.

1. Misattribution issues arise in various legal settings, including libel, plagiarism, right of publicity, and trademark. For a helpful discussion of the latter, see generally Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 611–14 (2008). See also Visual Artists Rights Act, 17 U.S.C. §106A (2006), construed in *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 47–48 (1st Cir. 2010) (noting that the Act includes a right of attribution “protects the author’s right to be identified as the author of his work and also protects against the use of his name in connection with works created by others”).

2. 424 U.S. 693 (1976).

3. *Id.* at 711–12.

4. See *id.* at 696.

5. 400 U.S. 433 (1971).

the state not only defamed Constantineau, but also, by so doing, altered her legal status (her right to purchase or obtain liquor).<sup>6</sup>

These cases did not deal with freedom of association claims, but they reveal caution by the Court in recognizing a constitutional claim for falsehoods uttered or printed by the state. It's a complex question how the state might violate one's freedom of association by falsely attributing a belief or statement or affiliation to an individual or group. Such false attribution wouldn't directly prevent or compel association. Rather, misattribution by the state would create a false image, which could lead to other harm (say, if others refuse to associate with you because they falsely believe you to hold certain views). But if *Davis/Constantineau* refuse to recognize a due process claim for libel by the state, because there is no deprivation of liberty or property from the mere creation of a false image, would the Court recognize a constitutional freedom of association claim in similar circumstances?

Two recent cases suggest, in dicta and in concurring and dissenting opinions, that the answer might be "yes." In *Johanns v. Livestock Marketing Ass'n*,<sup>7</sup> the Court considered a federal statute promoting beef products. The law gives the Secretary of Agriculture power to establish a board of beef producers and importers, who then set up an operating committee, and to impose a \$1 per head assessment on local and imported cattle. The money is used for, *inter alia*, promotional campaigns, which the committee designs and the Secretary approves. The campaigns have included the well-known "Beef. It's What's for Dinner" ads. (As a vegetarian, I can assert that the ads have failed to persuade me, nor have I switched to beef for breakfast, lunch, or midnight snack.<sup>8</sup>) Many, though not all, of the ads bear the attribution "Funded by America's Beef Producers." And most ads "also bear a Beef Board logo, usually a checkmark with the word 'BEEF.'"<sup>9</sup>

Although in prior cases of targeted federal assessments used for generic product advertising the Court had not considered the ads government speech,<sup>10</sup> *Johanns* held such ads, under the aegis of the Department of Agriculture, are government speech.<sup>11</sup> Furthermore, the Court squarely held "compelled funding of government speech does not alone raise First Amendment concerns."<sup>12</sup> Since the Court held the statutory scheme on its

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6. *Davis*, 424 U.S. at 707–09.

7. 544 U.S. 550 (2005).

8. *See id.* at 561 n.5.

9. *Id.* at 555. For the factual and legal background, *see id.* at 553–55.

10. *See, e.g.,* *United States v. United Foods, Inc.*, 533 U.S. 405, 416–17 (2001) (not addressing the government speech issue); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 483 n.2 (1997) (Souter, J., dissenting) ("The Secretary of Agriculture does not argue that the advertisements at issue represent so-called 'government speech,' with respect to which the Government may have greater latitude in selecting content than otherwise permissible under the First Amendment.").

11. *See Johanns*, 544 U.S. at 560–64.

12. *Id.* at 559; *see also id.* at 564 n.7.

face constitutes a government speech program, it was able to reject plaintiffs' arguments that the program compelled speech by a private entity or that it compelled a private entity to subsidize another private entity's message.<sup>13</sup> Thus, the Court was able to take the case out of the *Barnette/Wooley*<sup>14</sup> line and to distinguish *Abood/Keller*.<sup>15</sup>

Justice Souter's dissent in *Johanns* (joined by Justices Stevens and Kennedy) raised two related but separate issues. First, for the government to resist a First Amendment claim in this setting, it should have to make clear the speech is its own.<sup>16</sup> Second, if a reasonable viewer would see the ads as coming from the private parties who were assessed money for the ads, such parties should have a First Amendment claim based on the combination of the compelled subsidy and the misattribution.<sup>17</sup> These are separate issues because there could be a case in which attribution is murky, i.e., in which it is not clear whether the speech in question is coming from the government or a private party (or both). In *Johanns*, however, both aspects of Justice Souter's concern seemed to be met—the USA had done nothing to make clear to the average viewer that the ads were government speech, and such a viewer would almost certainly see the ads as coming from the private beef producers.<sup>18</sup>

The Court responded as follows. It rejected Justice Souter's first claim: if there is no misattribution to the private party, and if the speech is formally the government's, that a reasonable viewer would not identify the speech as such is insufficient to move the matter out of the government speech category.<sup>19</sup> It rejected Justice Souter's second argument by saying it was confronted with a facial challenge only, and the statutory/regulatory structure doesn't *require* misattribution.<sup>20</sup> The Court was open to an as-applied challenge "if it were established . . . that individual beef advertisements were attributed to [the plaintiffs]."<sup>21</sup> But the trial court had made no findings on this issue. Note well the Court didn't say proof of misattribution *would* make out a First Amendment violation; it

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13. *Id.* at 564–65, 565 n.8.

14. *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *see also infra* notes 52–83 and accompanying text.

15. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *see also Johanns*, 544 U.S. at 557–59; *infra* notes 46–51 and accompanying text.

16. *Johanns*, 544 U.S. at 571–72, 577–79 (Souter, J., dissenting).

17. *Id.* at 572, 577–80.

18. Whether the average/reasonable viewer would attribute the ads to any *specific* beef producer or producers was a tricky question. *See infra* notes 44–45 and accompanying text.

19. *See Johanns*, 544 U.S. at 564 n.7 (“[Plaintiffs] enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and whether or not the reasonable viewer would identify the speech as the government’s.”).

20. *See id.* at 564 n.7, 564–65. Souter responded, “But the challenge here is to the application of the statute through actual, misleading ads, as shown by a record replete with examples.” *Id.* at 577 n.5 (Souter, J., dissenting).

21. *Id.* at 565 (majority opinion).

only said such a theory “*might* (again, we express no view on the point) form the basis for an as-applied challenge.”<sup>22</sup>

What would be the nature of such a constitutional claim? The Court says it “relates to compelled *speech* rather than compelled *subsidy*,”<sup>23</sup> while Justice Souter links the two, arguing that the violation is being compelled to pay for speech that seems like yours when it’s not.<sup>24</sup> But neither seems correct. As I’ll explain below, *Abood/Keller* are indeed about the combination of a compelled subsidy and resulting expression, but they are not about misattribution. And a possible as-applied claim in a *Johanns*-type case would not be about compelled speech, because if we detach the subsidy from the speech (as the Court seems to say we should do), then there is not even an arguable case that plaintiffs have been compelled to speak (or carry the government’s or a private party’s message). Rather, Justice Thomas, concurring, came closest to explaining the constitutional harm if plaintiffs could show misattribution: “The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government’s control.”<sup>25</sup>

The right at stake is freedom of association; the violation is creating a false image of one’s beliefs and expression. To see how this has nothing to do with the targeted assessment,<sup>26</sup> consider this hypothetical: the government produces ads out of general tax revenue, falsely associating a specific beef producer with a generic beef message with which that beef producer doesn’t agree (say, because she believes her product is superior to how people perceive beef product generally<sup>27</sup>). The government has harmed the specific beef producer by creating a false association between it and a certain idea or expression. Despite the difference in approach to such a claim among Souter, the Court, and Thomas, the Justices appear open to recognizing this kind of misattribution as the basis for a constitutional claim. That the Court has not yet so held may reflect, in part, a *Paul v. Davis*-like unease with recognizing a constitutional claim for false speech by the government detached from any other claim of harm. We might seek to overcome this unease with two observations. First, mere falsity by the government could easily lead to harm if others

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22. *Id.* (emphasis added).

23. *Id.* at 564–65.

24. *See id.* at 571–72 (Souter, J., dissenting).

25. *Id.* at 568 (Thomas, J., concurring).

26. *Cf.* Robert Post, *Compelled Subsidization of Speech: Johanns v Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 207 n.64 (“[C]onstitutional issues raised by government stealth do not depend upon whether government speech is funded by a general tax or by targeted assessments.”).

27. *See Johanns*, 544 U.S. at 570–71 (Souter, J., dissenting) (discussing how plaintiffs advanced just such a concern).

refuse to associate with you, and we might not believe the Constitution requires you to wait until such harm occurs to have a cause of action (at least for injunctive relief). Second, although you could conceivably remedy the problem by loudly disclaiming the connection made by the false attribution, why should that burden be on you, the citizen, rather than on the government, who caused the problem to begin with?

The second case in which the Court appears open to recognizing what I'd call a free-standing claim of cognizable constitutional harm from government-caused misattribution is *Washington State Grange v. Washington State Republican Party*.<sup>28</sup> The State of Washington established a new primary system, whereby candidates self-designate a party preference, which is then listed on the ballot.<sup>29</sup> Parties may separately nominate their own candidates, but the top two vote-getters in the state-run primary advance to the general election, regardless of self-designated party preference and regardless of whom the parties have nominated.<sup>30</sup> Plaintiffs' principal claim was based on freedom of association—voters will assume (erroneously) that the political parties mentioned in the self-designations actually back the self-designating candidates.<sup>31</sup> In parallel fashion to *Johanns* (although without citing *Johanns*), the Court rejected the facial claim, concluding the electorate might be well-informed, in part because of the possibility of disclaimers on the ballot.<sup>32</sup> (No election had been conducted pursuant to the new rules.)

In a concurrence joined by Justice Alito, Chief Justice Roberts reasoned that whether voters erroneously perceive the self-designations as actual party preferences is relevant to the constitutional inquiry,<sup>33</sup> citing *Dale* and *Hurley* and distinguishing *FAIR*.<sup>34</sup> Since this was a facial challenge, in advance of knowing how the actual ballots would look and how an election would go, Justice Roberts agreed with the Court that no claim was currently available.<sup>35</sup> Interestingly, Justice Scalia dissented (joined by Justice Kennedy).<sup>36</sup> He deemed the system one that compels association between a political party and a candidate it hasn't endorsed, and thus would invalidate the law on its face.<sup>37</sup> Part of his opinion discussed likely

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28. 552 U.S. 442 (2008).

29. *Id.* at 444.

30. *Id.* at 444, 453.

31. *See id.* at 454.

32. *See id.* at 454–58; *see also id.* at 457 n.9 (“We are aware of no case in which the mere impression of association was held to place a severe burden on a group’s First Amendment rights, but we need not decide that question here.”).

33. *See id.* at 459–60 (Roberts, C.J., concurring).

34. *See id.* (referring to *Boy Scouts v. Dale*, 530 U.S. 640 (2000), *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group*, 515 U.S. 557 (1995), and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), all discussed at *infra* notes 70–82 and accompanying text).

35. *See Grange*, 552 U.S. at 460–62 (Roberts, C.J., concurring).

36. *See id.* at 462 (Scalia, J., dissenting).

37. *See id.* at 462–64.

confusion in this setting.<sup>38</sup> I say “interestingly” because this is the same Justice Scalia who was loath to accept the likelihood of confusion as part of a facial challenge in *Johanns*!

Thus, *Grange*, like *Johanns*, suggests a constitutional claim for as-applied proof that the government has falsely associated you with an idea or expression or belief or other person with which or with whom you do not wish to be associated.<sup>39</sup> This makes sense as a conception of freedom of association, although that it doesn’t follow directly from *Barnette/Wooley* (where the Court invalidated laws compelling one to speak or carry a message) or from *Abood/Keller* (where the Court invalidated laws compelling one to fund a private party’s message), and that the Court was reluctant in *Davis/Constantineau* to recognize a self-standing claim of harm from government falsity, should make us cautious about predictions. Note that a majority of Justices in *Capitol Square Review & Advisory Board v. Pinette*<sup>40</sup> were open to finding an Establishment Clause violation from private religious displays that a reasonable observer would erroneously attribute to the state,<sup>41</sup> and that even the *Pinette* plurality was open to such a claim if the state fostered or encouraged such a mistaken impression.<sup>42</sup> Establishment Clause harm is not the same as harm to freedom of association, but it’s worth noting another area in which misattribution might result in a constitutional claim.

There are still a few details to address. First, if the Court were to find a freedom of association violation in an appropriate as-applied case, it would have to resolve who the “reasonable” or “average” viewer is. This issue divided the concurring and dissenting Justices in *Pinette*, with Justice O’Connor more willing than Justice Stevens to attribute (!) knowledge about local history and context to such a viewer.<sup>43</sup> How the Court resolves this dispute will matter a great deal to how it proceeds with freedom of association claims of the misattribution sort; if the Court attributes too much knowledge about the formal legal-regulatory structure, then there will never be an as-applied claim.

Second, the issue of who has a freedom of association claim requires resolution. For example, who has a claim if a reasonable viewer would attribute generic food ads to producers of the product generally, rather than any specific producer? Maybe a trade association would have a claim. Writing for the majority in *Johanns*, Justice Scalia pointed this

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38. See *id.* at 467–68.

39. Cf. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1433 (2001) (anticipating this development).

40. 515 U.S. 753 (1995).

41. See *id.* at 772–783 (1995) (O’Connor, J., concurring in part and in the judgment, joined by Souter and Breyer, JJ.); *id.* at 797–816 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting).

42. See *id.* at 766 (plurality opinion).

43. See *id.* at 778–82 (O’Connor, J., concurring in part and in the judgment); *id.* at 800 n.5 (Stevens, J., dissenting).



out, concluding from the record there was insufficient evidence to show association of any particular beef producer with the ads.<sup>44</sup> This was another interesting Scalia moment, coming in the context of otherwise refusing to address the as-applied challenge because the trial court had made no relevant findings.<sup>45</sup>

### *B. Misattribution in the Compelled Speech Cases*

Neither *Abood/Keller* nor the *Barnette/Wooley* line of cases turns on misattribution, although this is more apparent in the former than in the latter. *Abood* and *Keller*, as originally explained and as discussed in *Johanns*,<sup>46</sup> involve a specific and fairly unusual circumstance—one in which the state compels a targeted group of persons to pay a fee that goes, *inter alia*, to ideological activities of a private group. Because the assessed persons don't have to say anything or carry anyone's message, and because the private group's ideological speech doesn't identify the assessed persons by name, there is no obvious route to misattribution.<sup>47</sup> Perhaps one could say, in *Keller* for example, "people who know I'm a member of the California bar will associate me with the bar's ideological speech." But now we're one step removed from the assessment, because the association could be made between any California lawyer who's a member of the state bar and the bar's ideological speech whether or not dissenting members are assessed the relevant fees. Fees aside, there's no right to stop the ideological speech of an organization of which you're a member when you're in the minority on the relevant issue.<sup>48</sup>

Rather, the right infringed in *Abood/Keller* is freedom of association without misattribution; it's a right to not have your money taken from you by state compulsion and spent by a private group with whose message you disagree.<sup>49</sup> In *Johanns* the Court rejected any similar right if the government is the spender/speaker. Precisely why your freedom of association is infringed if the government is transferring the assessed money to a private group rather than spending it itself is a bit unclear.<sup>50</sup> But this

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44. See *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 566 (2005); see also *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997).

45. See *Johanns*, 544 U.S. at 565–66.

46. See *id.* at 557–58.

47. See Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 15, 19, 28 (1983).

48. See *id.* at 21–22.

49. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14, 17 (1990) (discussing the concern with compelled association); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232–37 (1977) (discussing freedom of speech and freedom of association); see also *Johanns*, 544 U.S. at 557–58 (explaining *Abood* and *Keller* without analysis); *id.* at 565 n.8 ("being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy"); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 167, 207 (2002).

50. See generally Post, *supra* note 26.

is not a paper meant to justify *Abood/Keller*;<sup>51</sup> it is enough to explain that neither case turns on misattribution.

In the *Barnette/Wooley* line of cases, the Court has sometimes discussed misattribution, and sometimes not. It has sometimes deemed the presence of misattribution important to striking down a law as unconstitutional compelled speech, and sometimes not (and conversely for the absence of misattribution). And sometimes its analysis seems just plain wrong. I'll briefly canvass the case law here. One conclusion is that misattribution is not a necessary condition for a constitutional claim in this setting.<sup>52</sup> As I analyze the cases, there was no real likelihood of erroneous attribution in *Wooley* or in *Pacific Gas & Electric Co. (PG&E)*,<sup>53</sup> yet the Court invalidated the compelled speech in those cases.

*Barnette* did not discuss misattribution; neither did *Red Lion*<sup>54</sup> or *Miami Herald*.<sup>55</sup> In *Wooley*, then-Justice Rehnquist, dissenting, said we wouldn't attribute New Hampshire's "Live Free or Die" motto to the Maynards (or anyone driving a car with New Hampshire plates).<sup>56</sup> The majority didn't really respond. It talked about making the Maynards "an instrument for fostering public adherence"<sup>57</sup> to an idea they don't like, which isn't the same as saying a reasonable viewer would attribute the "Live Free or Die" message to them. In response to a concern that the holding would invalidate "In God We Trust" on coins and currency, the Court said currency is passed from hand to hand and needn't be displayed to the public; in contrast, "an automobile . . . is readily associated with its operator."<sup>58</sup> This is different from saying the license plate motto is attributed to the car owner or operator.

In *PruneYard*,<sup>59</sup> the Court mentioned, as a factor in upholding California's compelled access for private speakers in privately owned shopping centers, that the views of the various speakers who take advantage

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51. For a critique, see Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 12–18 (2000).

52. See *Johanns*, 544 U.S. at 579 n.9 (Souter, J., dissenting) (noting there is still harm in the *Barnette/Wooley* line even if proper disclosure cured any misattributional harm). *But cf.* Bezanson & Buss, *supra* note 39, at 1433 (suggesting that in *Barnette* and *Wooley* "a reasonable observer will see the ideas as *that person's own*") (emphasis added). For a discussion of "unwanted association" in the compelled speech cases, see Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 RUTGERS L. REV. 123, 158–62 (1999). For more general skepticism about the harm from compelled speech, see Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 473–89 (1995). *But see* Seana Valentine Shiffryn, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 852–64 (2005) (discussing harms from compelled speech and association, specifically (1) concern regarding the distortion of one's thinking process (cognitive dissonance), and (2) the effects from lack of sincerity).

53. *Pacific Gas & Electric Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986).

54. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

55. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

56. See *Wooley v. Maynard*, 430 U.S. 705, 720–21 (1977) (Rehnquist, J., dissenting).

57. *Id.* at 715 (majority opinion).

58. *Id.* at 717 n.15.

59. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

of the right of access “will not likely be identified with those of the owner,”<sup>60</sup> adding that it’s easy for a mall owner to post signs disavowing any connection to the messages of such speakers.<sup>61</sup> The status of the latter point in compelled speech cases is questionable; as Justice Powell noted, it puts the mall owner in a position of having to speak (to disavow) when perhaps she would rather remain silent.<sup>62</sup> And the former point, the key one here, although clearly correct (the California rule turns private malls into public forums, in which no particular view is attributed to the property owner, public or private), failed to distinguish *Wooley*, unless one believes the average viewer of a car with New Hampshire plates would associate “Live Free or Die” with the car’s driver. (*Wooley* differs in other ways—the state is dictating a single message there, rather than opening a type of public forum; carrying a message on one’s car is different from opening one’s mall to messages being spoken/displayed.)

In *PG&E*, the state forced the utility company to include private party messages in the company’s monthly billing envelopes, and required a disclaimer that the messages were not those of PG&E.<sup>63</sup> Despite the required disclaimer, the Court (in striking down the compelled access rule) expressed concern about forcing PG&E to associate with speech with which it might disagree<sup>64</sup> and to “appear to agree”<sup>65</sup> with the views of the group gaining access to the billing envelopes (or be “forced . . . to respond”).<sup>66</sup> But especially because the rule required the included message to come with a disclaimer that the views were those of the private party and not those of PG&E, why would anyone believe PG&E was “agree[ing]” with the message?

In upholding cable television must-carry rules in the first *TBS*<sup>67</sup> case, the Court justified the result in part on this ground: “Given cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”<sup>68</sup> The point is similar to that in *PruneYard*: when government is requiring a private property owner to open a kind of public forum for other speakers, the average viewer won’t associate any particular message with the property owner.<sup>69</sup>

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60. *Id.* at 87.

61. *Id.*

62. *Id.* at 99 (Powell, J., concurring).

63. *See Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 5, 7 (1986).

64. *See id.* at 15–16, 16 n.11.

65. *Id.* at 15.

66. *Id.*; *see also id.* at 15 n.11, 16.

67. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

68. *Id.* at 655.

69. *See Greene, supra* note 51, at 14.

*Hurley* is the one case invalidating state action as compelled speech in which misattribution analysis makes the most sense.<sup>70</sup> The Supreme Court invalidated the application of a Massachusetts law forbidding the exclusion of a gay and lesbian group from a privately sponsored St. Patrick's Day parade.<sup>71</sup> Although in theory a reasonable viewer would know the group was marching in the parade under compulsion of state law, and thus wouldn't attribute the group's message to the parade organizers, the Court sensibly reasoned otherwise. "[The group's] participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."<sup>72</sup> Furthermore:

Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade. Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.<sup>73</sup>

This is the most detailed and overt use of misattribution analysis in this line of cases. Note that prior to *Hurley*, the Court had not "decid[ed] on the precise significance of the likelihood of misattribution,"<sup>74</sup> and it hasn't done so since.

In *Southworth*,<sup>75</sup> the Court correctly rejected the compelled subsidy-speech argument, because student fees that go into a general pot of money to fund various student groups (including those with ideological messages) would not be attributed to any particular assessed student. This is, thus, similar to *PruneYard* and to *TBS*; the state has established a kind of public forum (here a funding forum) and no view expressed in that forum would be attributed either to the forum's owner or to any of its funders.

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70. For discussion of some of the complexities of a misattribution analysis here, see Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1013-14 (2003).

71. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 559, 581 (1995).

72. *Id.* at 575.

73. *Id.* at 576-77 (citation omitted).

74. *Id.* at 577.

75. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

*Dale* is a complex case<sup>76</sup> about compelled association in which the Court discussed compelled speech as well. The core of its holding is that the “presence” of an openly gay man as an assistant scoutmaster would “force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>77</sup> How this is so is baffling. Dale was not advocating (or engaging in) homosexual conduct when he acted as assistant scoutmaster, nor was he using that position as a bully pulpit for discussing gay rights. It is unclear how Dale’s mere presence—under state compulsion—as an assistant scoutmaster would force the Boy Scouts to send any message, let alone that they “accept[] homosexual conduct.”<sup>78</sup> Despite my critique here (following Justice Stevens’ dissent<sup>79</sup>), misattribution does seem to play a key role in the holding.

Finally, *FAIR* represents one of the best and clearest uses of misattribution analysis to reject a compelled speech claim. The Court turned away law schools’ contention that forcing them to permit military recruiters on campus would falsely attribute the military’s “Don’t Ask, Don’t Tell” policy on gay men and lesbians to the schools.<sup>80</sup> The Court cited *PruneYard*, concluding:

Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the [law] restricts what the law schools may say about the military’s policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.<sup>81</sup>

Rejecting misattribution because the reasonable viewer would appreciate the speech was compelled—“legally required to do so”<sup>82</sup>—would place in jeopardy prior holdings invalidating compelled speech, particularly those where we can assume the reasonable viewer understands the speech was compelled. *Wooley* and *PG&E* fall easily into this category; *Barnette* and *Hurley* perhaps less so. There is no sense from *FAIR*, though, that any precedent is in jeopardy; the “equal access policy” aspect of the case allows us to place it on the *PruneYard/TBS/Southworth* side of the ledger.

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76. See generally Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007); Shiffrin, *supra* note 52.

77. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

78. *Id.*

79. See *id.* at 694, 697–98 (Stevens, J., dissenting).

80. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 65 (2006).

81. *Id.* (citations omitted).

82. *Id.*

What should we conclude from the Court's treatment of misattribution in the compelled speech cases? Several things seem clear. First, if the compulsion is to fund or open one's property to a plethora of speakers (i.e., to help create a type of public forum), then misattribution won't occur and a compelled speech claim won't lie. Thus, compelled speech (or perhaps we should say compelled fostering of another's message) is not sufficient for a constitutional claim. Second, even if misattribution seems unlikely, as in *Wooley* and in *PG&E*, the Court will invalidate compelled speech outside of the public forum-type settings, indicating the harm from compelled speech goes beyond misattribution. (Although whatever harm there is can be cured, as it were, if the case falls into the creating-a-public-forum category.) This is also the best way to understand *Barnette*, namely, that it turns not on an average viewer's attributing the sentiments of the pledge of allegiance to each schoolchild who recites it, but rather on something else. What that something else is is a complex matter, not the subject of this Essay.<sup>83</sup> Third, that you can dissent from the compelled speech, and thus disabuse any viewer of a possible association between you and the message, has been relevant in the creating-a-public-forum compelled speech cases, but otherwise the Court doesn't want to place the burden on the compelled speaker or message fosterer to speak (even to dissent or disavow) when she might prefer to remain silent. This matches my point in discussing a possible *Johanns/Grange* as-applied case, i.e., we might consider the possibility of the individual's curing misattribution through "more speech" as an improper shifting of the burden from the state, who created the problem. (Note that if misattribution is not present, such as I claim it wasn't in *Wooley* and *PG&E*, then it is a different matter to ask the individual to disavow or dissent if she deems it necessary.)

## II. IS THERE A CONSTITUTIONAL RIGHT TO DEMAND THAT THE GOVERNMENT OWN UP TO ITS EXPRESSION?

Does the government act unconstitutionally when it behaves as a ventriloquist, throwing its voice through the dummy of others?<sup>84</sup> Or is such masking of government speech a concern of ideal political theory and not of our Constitution? If such ventriloquism is unconstitutional, is a right against it enforceable in court? If so, under what circumstances? Or should we consider the matter part of the under-enforced Constitution?

The demand that government own up to its expression—e.g., that it make clear its role in expressive choices it makes through conditional

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83. See Greene, *supra* note 52, at 480–82, 483–84, 486–87 (critiquing *Wooley* and *PG&E* in part because of the absence of misattribution and the possibility of simultaneous dissent/disavowal, while supporting *Barnette* because of the autonomy interest in not using one's body to communicate another's message).

84. See Greene, *supra* note 51, at 49–52.

funding—is grounded in a basic conception of a republican form of government.<sup>85</sup> Government, which operates through human beings we might call agents, is responsible to the sovereign citizens, the principals. At least this is so in the United States (at least in theory). The accountability and responsibility of the agents to the principals is at the center of governance through representation where the citizens are sovereign. To be sure, much of our constitutional structure divides power to ensure against any person or branch of government gaining too much power, and in so doing makes the lines of accountability and responsibility murky.<sup>86</sup> These are core, accepted aspects of our constitutional structure. But when possible, within this structure, we want our government agents and entities to act transparently.

This concern applies to all government action in a republican form of government, not just to government expression. And arguably we should consider this a political theoretic norm or part of our under-enforced Constitution.<sup>87</sup> Part of the concern is with the grievances being generalized; often, the complaint that a government agent or branch has hidden the ball is a complaint we all share as U.S. citizens. The Court has not allowed such claims to go forward, sometimes by invoking the case or controversy requirement for standing in Article III courts.<sup>88</sup> The better explanation for many of these “generalized grievances” cases is that the claimed rights don’t exist in our Constitution, or if they do, that they exist in an under-enforceable manner, to be worked out through poli-

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85. Many scholars have stressed this in writing about government speech. See Bezanson & Buss, *supra* note 39, at 1384, 1431–32, 1436, 1484–85, 1510; Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 666–67 (2008); Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 57, 61, 63, 66 (2002) [hereinafter Jacobs, *Who’s Talking?*]; Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 452, 458 (2001); Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1391 (2001) [hereinafter, Jacobs, *Public Sensibilities*]; Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Norton, *supra* note 1, at 591–92, 599–600; Helen Norton, *Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1333 (2004); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 565, 570 (1996). For some of the complexities of insisting on government transparency, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006).

86. See Abner S. Greene, *Discounting Accountability*, 65 FORDHAM L. REV. 1489, 1504–05 (1997); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177–79 (1994).

87. Cf. Lee, *supra* note 85, at 1040 (arguing transparency in government communications is generally a constitutional ideal rather than an enforceable right). On the under-enforced Constitution, see LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 84–128 (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Here I do not parse the difference between government transparency as a norm of political theory or as part of our under-enforced Constitution. For my argument suggesting we have an aspirational Constitution and should not be drawing lines between ideal political theory and the Constitution, see Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 FORDHAM L. REV. 1401 (2005).

88. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215–16 (1974); *United States v. Richardson*, 418 U.S. 166, 171 (1974).

tics.<sup>89</sup> If we all share the injury, and if channels of political change remain open, arguably courts are not needed as a corrective. These are not situations of protecting discrete and insular minorities or rights of political participation, where we believe independent judges have a key role to play.<sup>90</sup>

For government's masking of its expression to be actionable (and I include both deliberate masking and more inadvertent failure to disclose), we should require the masking to have caused some otherwise cognizable constitutional harm. The two best and most discussed examples are *Johanns* and *Rust v. Sullivan*.<sup>91</sup> In *Johanns*, the argument is the U.S. should not be able to invoke government speech and move the case out of a possible freedom of association claim unless it clearly owns up to its role in the beef ads. That would accomplish two things—it would make the government accountable for its actions (the beef program, the ads, etc.), and it would disassociate from the ad's content any beef producer who might otherwise be so associated. By claiming government speech but hiding behind ads that appear to be those of private parties, the U.S. avoids accountability while simultaneously creating a false association between the message and certain private parties.

In *Rust*, doctors receiving federal Title X money to provide family planning services to indigent women were prevented by federal regulation from counseling such women about abortion or referring them to abortion providers.<sup>92</sup> In upholding the regulation against statutory and constitutional challenges, the Court invoked a version of the government speech doctrine:

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.<sup>93</sup>

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89. *Luther v. Borden*, 48 U.S. 1 (1849), is sometimes cited for the proposition that Guarantee Clause questions—pertaining to Article IV, Section 4, “[T]he United States shall guarantee to every State in this Union a republican form of government”—are nonjusticiable. *Luther* dealt with an unusual and narrow set of facts, though, and can't by itself be understood as precluding all judicial recourse under the Guarantee Clause. See *Baker v. Carr*, 369 U.S. 186, 218–26 (1962).

90. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Arguably, though, lack of government transparency blocks the channels of political change and thus should not be cordoned off as a political question.

91. 500 U.S. 173 (1991); see also, e.g., *Lee*, *supra* note 85, at 1042–52; *Norton*, *supra* note 1, at 628–31.

92. *Rust*, 500 U.S. at 178–81.

93. *Id.* at 193.



While recognizing some limits to conditional funding—such as traditional public forums and public universities<sup>94</sup>—the Court said even if the doctor–patient relationship might also be protected from alteration via funding conditions,

the Title X program regulations do not significantly impinge upon the doctor–patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor–patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide postconception medical care, and therefore a doctor’s silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.<sup>95</sup>

Because people expect their doctors to be free to discuss a range of medical options, if a patient—especially an indigent one who likely has no other medical assistance—hears a doctor discuss childbirth and adoption as options but hears nothing about abortion as an option, she might conclude that the doctor does not consider abortion a good option. Her constitutionally protected choice—whether or not to carry the fetus to term—thus will not be knowingly made. We generally think of the exercise, and the waiver, of a constitutional right as something that must be made knowingly and voluntarily. Even if women in this setting are not coerced, and thus their choices are voluntary, arguably they have been misled by the government-paid doctors into exercising their constitutional right unknowingly. That the regulation doesn’t require the doctor to lie about her own views, and that it permits her to say “advice regarding abortion is simply beyond the scope of the program,” is a far cry from disclosure of the government’s role in truncating the normal doctor–patient conversation.<sup>96</sup> Thus, the combination of the lack of government transparency plus the hit to a woman’s substantive due process rights arguably should have led to an actionable claim in *Rust*.

I will make two final points here. First, the toughest question arising from the above analysis is whether the availability of abortion-related information outside the Title X setting—even from the very same doctors, so long as they keep their non-Title X practice “‘physically and financially separate’ from prohibited abortion activities”<sup>97</sup>—means that a

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94. See *id.* at 199–200.

95. *Id.* at 200.

96. *Id.*; see, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1017 (1995).

97. *Rust*, 500 U.S. at 180.

woman's abortion-related choice could still be sufficiently knowing to satisfy constitutional standards.<sup>98</sup> Second, what sort of government speech would be satisfactory to remedy the problem raised here? Would it suffice to place a sign above the clinic saying "You are now entering a government-funded facility. The information you are about to receive has been dictated by the U.S. government, and represents the viewpoint of the U.S. government only?"<sup>99</sup> Or should each doctor have to say something similar to each patient, and also be required to state she may have different views regarding the woman's choices that she is not allowed to communicate in this setting?

### III. WHEN AND HOW MAY THE GOVERNMENT SEEK TO AVOID EXPRESSION BEING IMPROPERLY ATTRIBUTED TO IT?

In theory, when compulsion is involved, there should be no misattribution. In the compelled speech cases, assuming perfect knowledge of the law, we should never falsely associate the speaker or message carrier with the compelled speech, because it was compelled and not chosen.<sup>100</sup> (In that setting, though, as we have seen, something else is motivating the Court to invalidate the compelled speech laws. Some of the cases arguably involve imperfect information and resulting misattribution (*Hurley* is the best example), but even where it's clear the speech is under compulsion, being compelled to utter or carry the government's or someone else's message causes harm, though not of the misattribution sort, or so the Court has held.) Likewise, when the Constitution or other law requires the state to keep its hands off messages and speakers, then, again assuming perfect information, there should be no misattribution, this time of a private party's message to the state. Take the two most obvious settings in which this is so. When, for example, the state of Texas lets Gregory Johnson go free for expressive flag burning, because the U.S. Supreme Court says the First Amendment requires it,<sup>101</sup> we shouldn't attribute Johnson's expression to Texas. The same is true for any private speech act the government doesn't regulate because the Constitution says it may not do so. And when a city permits all sorts of odious speakers to have their say in a municipal park, we shouldn't attribute any of the speech to the city, because the Constitution requires that parks be open on a content-neutral basis. Governmental entities are compelled

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98. For discussions of this difficult question, see Bezanson & Buss, *supra* note 39, at 1396-1401; Greene, *supra* note 51, at 28-29; Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 168-76. (1996).

99. Greene, *supra* note 51, at 50; see also Carole I. Chervin, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 428 (1989).

100. See Greene, *supra* note 52, at 473-75.

101. See *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

by the Constitution to permit speech they don't like, and in the public forum setting are compelled to foster it—to provide a platform for it.<sup>102</sup>

Things get more complex when we drop compulsion out of the picture. In certain settings, the state has a constitutionally legitimate interest in making content-based decisions to advance some ideas and not others, and as a result we properly attribute the resulting expression to the state. For example, in the “government as educator” setting, we give significant deference to the state’s desire to advance certain ideas, and thus we correctly see the pedagogical choices as those of the state (or its agents). *Hazelwood School District v. Kuhlmeier*<sup>103</sup> is best understood as supporting such a rule of deference and concomitant association-attribution. The state’s interest in content-based decision-making, and thus controlling the resulting attribution, also arises in core government speech examples (speeches by government officials, agency statements on public health and safety, etc.) and in some examples that might seem less central. For example, consider government’s decision to place a motto on state license plates or to issue commemorative stamps with images of certain people, events, or institutions.<sup>104</sup> These are also examples of government control of expression we are happy to consider government speech rather than the provision of a public forum and thus where government may make content-based choices and be associated with the expression that results. Even some specialty license plate programs, where the state approves some and not other messages to be placed along with the state name and license plate letters, may be seen as examples of government speech, where the state chooses to be associated with some and not other messages. Note carefully, though, that the government’s interest in choosing the ideas and messages it wants to advance, and thus being associated with those and not other ideas and messages, follows from our understanding that the Constitution doesn’t otherwise restrict content-based decision-making. If it did—for example, if we understood the First Amendment to require commemorative stamps to be subject to a random drawing for which images get placed on the stamps—then it would be

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102. I put aside the complex question of a governmental entity that closes all of its public parks and turns all of its public thoroughfares over to private control. Cf. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Marsh v. Alabama*, 326 U.S. 501 (1946). But cf. *Palmer v. Thompson*, 403 U.S. 217 (1971). For recent discussion of some problems arising on this public-private margin, see Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/30/LRColl2009n30Tebbe.pdf>.

103. 484 U.S. 260 (1988) (deferring to school principal’s content-based editorial decisions for the school newspaper, produced through the journalism class).

104. In addition to commemorative stamps, the U.S. Postal Service allows privately produced and printed stamps for regular mail, subject to the following:

The material must be consistent with the Postal Service’s intent to maintain neutrality on religious, social, political, legal, moral, or other public issues. . . . The material must not harm the public image, reputation, or goodwill of the Postal Service and must not be otherwise derogatory or detrimental to the Postal Service’s interest.

USPS DOMESTIC MAIL MANUAL § 604.4.3.3(d)(1), (4) (Feb. 1, 2010). This is an example of the kind of opening of a platform for private speech subject to significant content-based restrictions that I discuss below.

wrong to attribute any message associated with the image to the government.

Now consider hard cases that appear to fall between government speech and government as regulator; cases such as vanity license plates (where the individual selects her own license plate identifying letters), adopt-a-highway programs and signs, and ads on public transit buses and subways. If the state's primary interest in these cases were in avoiding association with certain messages or speakers, the easiest route would be if the Constitution required these speech venues to be treated as public forums. Then it would be the Constitution and not the state that would be permitting (in fact, requiring) that the messages be displayed. Perhaps we could invoke a concern with imperfect information, i.e., that the average viewer would not understand the speech is only present under compulsion. But the state could take steps to enlighten the public. And although private party should not have the burden of clearing up misattribution caused by the state, the state has no similar claim when the misattribution is caused by public misunderstanding of when the state is forced by law to allow expression.

I suggest the primary state interest in these settings in maintaining content-based control over vulgarity, indecency, hate speech, and politically odious speakers is to refrain from providing a platform for such speech. The state wants to avoid turning such speech venues into public forums (even though the attribution/association/imprimatur problem would then disappear). If we treat these speech venues as properly subject to state content-based decision-making, then, and only then, should the state have an attribution issue to deal with, because only then is it making choices about expression, and only then may the expression it permits be in some sense attributed to it. The state may have reasons for permitting some expression other than agreement with the message, though. At least we can say the state tolerates the message or doesn't consider it the kind of message for which it would be harmful to provide a platform. The same is true when the state chooses not to regulate (or chooses to under-regulate) in one of the content-based categories—e.g., obscenity, libel, fighting words—in which the Court has held it may regulate. But saying the state doesn't want, for example, vulgar vanity license plates or KKK adopt-a-highway signs because it doesn't want to be associated with such speech or to give such speech the state's imprimatur is the tail wagging the dog.<sup>105</sup> The state doesn't want these mes-

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105. Many scholars point to the state's concern in these cases with attribution, association, endorsement, imprimatur, and legitimation. See Bezanson & Buss, *supra* note 39, at 1477 (discussing adopt-a-highway signs; agreeing the KKK's message wouldn't be attributed to the state, but still saying "the State could be understood to legitimate the Klan through its endorsement, not necessarily sharing the Klan's policies or prior history but attesting to its rehabilitation in a new form"); Corbin, *supra* note 85, at 647-62 (arguing one problem with viewing these hard cases as private speech is the government may still be seen as approving/endorsing/tolerating that speech and is therefore concerned with the resulting association/attribution/imprimatur); *Id.* at 686-87 (arguing even if we

sages out there at all; it can't control them through its general regulatory powers or in public forums, but it wants to create new speech opportunities without offering a platform for these disliked messages.

The key predicate question, then, is not whether the state has an interest in not giving its imprimatur to certain speech in certain settings. Rather, it's whether we can sensibly treat these hard cases as limited public forums,<sup>106</sup> pursuant to which the state may open a new avenue for expression while making content-based exclusions. The question is difficult, because these are not the kind of managerial domains of which Robert Post writes.<sup>107</sup> Our background understandings of these settings don't dictate giving the state content-based (and perhaps even viewpoint-based) discretion. And these aren't instances of government as educator or as patron of the arts. Perhaps we could say these are "government as editor" cases, but that is a bit of a stretch, since the state isn't producing a newspaper or television or radio show or website.

So we are left with the difficult issue whether we have to treat these new-fangled speech opportunities as we treat classic public forums. We treat streets and parks as public forums subject to normal free speech rules because of their history, their compatibility with all kinds of speech, a cultural need for public space in which all can meet and witness and share ideas,<sup>108</sup> and the temporary nature of the speech we permit in streets and parks. *Pleasant Grove City v. Summum*<sup>109</sup> made an important point here. The basic holding is that when the government decides which monuments shall be placed and fixed to the ground in state-owned parks, it doesn't have to play by public forum rules.<sup>110</sup> This holding is not about a concern with limited physical space and thus the need to make some inclusion/exclusion judgments. (If that were our main concern, we could run a lottery to decide which monuments go up.) And, somewhat more controversially, despite what *Summum* says, we don't have to see a

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view these hard cases as mixed public/private speech, the state might still be concerned with endorsement and association); Norton, *supra* note 1, at 597, 614 (providing examples of private parties seeking government imprimatur in several of the settings discussed here); Norton, *supra* note 85, at 1320, 1341–48 (defending government's concern with misattribution, endorsement, imprimatur, and the like in several of the settings discussed here).

106. I don't want to get caught up in semantics here. I am using "limited public forum" to mean new speech opportunities the government opens up, limited either affirmatively (e.g., "we're funding dog paintings only" or "this is a theater for musicals only") or negatively, such as the concerns I discuss in the text.

107. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 199–267 (1995); Post, *supra* note 98, at 164–76.

108. See, e.g., David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 718 (1992). For helpful discussion of the relationship between public forum doctrine and government speech, see Steven Shiffryn, *Government Speech*, 27 UCLA L. REV. 565, 572–88 (1980).

109. 129 S. Ct. 1125 (2009). For insightful commentary on free speech issues raised by *Summum*, see Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY 83 *passim* (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/31/LRColl2009n31Blocher.pdf>; Tebbe, *supra* note 102, at 70–74.

110. *Summum*, 129 S. Ct. at 1129, 1138.

municipality's inclusion/exclusion decisions about fixed monuments as government speech to validate its discretion. Rather, we might expand our conception of what a limited public forum may be. Just as the state may wish to avoid vulgarity, indecency, hate speech, and politically odious speakers when it speaks on its own behalf, so may it wish to do so when it provides opportunities for private speech, outside the setting of the kinds of temporary, in-person speech it must permit in traditional public forums.<sup>111</sup> It's not just that monuments generally raise a greater risk of attribution to the state than does temporary in-person speech; it's that monuments (and fixed displays, temporary or otherwise, such as vanity license plates, adopt-a-highway signs, and transit ads) offer a potentially more harmful and culturally insidious platform for messages and speakers than does temporary in-person speech. Establishment Clause issues aside, we should see these government decisions as choices properly subject to content-based decision-making, with limits.

Permitting the state to restrict vulgarity and indecency in the speech venues under discussion here makes sense. Such speech is still permitted privately and in traditional public forums. Despite their virtues (some would say arguable but I'm fine with agreeing they exist), vulgarity and indecency also harm, and creating a non-vulgar, non-indecent vanity plate, adopt-a-highway, or transit ads program properly balances the creation of new speech opportunities with preventing offense to the sensibilities of many. This makes sense even if we don't consider the speech that of the government.

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111. These concerns with specific types of content-based harm might not have sufficed to uphold Pleasant Grove's decision to reject Sumnum's monument, and thus only by deeming the decision government speech could we approve of the Court's holding. For a discussion of the malleability of public forum doctrine, see Greene, *supra* note 51, at 61–67. The discussion that follows shares a great deal of common ground with Corbin, *supra* note 85 and Jacobs, *Public Sensibilities*, *supra* note 85. For arguments that would seemingly reject the discussion that follows, see Jacobs, *Who's Talking?*, *supra* note 85, at 88–105 (setting up an either/or world: either speech is the government's in one way or another and therefore it is okay to make viewpoint distinctions, or it is private speech and subject to standard public forum rules); Norton, *supra* note 1, at 602–03 (traditional free speech analysis applies when government declines to claim speech as its own as a formal matter, even in these hard case settings); *id.* at 622–24 (specific adopt-a-highway program doesn't satisfy functional government speech test; thus, apparently relegated to private speech status and traditional free speech principles); *id.* at 627–28 (stating that selling commemorative bricks to be fixed at public school is not government speech and thus is subject to traditional public forum analysis; while I agree the *per se* exclusion of religious references was probably invalid, the school should have the kind of content-based flexibility I discuss in the text); Norton, *supra* note 85, at 1333, 1341, 1349–50 (arguing government may defend some of these hard cases by adopting the speech as its own, but if government is not speaking then traditional free speech principles including public forum principles apply); Redish & Kessler, *supra* note 85, at 546–47 (would disapprove my position here, deeming it a viewpoint-based subsidy and not a matter of judgmental necessity). See also Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 992–94 (1998) (permitting leeway when government itself is speaking, but applying standard free speech rules otherwise; it is not clear how the argument would apply to cases such as vanity plates, adopt-a-highway signs, and transit ads, if we agree with my proposition that the government isn't advancing its own message in these settings).

More complicated are exclusions of certain political messages or groups, like saying no to racial hate speech or to groups such as the KKK or Nazi Party. The concerns here should not be the positive ones of speech theory—autonomy, participation in public affairs, and opening a marketplace of ideas—because we’re leaving open purely private speech and traditional public forums and because the speech value to harm calculus should be different in the state-created speech forums under discussion here. Our principal concern should be with “negative theory,”<sup>112</sup> namely, that we might distrust the state’s ability to make sufficiently politically neutral judgments. That said, again I would suggest viewing these forums as subject to relaxed speech rules, and allowing the kind of more common mainstream understanding of what’s harmful to permit exclusions. We can run the greater risk of harm from hateful/odious speech when dealing with purely private speech and traditional public forums; we can run the greater risk of government merely playing favorites in its newly created, limited speech forums.

For both sets of exclusions—vulgarity/indecency and hateful/odious—although we’re not deferring because the government is speaking or because its motivating interest is in avoiding association or attribution, some of the reasons we defer to government content-based speech are at play here, as well. When the government isn’t acting as regulator, it has a role to play in shaping public culture, and inevitably that shaping will track mainstream sensibility. So long as the state’s choices are transparent and its regulatory and public-forum administration roles properly limited, we should permit it to exercise other powers—both of speech and of platform-providing—in ways that better match majoritarian sensibilities.<sup>113</sup>

#### CONCLUSION

I conclude with four points. First, the Court has decided a set of cases in which public schools or universities opened up either physical space for speech activity or administered a special set of dollars for speech activity.<sup>114</sup> The Court’s rulings in these cases have been: (1) excluding religious speech in these settings violates the Free Speech Clause; and (2) permitting such speech doesn’t violate the Establishment Clause.<sup>115</sup> The Court’s language shifts in these cases from treating the forums as akin to streets and parks, in which standard free speech rules

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112. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80–85 (1982).

113. See Greene, *supra* note 51, 2–6.

114. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (the one case in which the predicate wasn’t a free speech holding but rather a federal access statute); *Widmar v. Vincent*, 454 U.S. 263 (1981).

115. *Good News Club*, 533 U.S. at 102; *Rosenberger*, 515 U.S. at 845–46; *Lamb’s Chapel*, 508 U.S. at 393, 395; *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 277.

apply, to acknowledging some content-based restrictions (but not viewpoint restrictions) would be permissible if reasonably related to the nature of the forum. It's not important for this Essay precisely how to characterize this line of cases—whether they're best seen as acknowledging a type of forum that once the state opens it must treat as it does streets and parks, or whether they're best seen as still leaving a fair bit of discretion for the state to make subject-matter restrictions. Either way, two points from these cases are clear and relevant here: (1) viewpoint restrictions are invalid however one characterizes these forums; and (2) the Court has not dealt with a case in which the state opens a fairly broadly described speech forum and seeks to preclude not religious speech, but rather vulgar and indecent speech, or speech that we might deem hateful or odious.

Second, if one agrees the state should be permitted to open the kinds of forums discussed in this part of the paper (vanity license plates, adopt-a-highway signs, and transit ads) and exclude vulgar, indecent, hateful, and politically odious speech, then one either has to deem these not viewpoint-based or be open to revising the doctrine. The latter is the more accurate and better way to go.<sup>116</sup>

Third, certain types of viewpoint restrictions in these intermediate-type forums should, nonetheless, be constitutionally problematic. Consider examples such as permitting Pro-Life vanity plates (or adopt-a-highway signs or transit ads) while rejecting Pro-Choice messages. If the state wants to adopt Pro-Life (or vice versa) as its own message or motto, it may do so, even though the matter is one of current social contest.<sup>117</sup> But in these limited public forums, content-based decisions should be meant to advance widely shared values, such as those against vulgarity, indecency, hate speech, and odious political views. Permitting one side or the other of the abortion debate to use one of these speech platforms doesn't seek to prevent the kind of harm the state believes exists from vulgar, hateful, or odious speech.

Fourth, the state may, and perhaps should, make subject-matter exclusions to avoid possible controversy in these forums. This is one way of understanding and affirming *Lehman v. City of Shaker Heights*, in which the Court upheld the city's permitting commercial advertising but not political speech in its transit ads.<sup>118</sup> An advantage of this method is that it renders moot the need to decide which political views are odious (KKK, Nazi, etc.), a matter of central concern to negative theory.

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116. See Greene, *supra* note 51, at 31–40, for my related discussion of viewpoint discrimination in government speech.

117. See Abner S. Greene, *Government Speech on Unsettled Issues*, 69 *FORDHAM L. REV.* 1667, 1669–70 (2001); Greene, *supra* note 51, at 2–6.

118. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).