

Swarthmore College

Works

Political Science Faculty Works

Political Science

2009

The Dueling First Amendments: Government As Funder, As Speaker, And The Establishment Clause

Carol Nackenoff

Swarthmore College, cnacken1@swarthmore.edu

Follow this and additional works at: <https://works.swarthmore.edu/fac-poli-sci>



Part of the [Political Science Commons](#)

[Let us know how access to these works benefits you](#)

Recommended Citation

Carol Nackenoff. (2009). "The Dueling First Amendments: Government As Funder, As Speaker, And The Establishment Clause". *Maryland Law Review*. Volume 69, Issue 1. 132-148.

<https://works.swarthmore.edu/fac-poli-sci/579>

This work is brought to you for free by Swarthmore College Libraries' Works. It has been accepted for inclusion in Political Science Faculty Works by an authorized administrator of Works. For more information, please contact myworks@swarthmore.edu.

The Dueling First Amendments: Government as Funder, as Speaker, and the Establishment Clause

Carol Nackenoff

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [First Amendment Commons](#)

Recommended Citation

Carol Nackenoff, *The Dueling First Amendments: Government as Funder, as Speaker, and the Establishment Clause*, 69 Md. L. Rev. 132 (2009)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol69/iss1/12>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE DUELING FIRST AMENDMENTS: GOVERNMENT AS FUNDER, AS SPEAKER, AND THE ESTABLISHMENT CLAUSE

CAROL NACKENOFF*

The public events and public speeches respondents seek to call in question are part of the open discussion essential to democratic self-government. The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns. The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society.¹

The Supreme Court of the United States has recently been exhibiting a good deal of deference to other branches of the federal government in arenas in which government speech is held to be taking place. Government speech can include selective funding with tax dollars. This Essay will contend that an expansion of the government speech doctrine is likely to have a significant impact on Establishment Clause jurisprudence. The Supreme Court may be poised to return a number of Establishment Clause challenges to the political process.

I. JUSTICE KENNEDY'S CONCURRING OPINION IN *HEIN v. FREEDOM FROM RELIGION FOUNDATION*: HARBINGER OF THINGS TO COME?

Posing the question of standing in the 2007 *Hein v. Freedom From Religion Foundation* case as an issue of interfering with dialogue and with the free exchange of ideas and information between the Executive Branch of the federal government and its constituencies, Justice Kennedy provided the fifth vote to deny standing to members of the

Copyright © 2009 by Carol Nackenoff.

* Carol Nackenoff is the Richter Professor of Political Science at Swarthmore College, where she teaches constitutional law, American politics, and environmental policy. She is the author of *THE FICTIONAL REPUBLIC* (1994), co-editor of *JANE ADDAMS AND THE PRACTICE OF DEMOCRACY* (2009), and is currently working on a manuscript exploring the contested meaning of citizenship in the Progressive Era. The author would like to thank Nicholas Buttino, Swarthmore College class of 2009, for research assistance and suggestions for this paper.

1. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 616 (2007) (Kennedy, J., concurring).

Freedom From Religion Foundation.² That the Freedom From Religion Foundation lacked standing to raise its Establishment Clause challenge appears to be settled.³ What more we know from *Hein* is quite uncertain. This uncertainty includes and extends beyond the fate of taxpayer challenges against the use of public funds in support of religion. The *Hein* decision also raises questions about what latitude government enjoys, as a speaker and funder with ideas, in the face of Establishment Clause challenges.

The 2009 *Pleasant Grove City v. Summum*⁴ decision, “litigated in the shadow of the First Amendment’s Establishment Clause,”⁵ made the question of the government’s latitude in the face of Establishment Clause challenges even more pronounced. As Justice Souter pointedly remarked in his concurrence in *Summum*, “[t]he interaction between the ‘government speech doctrine’ and Establishment Clause principles has not . . . begun to be worked out.”⁶ After one post-*Hein* Court Term, what do we know about when government-funded speech enters the arena of Establishment Clause case law? This Essay suggests that, with the Supreme Court of the United States using as its vehicle an expanding conception of government speech, major changes involving Establishment Clause jurisprudence are likely to be on the way. Such changes could manifest as early as the 2009 Term in the case of *Salazar v. Buono*,⁷ an Establishment Clause case in which standing is an issue.⁸

2. *Id.* at 592 (plurality opinion).

3. *See id.* at 593 (explaining that a plaintiff has standing to challenge federal legislation authorizing the use of funds that allegedly violates the Establishment Clause, but here, the Executive Branch rather than Congress made such authorization).

4. 129 S. Ct. 1125 (2009).

5. *Id.* at 1139 (Scalia, J., concurring) (emphasis omitted).

6. *Id.* at 1141 (Souter, J., concurring).

7. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 129 S. Ct. 1313 (2009).

8. *Id.* The case involves a cross erected by the Veterans of Foreign Wars (“VFW”) at the top of Sunrise Rock in the Mojave National Preserve as a memorial to those who died in the First World War. *Buono*, 502 F.3d at 1072. After a former employee of the Mojave National Preserve successfully filed suit to bar permanent display of the cross, Congress designated Sunrise Rock as a national memorial and passed a statute that barred the use of federal funds to dismantle the VFW cross. *Id.* at 1073 & n.4, 1074. During the following year, Congress conveyed the parcel on which the cross was displayed to private hands. *Id.* at 1074–76. *Buono* moved to bar the land swap and to enforce the order of the United States District Court for the Central District of California, which barred display of the cross on federal land, and the district court granted the motion. *Id.* at 1076. The Ninth Circuit Court of Appeals affirmed, *id.* at 1086, and the Secretary of the Interior submitted a petition for certiorari, Petition for Writ of Certiorari, *Salazar*, 129 S. Ct. 1313 (No. 08-472). One of the questions the Supreme Court granted certiorari to decide is whether Mr. *Buono*, who sought redress because the public land in question is not a forum for the

The Supreme Court is deeply divided over the proper approach to taxpayer challenges to government spending under the Establishment Clause.⁹ In many Establishment Clause challenges, standing is difficult to obtain because the purported injuries are often broadly distributed. The Supreme Court's decision in *Flast v. Cohen*,¹⁰ which permitted taxpayer standing for an Establishment Clause challenge to a federal statute providing aid to religious schools,¹¹ has been limited by later Court decisions.¹² For example, it has been reread as limited to congressional action under the Taxing and Spending Clause of Article I, Section 8 of the Constitution.¹³

Controversies in environmental law have also had an effect on the Supreme Court's reasoning about standing, and there is currently a tendency to read Article III barriers to standing as posing more formidable obstacles to litigants than before Justice Scalia joined the Court. Despite protests from Justices Blackmun and O'Connor that the majority in *Lujan v. Defenders of Wildlife*¹⁴ was waging a "slash-and-burn expedition through the law of environmental standing,"¹⁵ Justice Scalia wrote the following for the Supreme Court:

When . . . the plaintiff is himself an object of the action (or forgone action) at issue[,] . . . there is ordinarily little question [that he has standing] When, however . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.¹⁶

display of other religious symbols, has standing. *Id.* at I ("Whether [Buono] has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.").

9. See *infra* text accompanying notes 22–35.

10. 392 U.S. 83 (1968).

11. *Id.* at 88.

12. Scalia reads these limitations more broadly than some of his colleagues. See Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, in VIEWS FROM THE BENCH 200, 210–11 (Mark W. Cannon & David M. O'Brien eds., 1985) ("The dictum of *Flast* has been disavowed by opinions that explicitly acknowledge that standing and separation of powers are intimately related.").

13. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479–82 (1982) (deciding that plaintiffs lacked standing because their claim did not challenge congressional exercises of the power to tax and spend conferred by Article I, Section 8).

14. 504 U.S. 555 (1992).

15. *Id.* at 606 (Blackmun, J., dissenting).

16. *Id.* at 561–62 (majority opinion). This case involved citizen suits over Executive Branch officials' failure to enforce, or inadequate enforcement of, the Endangered Species Act. *Id.* at 557–59; see also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992) (explaining that *Lujan* "invali-

Otherwise, he argues, there is a risk of serious interference with executive power—a “transfer from the President to the courts” of “the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”¹⁷ Separation of powers means that courts should not second-guess the actions of the Executive Branch at the behest of someone without the requisite degree of injury, and congressional citizen suit provisions cannot confer standing without this showing of plaintiff injury.¹⁸ Justice Scalia’s approach to standing has, over the years, made it harder for litigants to cross the threshold he claims is constitutionally imposed by Article III.

Standing for plaintiffs’ challenges to government spending or government action under the Establishment Clause remains closely watched and highly contentious. In a high-profile case from 2004, *Elk Grove Unified School District v. Newdow*,¹⁹ the Supreme Court granted certiorari to hear a case in which the United States Court of Appeals for the Ninth Circuit had held that a group of public school teachers had violated the Establishment Clause by leading students in a recitation of the Pledge of Allegiance, which contained the phrase “under God.”²⁰ The Supreme Court reversed the decision on the ground that Newdow, who did not have legal custody of the child in question, lacked standing in the case because he did not have the right to sue on the child’s behalf as “next friend.”²¹

In *Hein*, the Supreme Court displayed its disarray over Establishment Clause standing requirements. For example, Justice Kennedy both joined the plurality opinion of Justice Alito (in which Chief Justice Roberts also joined) and wrote his own additional concurrence.²² At the same time, he did not join Justice Scalia’s concurrence (with Justice Thomas), which denied standing and argued that *Flast* should be overturned.²³ Seven Justices held that *Flast*, when properly under-

dates the large number of statutes in which Congress has attempted to use the ‘citizen-suit’ device as a mechanism for controlling unlawfully inadequate enforcement of the law”).

17. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art II, § 3). Sunstein argues that Justice Scalia’s turn on the doctrine of standing is simply judicially created, and that “[r]ead for all it is worth,” *Lujan* could be the most important shift in standing doctrine since World War II. Sunstein, *supra* note 16, at 165–66. It should be noted that *Lujan* has *not* been given this broad reading in subsequent Supreme Court decisions; however, new blood on the Court appointed by Presidents Bush and Obama could influence the effect of this case as precedent.

18. *Lujan*, 504 U.S. at 559–62.

19. 542 U.S. 1 (2004).

20. *Id.* at 5.

21. *Id.* at 9–10, 17–18.

22. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 591 (2007) (plurality opinion); *id.* at 615 (Kennedy, J., concurring).

23. *Id.* at 618 (Scalia, J., concurring).

stood, remained good constitutional law; of these seven, four believed that Freedom From Religion Foundation had standing under *Flast*.²⁴ But six Justices—the four dissenters plus Justices Scalia and Thomas—could find no distinction between the *Hein* challenge to an Executive Branch expenditure and challenges to Acts of Congress under the Spending Clause.²⁵

Justices Scalia and Thomas joined the bewilderment of the dissenters as to “why the plurality fixates on the amount of *additional* discretion the Executive Branch enjoys under the law beyond the only discretion relevant to the Establishment Clause issue: whether to spend taxpayer funds for a purpose that is unconstitutional.”²⁶ Justice Scalia rejected his colleagues’ express allocation argument denying standing:

[T]he plurality would deny standing to a taxpayer challenging the President’s disbursement to a religious organization of a discrete appropriation that Congress had not explicitly allocated to that purpose, even if everyone knew that Congress and the President had informally negotiated that the entire sum would be spent in that precise manner.²⁷

Additionally, for Justice Scalia, the “Psychic Injury” approach to standing for purported Establishment Clause violations is nonsense.²⁸ The danger, Justice Scalia argued, is “a future in which ideologically motivated taxpayers could ‘roam the country in search of governmental wrongdoing and . . . reveal their discoveries in federal court,’ transforming those courts into ‘ombudsmen of the general welfare’ with respect to Establishment Clause issues.”²⁹ For Justice Scalia, the focus on “a taxpayer’s purely psychological displeasure that his funds are being spent in an allegedly unlawful manner”³⁰ not only lacks the con-

24. The four Justices who believed that the plaintiff had the requisite standing under *Flast* were the dissenters: Justices Souter, Stevens, Ginsburg, and Breyer. *Id.* at 643 (Souter, J., dissenting).

25. *See id.* at 629 (Scalia, J., concurring) (“[T]he plurality offers no explanation of why the factual differences between this case and *Flast* are *material*.”) (emphasis in original); *id.* at 637 (Souter, J., dissenting) (“Here, the . . . plurality opinion declares that *Flast* does not apply, but a search of that opinion for a suggestion that these taxpayers have any less stake in the outcome than the taxpayers in *Flast* will come up empty . . .”).

26. *Id.* at 631 (Scalia, J., concurring).

27. *Id.* at 630.

28. *See id.* at 631 (“Respondents argue that *Flast* did not turn on whether Congress has expressly allocated the funds to the allegedly unconstitutional use, and their case plainly rests on Psychic Injury.”).

29. *Id.* at 632 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982)).

30. *Id.* at 633.

creteness of being a “Wallet Injury,” but it merely constitutes an ideological motivation and viewpoint.³¹ There are no judicially cognizable injuries, only disagreements about policy.

For Justice Souter and the dissenters, however, the “‘injury’ alleged in Establishment Clause challenges to federal spending” is “the very ‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion.”³² For the dissenters, claims about alleged violations of the Establishment Clause occasioned by government spending decisions are not mere ideas. Such claims are more than “hackles of disagreement [about] the policy supported.”³³ If identifiable amounts of taxpayer money are funding conferences that promote religion, there is a concrete injury—even if the amount of an individual taxpayer’s money is miniscule.³⁴

With the Supreme Court so divided over the proper approach to taxpayer standing under the Establishment Clause, the day may not be far off when Justice Kennedy’s approach in *Hein*, with its emphasis on “ideas,”³⁵ comes to prevail in cases of government expenditures for faith-based initiatives and school vouchers, which are seen as government’s search for solutions to social problems. After all, policies are ideas; and now, they are also governmental speech.

II. GOVERNMENT AS SPEAKER MEETS GOVERNMENT AS SELECTIVE FUNDER

This Essay maintains that the Supreme Court’s posture on a specific line of freedom of speech cases helps us understand and even predict the fate of recent and upcoming Establishment Clause challenges. If *Hein*’s reading of Establishment Clause standing requirements converges with these other First Amendment trajectories, the Executive Branch—or Congress—could be afforded broad opportunities to rewrite the boundaries of church-state relations.

While Justice Kennedy cautioned that federal officials must make a conscious effort to obey the Constitution even when their activities cannot be challenged in a court of law, he was more concerned by what the scenario would have been if standing had been granted,

31. *Id.* at 619, 632–33.

32. *Id.* at 638 (Souter, J., dissenting) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006)).

33. *Id.* at 639.

34. *Id.* (“When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury.”).

35. *See id.* at 616–17 (Kennedy, J., concurring) (emphasizing that government should be able to discover and exchange ideas).

which was the possibility that the “courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.”³⁶ Accepting an excessively broad view of standing, therefore, would entangle the federal courts in oversight in areas in which the other branches of government should have wide discretion. This is hardly a new concern.³⁷

Viewing the activities of the White House Office of Faith-Based and Community Initiatives as government speech³⁸ complicates already complex Establishment Clause challenges to governmental expenditures. Justice Kennedy’s approach resonates with a set of First Amendment precedents involving government as funder—precedents that Justices Scalia and Thomas have already embraced and that might readily attract Justices Roberts and Alito. This supposition seems more likely after Justice Alito’s majority opinion in *Summum*, joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer.³⁹

The government-funded conferences and workshops providing grant-writing tutorials at issue in *Hein* were designed for faith-based groups, so that these groups could better access federal funds. Executive Branch appropriations funded these groups pursuant to President Bush’s Executive Order establishing the White House Office of Faith-Based and Community Initiatives (“Office”). The purpose of the Office was to use federal funding to “expand the role” and “increase [the] capacity” of religious organizations, thus coordinating a national effort to expand opportunities for these kinds of groups.⁴⁰ Such ef-

36. *Id.* at 617.

37. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 189, 259, 301 (1983) (explaining why the Supreme Court should not be the final arbiter of government speech); Steven Shiffrin, *Government Speech*, 27 *UCLA L. REV.* 565, 572–88 (1980) (exploring the Supreme Court’s general confusion about governmental speech).

38. See Lauren S. Michaels, Note, *Hein v. Freedom From Religion Foundation: Sitting This One Out—Denying Taxpayer Standing to Challenge Faith-Based Funding*, 43 *HARV. C.R.-C.L. L. REV.* 213, 224–25 (2008) (discussing Justice Kennedy’s speech-oriented concurrence in *Hein*).

39. Justice Kennedy did not join any of the concurrences in *Summum*, suggesting that the potential breadth of Justice Alito’s majority opinion did not trouble him. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (Stevens, J., concurring); *id.* at 1139 (Scalia, J., concurring); *id.* at 1140 (Breyer, J., concurring); *id.* at 1141 (Souter, J., concurring).

40. Exec. Order No. 13,199, 3 C.F.R. 752 (2002), *reprinted as amended in* 3 U.S.C. note preceding § 101 (2006). Executive Order 13,199 was significantly amended in the early weeks of the Obama Administration. See Exec. Order No. 13,498, 74 *Fed. Reg.* 6533 (Feb. 5, 2009) (rechartering the Office to ensure, *inter alia*, conformity with establishment and free exercise constitutional commitments).

forts led to increased numbers of government grants to religious organizations.

When *Hein* is framed as a matter of government acting as speaker when using taxpayer money, it reverberates with a trajectory of First Amendment jurisprudence that has been controversial since at least 1991.⁴¹ Since *Rust v. Sullivan*,⁴² the Court has been deferential to government when it advances particular viewpoints with taxpayer money. And the Court sometimes points to *Rust* as one of the sources of the government speech doctrine. Chief Justice Rehnquist, writing for the *Rust* majority on a closely divided Court, argued the following:

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.⁴³

Chief Justice Rehnquist used the same logic writing for the plurality in *United States v. American Library Ass'n, Inc.*⁴⁴ Congress may insist that “‘public funds be spent for the purposes for which they were authorized.’”⁴⁵ In this case, the plurality found that the Children’s Internet Protection Act (“CIPA”), which requires public libraries to install filtering software that blocks Internet access to obscene material and child pornography in order to receive federal funding, did not impose unconstitutional conditions.⁴⁶ The plurality emphasized that when the government appropriates public funds it is entitled to establish the limits of the program for which the funds are appropriated.⁴⁷

41. While the doctrine of government speech is a relatively new approach to some of these issues, see *supra* note 37 for earlier scholarly treatment of the issue.

42. 500 U.S. 173 (1991).

43. *Id.* at 193. Chief Justice Rehnquist also noted that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *Id.* at 194.

44. 539 U.S. 194 (2003) (plurality opinion).

45. *Id.* at 212 (quoting *Rust*, 500 U.S. at 196). Justice Kennedy, who did not join the plurality opinion, concurred on the grounds that, absent a showing by an adult user that libraries or librarians lacked the capacity to unblock specific sites, the restriction was warranted. *Id.* at 215 (Kennedy, J., concurring in the judgment).

46. *Id.* at 198–99, 214 (plurality opinion).

47. *Id.* at 211. Although plaintiffs argued that CIPA forced public libraries “to surrender their First Amendment right to provide the public with access to constitutionally protected speech,” the Court found no need to rule on whether government entities have such First Amendment rights. *Id.* at 210–11.

By the time the Supreme Court decided *Rust*, it had already begun to establish that government funders generally enjoyed wide latitude when choosing among competing demands for public funds. For instance, whatever right a woman has to seek an abortion, such right poses no special obstacle to the exercise of the government's funding discretion. Writing for the majority in *Maher v. Roe*,⁴⁸ Justice Powell noted that previous Supreme Court jurisprudence did not limit "the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."⁴⁹ Based on *Maher*, the *Rust* Court determined that the federal government's refusal to fund programs mentioning abortion as an acceptable method of family planning under Health and Human Services rulemaking was also constitutional.⁵⁰ As Chief Justice Rehnquist, writing for the majority, observed in *Rust*, the government "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."⁵¹

Is it possible, however, to view this approach as government expenditure in furtherance of a religious viewpoint?⁵² I will later return to this question as it bears on funding faith-based organizations, suggesting that the issue is not as clear-cut as the Supreme Court seems to indicate.⁵³

If government as funder could choose to prefer live childbirth over abortion with taxpayer dollars, government could also choose to require the National Endowment for the Arts ("NEA") to take into account "general standards of decency and respect for the diverse beliefs and values of the American public" when awarding grant money as it did in *National Endowment for the Arts v. Finley*.⁵⁴ Plaintiffs, artists who had unsuccessfully applied for NEA grants, claimed that the restrictions in Title 20, Section 954(d)(1) of the United States Code violated their First Amendment rights and acted as a form of

48. 432 U.S. 464 (1977).

49. *Id.* at 474; see also *Harris v. McRae*, 448 U.S. 297, 316–17 (1980) (upholding Congress's decision to subsidize medically necessary services but not medically necessary abortions because indigent women have the same choice they would have had if Congress had not subsidized any health care costs).

50. *Rust*, 500 U.S. at 192–93.

51. *Id.* at 193.

52. On the inconsistent approach of the Supreme Court to selective funding, see the provocative piece by Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991) (exploring the constitutional implications of governmental funding policies concerning both abortion and religious education).

53. See *infra* text accompanying notes 88–93.

54. 524 U.S. 569, 572 (1998) (quoting 20 U.S.C. § 954(d)(1) (2006)).

viewpoint discrimination.⁵⁵ Justice O'Connor and the majority responded by noting the following: (1) the language in Section 954(d)(1) was merely hortatory (as the NEA had claimed); (2) the subjective nature of the terms "decency" and "respect" allowed for many constitutional applications of the statute; and (3) the nature of arts funding itself requires the NEA to make value judgments about artistic worth, and therefore the NEA did not curtail freedom of expression since government subsidy was neither promised nor certain in any case.⁵⁶

While Justice O'Connor's opinion avoided the hard issues in this case, Justice Scalia did confront the issue directly in his concurrence. Justice Scalia argued that government may establish "content- and viewpoint-based criteria upon which grant applications are to be evaluated."⁵⁷ Indeed, Justice Scalia persuasively illustrated his argument when he noted that "[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."⁵⁸ At some level, he is correct: Because governmental policies do favor some values over others, government makes choices among values. In that sense, governmental spending decisions are value decisions, and if a party wins the White House and a majority of both Houses of Congress, it is allowed to recast policy directions and values. Justice Scalia's observation sounds very much like the position of Oliver Wendell Holmes, who believed that the interests that win elections generally should have their way. For example, Holmes wrote to Felix Frankfurter, "I quite agree that a law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell."⁵⁹ So citizens express their preferences through elections, and elected leaders seek to implement the preferences of their constituents.⁶⁰

55. *Id.* at 577–78.

56. *Id.* at 580–86.

57. *Id.* at 590 (Scalia, J., concurring). He was joined by Justice Thomas.

58. *Id.* at 598.

59. ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 58 (2000).

60. Other commentators have made clear why this simple model does not work. *See, e.g.*, LARRY M. BARTELS, *UNEQUAL DEMOCRACY* (2008) (exploring the political sources of economic inequality); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006) (analyzing the "almost insurmountable" constitutional barriers to democracy); NOLAN McCARTY ET AL., *POLARIZED AMERICA* (2006) (arguing that the increased polarization of political institutions in the United States leaves the political system unable to redress societal inequalities); SPENCER OVERTON, *STEALING DEMOCRACY* (2006) (arguing that the structure of the American election system frustrates the voting rights of certain citizens).

Increasingly, the Supreme Court sees government funding as a matter of expressing ideas and participating in speech. The Speech Clause is held to offer protection for speakers *against* government, not to confer speech rights on government.⁶¹ Nevertheless, if government is not a First Amendment rights-bearing entity, it has wide latitude to speak what it will and can withstand First Amendment challenges when plaintiffs invoke the “recently minted”⁶² government speech doctrine. That is, instead of proceeding with more traditional First Amendment tests when a First Amendment challenge is raised against government activity, the Supreme Court employs the government speech doctrine to apply a level of scrutiny that is highly deferential toward government’s articulated (or even unarticulated) purposes.

III. FROM BEEF TO MONUMENTS AND ESTABLISHMENTS

What happens, then, when the arguments that government quite naturally and appropriately favors and disfavors points of view on innumerable subjects, and that government as speaker may advocate with taxpayer money, encounter the expectation of neutrality toward religion under the Establishment Clause?

In *Johanns v. Livestock Marketing Ass’n*,⁶³ the Supreme Court suggested that compelled funding of government speech—in this case, a federally funded marketing campaign promoting beef—raises no First Amendment concerns.⁶⁴ Justice Scalia, writing for the Court, argued that “[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.”⁶⁵ In his dissent, however, Justice Kennedy insisted that the speech at issue could not “meaningfully be considered government speech at all.”⁶⁶ Similarly, Justice Souter argued that the government must own the message as government property; “[o]therwise there is no check whatever on government’s power to compel special speech

61. See David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. REV. 1637, 1638 (2006) (“[T]he Speech Clause is typically understood as a bulwark of protection against—rather than a source of rights for—government.”).

62. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring). In *Summum*, Justice Stevens argued that “[t]o date, [the Court’s] decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.” *Id.* Justice Souter also described the government speech doctrine as “recently minted” in his separate concurrence. *Id.* at 1141 (Souter, J., concurring in the judgment).

63. 544 U.S. 550 (2005).

64. *Id.* at 559 (“We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.”).

65. *Id.* at 562.

66. *Id.* at 570 (Kennedy, J., dissenting).

subsidies.”⁶⁷ Thus, Justice Kennedy’s and Justice Souter’s objections are that it is not plausible, in a case of targeted taxation, for government to claim the speech as its own. Only when government speaks properly in its own name can it exercise so much latitude.

The current Supreme Court’s posture seems to be that government as speaker can say what it wishes—with a few caveats. Justice Alito’s majority opinion in *Sumnum* pulls together the current wisdom on government speech nicely: “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”⁶⁸ Therefore, a government entity “‘is entitled to say what it wishes’”⁶⁹ and “to select the views that it wants to express.”⁷⁰ Invoking Justice Scalia’s concurrence in *National Endowment for the Arts v. Finley*, Justice Alito wrote that “[i]t is the very business of government to favor and disfavor points of view.”⁷¹ The *Sumnum* Court also invoked *Johanns*: “[W]here the government controls the message, ‘it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources.’”⁷² That is, when government “‘enlists private entities to convey its own message,’”⁷³ government is free to advocate—so long as it comports with the Establishment Clause (as if there is clear agreement on what it means to comport).⁷⁴ Justice Alito adds that “[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice,”⁷⁵ so that, for instance, if Congress spoke clearly, Executive Branch officials might be barred from particular kinds of advocacy with public monies.⁷⁶ Apart from these limitations, matters are in the hands of the electorate.⁷⁷

67. *Id.* at 571 (Souter, J., dissenting). Justice Kennedy joined this dissent. For these dissenters, the “government may not force targeted individuals to pay for others to speak.” *Id.* at 573.

68. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1131 (2009).

69. *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

70. *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998)).

71. *Id.* (quoting *Nat’l Endowment for the Arts*, 524 U.S. at 598 (Scalia, J., concurring)).

72. *Id.* (quoting *Johanns*, 544 U.S. at 562).

73. *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

74. *See id.* at 1131–32.

75. *Id.* at 1132.

76. It is not clear to me what barriers erected through historical practice would withstand the government speech doctrine.

77. *Sumnum*, 129 S. Ct. at 1132 (“If the citizenry objects, newly elected officials later could espouse some different or contrary position.” (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000))).

Government funding that crosses boundaries previously erected or suggested by Establishment Clause precedent seems now to be treated as the nearly uncontested privilege of government as speaker. Justice Kennedy would seem to believe that, in *Summum*, Justice Alito correctly designated government as the proper speaker since he neither concurred nor dissented.

One can only wonder whether, after *Summum*, we are all post-structuralists now. Did Justice Alito manage to get every member of the Supreme Court except Justice Souter to join in the *Summum* opinion only by multiplying the plausible meanings of a Ten Commandments monument erected by the Fraternal Order of Eagles? Comparing the monument in question in *Summum* to the Greco-Roman mosaic of the word “Imagine,” erected in Central Park in memory of John Lennon, and quoting the lyrics of Lennon’s song in full,⁷⁸ Justice Alito asks a question: What is the message? He argues the following:

[T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. . . .

Contrary to respondent’s apparent belief, it frequently is not possible to identify a single “message” that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.⁷⁹

Only by escaping the possibility that government has a message, or that government has agreed to convey some donor messages but not others, does the Court appear to dispose of “the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”⁸⁰ It seems quite curious that if monuments have multiple

78. *Id.* at 1135 & n.2 (quoting JOHN LENNON, *Imagine*, on IMAGINE (Apple Records 1971)).

79. *Id.* at 1135–36.

80. *Id.* at 1134. In *Van Orden v. Perry*, Justice Breyer notes in his concurrence that the Fraternal Order of Eagles, “a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment). As noted by Justice Scalia in his concurring opinion in *Summum*, the monument at issue in *Summum* was approximately the same vintage. *Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring).

messages and monuments' texts convey multiple messages not dependent on the author, the artist, the donor, or the government, that something similar could not be said of other texts—say, the Constitution.⁸¹

The irreducible Establishment Clause barrier to government action as funder or legislator is that government may not establish a national religion by law.⁸² Of course for most Supreme Court Justices, the barrier has been higher than this since *Everson v. Board of Education*,⁸³ but it is no longer clear how high the barrier is, especially with new Justices joining the Supreme Court since the death of Chief Justice Rehnquist, the departure of Justice O'Connor, and the recent departure of Justice Souter (who would uphold higher barriers than most of his colleagues). For Justices Scalia and Thomas, it has been clear that “‘the minimum requirement of neutrality is that a law not discriminate [against religion] on its face.’”⁸⁴ Justice Kennedy joined this reasoning in “upholding aid that is offered to a broad range of groups or persons without regard to their religion.”⁸⁵ If the wall of separation ever successfully barred direct government funding of religious organizations, the requirement of neutrality as currently understood does not, and may even require government to include religious organizations in funding programs that serve secular purposes.

81. It would be quite remarkable if original public meaning Justices and textualists would want to go down this (post-structuralist) road when discussing public monuments, which is surely why Justices Scalia and Thomas make the specific point in their *Summum* concurrence, embracing the late Chief Justice Rehnquist's language in *Van Orden*, that the “Ten Commandments ‘have an undeniable historical meaning’ in addition to their ‘religious significance.’” *Summum*, 129 S. Ct. at 1140 (quoting *Van Orden*, 545 U.S. at 690 (plurality opinion)).

82. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) (discussing James Madison's views on the establishment of a national religion and arguing that Madison did not see the First Amendment “as requiring neutrality on the part of government between religion and irreligion”).

83. 330 U.S. 1 (1947).

84. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).

85. See *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion) (“If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”). In her concurrence in the judgment, Justice O'Connor sparred with Justice Thomas over what she saw as his abandonment of the direct versus indirect aid distinction and for writing an opinion of “unprecedented breadth.” *Id.* at 837 (O'Connor, J., concurring); cf. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (“[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice”) (internal citations omitted).

What would it mean to violate the Establishment Clause using the government speech doctrine? The Supreme Court insists that government is permitted to advance viewpoints when it speaks, and it looks as if advancing “ideas,”⁸⁶ such as the appropriate use of faith-based initiatives in public programs, is protected against most Establishment Clause challenges. Government as funder is likewise permitted to promote specific aims, and funding these aims—as in the case of funding conferences and workshops to encourage and to help prepare funding proposals from faith-based groups—also seems to be protected against most Establishment Clause challenges.⁸⁷

The Establishment Clause issues raised here are more complicated than the current Supreme Court seems to want to consider. When government funds faith-based initiatives, is government the speaker?⁸⁸ When government funds actors and organizations in the “private” sector to perform tasks and services that government might have undertaken itself—whether it be running prisons or schools, contracting operations in Iraq, or providing community social services—what constitutional standards govern the actions and expressive activities of these entities? Are they governmental actors, merely private ones, or something in between?⁸⁹ What kind of oversight may government exercise, if any?

Another Establishment Clause complication is illustrated in the matter of abortion counseling. With parental consent provisions in state abortion statutes, Helena Silverstein has recently documented how judicial bypass provisions are frequently abused by members of the bench, who may compel minors to submit to religious counseling

86. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 616–17 (2007) (Kennedy, J., concurring).

87. It is also worth noting that the Supreme Court considers money to be speech, as in the line of cases concerning campaign expenditures. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (plurality opinion) (finding that a Vermont statute that limited campaign expenditures violated the Speech Clause); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam) (“Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.”). Justice Kennedy has been particularly vocal in arguing that campaign contributions are also core political speech and has insisted upon the abolition of the distinction between contributions and expenditures. *See, e.g., Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406–10 (2000) (Kennedy, J., dissenting).

88. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (arguing that the First Amendment should recognize a category of mixed speech because of the problems inherent in the First Amendment’s dichotomous characterization of speech as either purely private or purely governmental).

89. *See id.* at 608, 626–40 (noting the lack of judicial recognition for mixed speech and suggesting a framework for analyzing issues of mixed speech).

from pro-life evangelicals.⁹⁰ She argues that judges make calculated efforts to convey their religious views and to persuade minors to carry fetuses to term.⁹¹ If this is not an Establishment Clause issue, is it because the young women were not ultimately compelled to deliver babies they wished not to have? Or are these not Establishment Clause issues because their cases had become moot if they could not obtain a judicial bypass and did not or could not obtain parental consent? Although Alabama Chief Justice Roy Moore's refusal to remove the Ten Commandments from his courtroom created high-drama Establishment Clause media coverage a few years ago,⁹² why are we more concerned with stone tablets and framed displays than with the proselytizing of minors by government officials or their surrogates? Because judges may have outsourced some of the counseling so that it did not take place in the courtroom, does this save religious counseling from the same kind of infirmity that doomed a nondenominational prayer at the high school graduation in *Lee v. Weisman*?⁹³ In the case of compelled pro-life counseling, is it unlikely that government-sponsored speech, even if performed by others, represents an establishment?

The trajectory of First Amendment jurisprudence seems to silence the kinds of Establishment Clause challenges that might have been posed by the activities of the White House Office of Faith-Based and Community Initiatives or by the organizations funded by the White House under this program. If taxpayers are ultimately barred from having standing to challenge alleged Establishment Clause violations caused by government taxing and spending to support religion, do the interests and prerogatives of government as speaker or government as funder then ultimately trump the "ideological" or "psychological" injuries of disgruntled citizens?

If few or none can conceivably raise Establishment Clause challenges to government spending programs or government speech activities, then short of government's establishment of a national church, the Establishment Clause could be rendered nearly as irrelevant to the Constitution as the Privileges or Immunities Clause of the Fourteenth Amendment. For good or ill, the Establishment Clause would then be

90. HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* 97–99 (2007).

91. *Id.* at 97–99, 115–16, 130.

92. See, e.g., Jeffrey Gettleman, *Alabama Panel Ousts Judge over Ten Commandments*, N.Y. TIMES, Nov. 14, 2003, at A16 (providing background information on this event).

93. 505 U.S. 577 (1992). Are female minors who are seeking judicial bypass so very different from impressionable students who do not want to skip their high school graduation?

largely left to the political process.⁹⁴ The government speech doctrine, First Amendment case law on government as funder, and the current reading of the Establishment Clause are combining into a perfect storm. While government may not have formal speech rights, it has enormous speaking privileges, and the Supreme Court is closing off avenues through which citizens may make First Amendment appeals against such speech or against such funding. Indeed, when one looks at *Hein, Summum*, and the Establishment Clause, it appears as if many citizens stand to lose a First Amendment battle with the speaking and funding privileges of government.

94. See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”).