THE GOVERNMENT SPEECH-FORUM CONTINUUM: A NEW FIRST AMENDMENT PARADIGM AND ITS APPLICATION TO ACADEMIC FREEDOM

WAYNE BATCHIS[1]

1. Director of Legal Studies and Associate Professor of Political Science, University of Delaware. Ph.D., Johns Hopkins University; J.D., University of Pennsylvania. I am grateful to the organizers of and participants in the Eight Annual Constitutional Law Colloquium in Chicago where I received excellent feedback on the ideas that generated this paper. I am especially indebted to Helen Norton for her thoughtful close reading of an earlier draft of the article.

I.
INTRODUCTION

In late 2017, two legal giants sparred on the virtual pages of Vox over the First Amendment status of academic freedom. To Robert Post, former Dean of Yale Law School, the conclusion was rather straightforward: there is simply no constitutional freedom of speech on state campuses.[2] To Erwin Chemerinsky, Dean of Berkeley Law School, Post's conclusion was sorely mistaken: First Amendment law "is clear that . . . faculty [may not] be punished for the views they express."[3] How can two of the most preeminent First Amendment scholars stand in such stark contrast on a core issue of basic importance? Their disagreement turns on one of the central conundrums of First Amendment law: when the government acts (here in the form of a state university) it must invariably use its discretion to decide which messages it wishes to convey and which messages it would like to avoid because they run counter to its mission or goals. As Post reasonably asserts, "Universities, public or private, could not function if they could not make judgments based on content."[4] That said, courts have long accepted that the First Amendment has a role to play when the government makes public venues available for expression,[5] when it supports expression with public money,[6] when it dictates what books might appear in a public school library,[7] when it hires and fires its own employees,[8] and in many other instances in which the government must otherwise use its discretion. Hence, Chemerinsky's response to Post: "It is a logical fallacy to say that because basic free speech principles sometimes do not apply on campus, they must never apply."[9]

The U.S. Supreme Court has not definitively resolved whether academic freedom is protected by the First Amendment. I argue in this piece that the dilemma in fact encompasses much more than

2. Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, Vox (Dec. 31, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests [https://perma.cc/2XB7-3UA7].

3. Erwin Chemerinsky, *Hate Speech is Protected Free Speech, Even on College Campuses*, Vox (Dec. 26, 2017), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest [https://perma.cc/YNY6-NECF].

4. Post, *supra* note 2.

5. Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

6. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

7. Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

8. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

9. Chemerinsky, *supra* note 3.

academic freedom. There is a large doctrinal blind spot between the government-as-speaker and the government-as-the-creator-of-public-fora (venues for others' speech). This blind spot obscures a significant swath of First Amendment law. Up to this point, this body of law has not been tied together. A broad range of First Amendment questions remain unmoored, relegated to ad hoc resolution or ill-fitting doctrinal classifications. The purpose of this article is to reassess an inherent and unresolved tension in First Amendment law between the government's need to control its own message and the expressive constraints it imposes on those it controls. I assert that there is a better way to manage this tension. It may be reconceptualized as a spectrum that encompasses most, if not all, government-related speech and speech facilitation: a government speech-forum continuum.

This Article begins by setting the stage, framing the broad issue of expression-related government activity by reference to a narrow one: how the Supreme Court's First Amendment jurisprudence has addressed public employee speech, and the implications for academic freedom. Next, I describe the First Amendment puzzle I seek to resolve and provide a new synthesis of what has been understood by the Court as two discrete doctrinal categories: *government speech* and the *public forum*. This is followed, in turn, by three sets of illustrative examples: an exploration of public forum cases that would have benefited from a concomitant government speech analysis; an examination of government speech cases in which the public forum doctrine is also relevant; and cases in which the Court largely failed to utilize either doctrine, but could have advanced clarity and doctrinal consistency by doing so. This Article then provides a more in-depth treatment of one such area in which the Court has declined to rely upon either government speech or the public forum: public employee speech. This leads to an exploration of how a reconceptualized understanding of public employee expression—utilizing the government speech-forum continuum framework—might apply when the public employee at issue is a college professor at a state university. I conclude by examining the deeply-rooted ideas behind academic freedom and ultimately determine that most state faculty expression should be treated as a limited public forum. When a public university professor speaks to his class or publishes the results of his research, the venue for his expression is a limited public forum—implicitly established by the state for certain limited purposes. In contrast, if that professor were instructed to administer or declare a particular university policy, this might reasonably be understood as government speech.

II.
AN UNRESOLVED QUESTION

Just over a decade ago, in *Garcetti v. Ceballos*, the Supreme Court clarified the breadth of free speech rights enjoyed by public employees under the First Amendment. The answer, to the consternation of some, was not very broad. Indeed, as many courts and scholars have acknowledged, the 2006 decision "changed the law."[10] The Court converted what had been a case-specific balancing test to determine whether a public employee's speech was protected into a less speech-protective black-or-white rule. It held: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[11] While some benefits adhere to clarity in constitutional adjudication, the implications of this new rule were discouraging to proponents of broad constitutionally-protected academic freedom for faculty at state universities.

Nevertheless, for those concerned that the application of this principle to public higher education would mean the obliteration of core principles of academic freedom—and the longstanding assumption that the First Amendment plays a role in safeguarding the expressive freedom of faculty—there was a narrow ray of light. A few short lines of dicta in Justice Kennedy's majority opinion suggested that the Court was not yet deciding whether its analysis in the case "would apply in the same manner to a case involving speech related to scholarship or teaching."[12] Since 2006, much scholarly and judicial ink has been spilled wrestling with the questions the Court seemed to subtly invite: whether *Garcetti's* straightforward test should apply to faculty employed by state colleges and universities; if not, why not; and, if a different test is to apply in the academic context, what alternative test is appropriate. There is currently a circuit split on the matter, with some courts finding a straight reading of *Garcetti* to apply to faculty speech and at least two circuits disagreeing.[13] The doctrinal debate seems to turn pri-

10. Demers v. Austin, 746 F.3d 402, 410 (9th Cir. 2014); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech To Protect Its Own Expression,* 59 DUKE L. J. 1, 30 (2009).

11. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

12. *Id.* at 425.

13. *See* Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008); *Demers*, 746 F.3d at 406; Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011).

marily on the question of whether there is, or should be, a *Garcetti* exception for scholarship and teaching.

In this Article, I argue that this way of framing the issue fundamentally misconceives the trajectory of First Amendment law and is less than ideal, regardless of how it is resolved. The academic speech dilemma posed by *Garcetti* should be understood in the context of a broader body of case law related to government-sponsored speech. Granted, the evolving web of First Amendment doctrine is notoriously complex and some have gone as far as to characterize it as distressingly incoherent.[14] First Amendment law is, in part, a story of a Court making the best of a bad situation, struggling to resolve vexatious free speech questions rife with deep internal tensions—a jurisprudential realm lacking in easy answers and marked by unsatisfying tradeoffs. Nonetheless, when one pulls back from decades of arguably less-than-consistent case-by-case resolution, one can see order in the doctrinal chaos. Sensible patterns begin to emerge, and the Court gradually begins to tie together the doctrinal loose-ends. This, I contend, is precisely what is occurring in the awkward continuum of settings in which the government plays a key role in the speech conveyed: conditions in which the government might itself be said to be transmitting a message, controlling a message, shaping or encouraging (through subsidies or other means) certain messages and not others, or in some sense simply facilitating speech.

The problem in First Amendment doctrine inheres in the fact that, in a democracy such as ours, government is ubiquitous. It intrudes into all spheres of life, and, at times, has very specific ideas to convey in doing so. It frequently enlists individuals and institutions to propagate particular messages both directly and indirectly through subsidization of particular activities. In other instances, government takes responsibility for establishing and regulating the social infrastructure that makes free interpersonal interaction possible and effective in the first place. It acts, in other words, as a speech facilitator. However, even when it does so, it often limits or defines in various ways the type of expression it intends to facilitate. In between, there is a mind-boggling array of variations as to how these roles may play out, and how they may blend together, each with different First Amendment implications.

This Article seeks to conceptualize expression-related government activity as a spectrum or continuum rather than as rigid doc-

14. *See generally* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

trinal categories. It uses this framework to explore the question of academic freedom at state institutions of higher learning. Although the doctrinal concepts of "government speech" and "public fora" serve important functions, the government, of course, is not a person. To say that the government "speaks" is a convenient and useful fiction, but a fiction nonetheless. A government must speak through its agents. Whenever it does so, it affirmatively uses government resources to empower individual speech. The greater the extent to which the message of this individual speech is constrained, dictated, or circumscribed by the government, the closer we might say the expression moves toward the Court's doctrinal category of government speech. A public forum similarly entails an affirmative use of government resources to empower individual speech. However, even a traditional public forum, a locus of free expression like a public park, is never fully "public." To some degree, speech that occurs there is necessarily constrained by government, if merely by virtue of the very decision to initially establish a two-acre park rather than a four-acre park, thus permitting a protest of only half the number of participants otherwise possible. The looser the constraints associated with the governmental action or law—based on the text of a law itself, the real-world application, the context, or the social norms or traditions that attach to the particular expression—the more likely a court would justifiably apply public forum analysis. Yet, as we shall see, even under forum analysis, First Amendment protection varies depending upon the nature and context of the forum. I will argue that academic speech falls along this continuum and is well suited for the limited public forum variant of forum analysis.

III.
TWO POLES ON THE GOVERNMENT SPEECH-FORUM CONTINUUM

We might imagine two poles, one at each end of a continuum. At one pole is the 'government-as-speaker' (justifying use of the government speech doctrine) and, at the other, the 'government-as-speech-facilitator' (calling for the use of the public forum doctrine). What has become clear from the Court's evolving freedom of speech jurisprudence is that the First Amendment plays almost no role at the former pole, and a critical one at the latter. However, what Court doctrine has over time come to characterize largely as binary is, in truth, a matter of degree. Utilizing the Court's established doctrinal framework, I argue that a large segment of the Supreme Court's First Amendment case law should, in fact, be

rationalized as falling somewhere along a continuum. Conceptualizing expression-related government activity as a continuum, rather than a dichotomy, allows for a more nuanced and frank assessment of the relative First Amendment stakes involved. This approach offers clarity in a much larger class of expression than is currently understood to fall within the doctrinal realm of either government speech or forum analysis. This continuum is broad enough to encompass categories such as public employee speech, government-subsidized speech, and government programs that confer select benefits to speakers, such as trademark registration. This Article will conclude with the following question: where along this continuum does speech by faculty at state institutions of higher learning fall? But, before I arrive at this question, we must first explore how, and why, this continuum offers such a helpful explanatory rubric for a large body of First Amendment law, much of which fails to directly—or implicitly—rely upon such an overarching conception.

The pole of "government-as-speech-facilitator" actually has a long-standing historical, doctrinal legacy from the standpoint of the First Amendment (which itself only became truly invigorated approximately 100 years ago, when the Supreme Court first begin to wrestle with and acknowledge the First Amendment's role in protecting free expression). The public forum doctrine sprang to life in 1939 and was, in its most basic sense, a simple recognition that important speech has traditionally occurred in certain types of public places. The Court, in an opinion written by Justice Owen Roberts, explains that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[15] Thus, Roberts asserts that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . must not, in the guise of regulation, be abridged or denied."[16] It is a proposition that might appear intuitive at first glance. The founding fathers could not have been clearer about the primacy they placed on expressive freedom. It would indeed be ironic if the mere fact of government ownership and control over traditionally expressive public places could justify shutting down free expression or, perhaps even more troublingly, justify acts of blatant content and viewpoint discrimination that would stifle some messages and favor others. If free expression is truly a central value

15. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

16. *Id.* at 515-16.

of American democracy, venues where so much critical speech has historically occurred must be protected. The public forum doctrine was born of this compelling rationale.

It would gradually become apparent, however, that the seemingly straight-forward nature of the public forum principle—applying to quintessential public places like a town square, a sidewalk, or a city park—may, in fact, be deceptive. As a First Amendment doctrine, the public forum guarantee is a much more radical entitlement than one might expect. Most First Amendment law takes the form of a negative right: a freedom *from* government. After all, the language of the First Amendment is explicitly restrictive; it tells us that "Congress shall make no law . . . abridging the freedom of speech,"[17] not that "Congress *must* make taxpayer-funded parks and sidewalks available for an unlimited range of expression by private individuals." The public forum doctrine effectively established an affirmative governmental obligation to serve as a speech-facilitator. In other words, the doctrine gave rise to the notion that the government, as a property owner, is in control of and responsible for financing and maintaining a public facility, yet simultaneously constrained by the First Amendment as to how the public facility may be regulated. On its face, this may not appear problematic. However, as we acknowledge that government must choose when, where, and what kinds of forums to establish, the questions become more complex. And as we move away from the relatively straightforward "quintessential" scenario, we find that there is a wide diversity of forums—owned by the government—in which the public, or select portions of the public, are permitted to speak in various ways and for various purposes. As we shall see, the Court has accommodated this complexity by adopting additional public forum categories, such as the designated and limited public forums.

Eventually, however, we must acknowledge the other end of the continuum: "government-as-speaker." Government is often charged with communicating what the law requires, such as a sign reading "Speed Limit 65," or with communicating policies the public desires, such as a cautionary television advertisement depicting a fried egg sizzling on a pan and warning, "this is your brain on drugs." Yet, in contrast with the longstanding public forum doctrine, the Court has only recently identified what has become known as the "government speech doctrine."[18] This doctrine, also like the public forum doctrine, may appear deceptively straight-for-

17. U.S. CONST. amend. I.

18. *See infra*. Part V.

ward: it simply asserts that the First Amendment does not act as an impediment to government expression.[19] And why should it? Lawmaking itself is about promoting a very specific vision of the public good. The government should not be required, for example, to run a supplementary advertisement attesting to the benefits of illegal drugs in response to the requests of those who would like it to convey these alternative ideas. The government may discriminate on the basis of content and viewpoint; it may choose one message and reject others.

But here again, complexity emerges. Delivering a governmental message means enlisting others to convey it. It may mean employing civil servants who will propagate the government's ideas. It may mean contracting-out the work to an artist to paint a patriotic mural in a public building, or paying an actor to perform at a public event, or providing a speaking fee to an inspirational self-help guru to raise the morale of government workers. In such circumstances, it is the rare case that government acts with pure, let-the-message-fall-where-it-may neutrality. In a democracy, the people elect individuals with particular messages to convey particular ideas. At the same time, the extent to which the content and viewpoint of government speech is strictly dictated when conveyed by agents of the state (if we are to refer to these actors as agents, which itself is contestable) varies. The government might pay an artist to paint that "Speed Limit 65" road sign or pay that artist to be an artist and produce artwork for the public good regardless of its content or viewpoint. Are both instances government speech? If the latter is not, what is it? My contention would be that it is closer to the public forum pole of our continuum.

Nonetheless, the Supreme Court has not characterized First Amendment matters as falling on a government speech-forum continuum. This is understandable. First Amendment doctrine evolves over time, and, as mentioned above, the very concept of a government speech doctrine is quite new. So what we find is that the Court sometimes classifies expression as government speech,[20] sometimes classifies a matter as a public forum issue, and sometimes sees neither.[21] It is now time to connect the dots. Understanding that a large subset of First Amendment cases in fact fall along this continuum would offer a number of benefits: it would promote clarity and consistency, help make sense of disparate case law and

19. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

20. See *infra* Part IV.A.

21. See *infra* Part IV.C.

jurisprudence that can seem to lack coherence, and facilitate a more nuanced doctrinal recognition of concomitant government speech and private speech interests.

Doctrinal principles and tests accumulate over time. This is for good reason. The Court must struggle with unanticipated variations on distinct First Amendment problems that appear to call out for new solutions. However, the resulting doctrinal clutter—what Schauer has referred to as doctrinal overlap—may ultimately produce greater inconsistency and confusion, and permit increased opportunities for results-oriented, doctrinal cherry-picking by judges.[22] I will begin by looking at three examples: cases in which the Court sees only a public forum, cases in which the Court sees only government speech, and instances in which it sees neither (but should). I will then address where academic speech by tenured professors should fall along this continuum.

IV.
PUBLIC FORUM CASES

A. Moving Beyond the Quintessential Public Forum and the Problem of Scarcity

In 1975 the culture wars were in full swing, and it is difficult not to see the decision in *Southeastern Promotions v. Conrad* in light of the dominant cultural conflict of the time. A theatrical production company sought to bring the controversial rock musical "Hair" to Chattanooga, Tennessee—a production that included nudity, vulgar language and significant sexual content.[23] The city denied the production use of a municipal theater. It reasoned that the musical "would not be 'in the best interest of the community.' "[24] In striking down the city's decision as a violation of the First Amendment, the Court was, on the surface, simply taking the next logical step in the quintessential public forum reasoning. As Justice Douglas put it, "[a] municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk."[25]

22. Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 267 (2015) ("Just as Karl Llewellyn famously observed that the selection between equally applicable but mutually exclusive canons of statutory construction might be the consequence of a judge's desired outcome rather than methodological preference, so too might the selection of a frame of doctrinal analysis be the consequence of a different kind of outcome preference.").

23. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 548 (1975).

24. *Id.*

25. *Id.* at 563.

Nevertheless, the inherent challenges of applying the public forum principle beyond the most obviously and traditionally public, open spaces quickly bubbled to the surface, and the problems were not just definitional. Although Justice Rehnquist, in dissent, rejected the majority's characterization of "a community-owned theater as . . . the same as a city park or city street,"[26] his view does not appear to be driven entirely by First Amendment minimalism—that is, a raw desire to restrictively cabin a protective First Amendment principle. To Rehnquist, there was a substantive difference between the quintessential public forum of *Hague* and the municipal theater in *Conrad*. Applying the same principles here as would apply in a public park might have absurd consequences. Why? A public theater "must of necessity schedule performances by a process of inclusion and exclusion."[27] Rehnquist asked, "May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come first served basis?"[28] Applying the public forum doctrine under these circumstances, in other words, "seems to give no constitutionally permissible role in the way of selection to the municipal authorities."[29]

In 1975, there was no "government speech doctrine" as we understand it today. The Court had not conceptualized government speech as its own First Amendment classification. But what Justice Rehnquist was essentially conveying was disagreement with the majority as to where Chattanooga's actions fall on the governmental speech-forum continuum. The City of Chattanooga was doing what governments do: it was using taxpayer money to promote a particular policy, establishing a venue for "productions suitable for exhibition to all the citizens of the city, adults and children alike."[30] In one regard, it was establishing a forum for public expression. The stage was to be used by a wide variety of theater companies, each with its own independent-of-government artistic voice. In another regard, the city, by making policy choices as to what range of uses were "suitable," was itself speaking. By making restrictive choices as to what kind of expressive activity would take place in the forum, the city was conveying its own distinctive message.

One might be tempted to retort that this is no continuum. It is black or white. For First Amendment purposes there either is a pub-

26. *Id.* at 570.
27. *Id.*
28. *Id.* at 572-573.
29. *Id.* at 573.
30. *Id.* at 569.

lic forum or there is not. The majority and the dissent simply disagree as to how 'public forum' should be defined. One might find Rehnquist's position to be persuasive because, with just one stage and 365 days in a year, a government that runs a theater must inevitably make choices—and choices require determining what speech stays and what speech goes. Thus, the argument might run, such a forum cannot be a true public forum in the same sense of a public park or sidewalk. However, this binary framing is neither an ideal doctrinal approach nor an accurate representation of reality.

The finite availability of a theater as a site of public expression may seem to distinguish it from a public park, but, upon reflection, the distinction is really a matter of degree rather than of kind. The geographic space in a public park is also finite and marked by potential scarcity; the ability to effectively convey a message and be heard or observed is dependent upon the density of people and volume of spoken expression taking place in the space at a single moment. Regulation of large crowds, including necessary caps on the number of individuals who may be present in a park at one time, requires government choice of what speech to allow and what speech to curtail. Under the Court's public forum doctrine, such regulation would need to be content and viewpoint neutral. But it cannot be the finite quality of the expressive platform that is the defining feature of a forum that is classified as non-public. All forums are ultimately finite. A more accurate characterization would be that there exists a governmental speech-forum continuum. Somewhere in-between 365 performances at a public theater by a diverse range of theatrical troupes who otherwise have little connection to the state, and one performance by a government employee reading from a script written by a government-employed playwright intending to further specific values, the expressive platform crosses from a public forum to government speech on the governmental speech-forum continuum. The objective here is not to specify precisely where this line should be drawn under all circumstances in which this continuum applies; this would be beyond the scope of this Article. The objective is simply to suggest that courts acknowledge the presence of this continuum, so they can more transparently flesh out, in a principled and consistent fashion, justifications for treating some speech as government speech and other speech as protected by a public forum.

B. Slippery Slopes, Doctrinal Nuance, and the Proliferation of Forum Classifications

One of the more common criticisms of the public forum doctrine, and the government speech doctrine as well, is the lack of a limiting principle. As dichotomous doctrinal categories, there is a temptation to utilize the classifications in areas where they arguably do not belong. Arron H. Caplan protests that "the public forum has been used for ill-fitting functions, much like using a hammer to drive screws or staples."[31] An overly expansive application of the public forum concept might mean that government is unreasonably thwarted from doing what it was elected to do: implementing policies with a particular viewpoint. Clearly, Justice Rehnquist felt this way about the Conrad Court's determination that the city of Chattanooga was constitutionally prohibited from allowing only family-friendly productions in its municipal theater. Parallel concerns, but with fears of the very opposite type of adverse consequence, have been expressed with regard to the government speech doctrine. Mark Strasser cautions "that the Court must offer meaningful limitations on what can be characterized as government speech before that exception swallows up many of the protections offered by the First Amendment."[32] In other words, a world in which government is ubiquitous, and in which vast quantities of government action are construed to be government speech, may be one with a diminished expressive public realm. However, unlike the prescription offered by these and other commentators, I would suggest that the solution is not to work to contain and cabin public fora and government speech as discrete doctrinal categories, but to be *more inclusive,* and acknowledge these concepts as the two poles of a broad governmental speech-forum continuum. The Court's gradual expansion of forum analysis—particularly the addition of the limited public forum concept—is a positive step in this direction.

The Court has not been blind to the incremental nature of government-controlled fora. As mentioned above, the Court over time carved out additional categories to accommodate variations among fora. The "nonpublic forum," "designated public forum," and "limited public forum" were eventually added to the Court's public forum doctrinal repertoire, which was initially limited to the

31. Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 660 (2010).

32. Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 Hastings Const. L.Q. 37, 38 (2016); Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 284 (2015).

quintessential (traditional) public forum established in *Hague*. This nuanced expansion of the forum regime is largely consistent with the more capacious continuum theory presented here. However, as many commentators have pointed out, the Court has, unfortunately, been less than consistent with its use of public forum terminology, as well as the tests that govern the respective categories.[33] The concept of a limited public forum shifted without acknowledgement by the Court sometime around 1990 from a category subject to the same First Amendment standard that applies to a traditional public forum to the test for a nonpublic forum.[34] Lower courts and scholars even differ on the number of doctrinally significant tiers that exist. Some reduce the number to as few as two, while others insist on the significance of the four discrete categories mentioned above.[35] The big picture, however, is that the Court has come to accept the idea that a government forum is a variable First Amendment concept that extends well beyond public parks and real property: a government may own and control property that is not open to the public for expression, identified as a "nonpublic" forum; it may intentionally create a new public forum that is not traditional in form, which would be deemed a "designated" public forum; and it may establish a forum that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects,"[36] referred to as a "limited" public forum.

While some may bemoan the increasing complexity of the doctrine,[37] its expansion is likely reflective of a growing awareness of the ubiquity of government, and the need to maintain freedom of expression even in settings where government plays a significant role in structuring opportunities for communication. One scholar defined a forum as "a platform for expression *by persons other than the owner of the platform*."[38] And while this definition is not a bad one, if we are discussing *government* fora we might be wary of the latter clause (emphasis added). Determining whether a speaker is "other than" the government will almost always be an exercise in line-drawing by courts. The more the forum is regulated, the range of expression constrained, the message dictated by government, the more a speaker resembles the government itself, and vice versa. A

33. Caplan, *supra* note 31, at 653.

34. *Id.* at 654.

35. *Id.*

36. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 n.11 (2010).

37. *See generally*, Caplan, *supra* note 31, at 647.

38. *Id.* at 655 (emphasis added).

continuum approach captures both the reality of government speech and an increasingly complex public forum doctrine in a single theory.

C. The Limited Public Forum: A Middle Ground along the Government Speech-Forum Continuum

Upon reflection, all government speech is ultimately speech by proxy—someone who is given authority by law to speak on behalf of the government. As Schauer observes, "[b]ecause neither the federal government nor the states have a mouth with which to speak nor the fingers with which to wield a pen or tap a keyboard, . . . the government must speak through its employees, all of whom enjoy First Amendment rights in their individual capacities."[39] Thus, where government controls who may appear on stage in an important debate between political candidates,[40] or structures and finances a system of student organizations at a state university,[41] or allows drivers to express themselves on their government issued license plates,[42] or subsidizes legal representation by attorneys who will use their professional discretion and judgment to express a legal argument,[43] forum analysis is critical. It is essential if we are to have an honest discussion of the many varied ways government acts to promote policy messages, while at the same time not ceding to government complete freedom to deny free expression just because those who seek to express themselves do so in the context of a government program, institution or regulation. The Court's relatively recent creation of the limited public forum concept is helpful in this regard. Although it has, up until now, only been used in a narrow set of circumstances, the limited public forum has the potential for a broader application. For some speech issues that fall along the continuum, this doctrinal formulation might be harnessed to strike an appropriate middle ground between a traditional public forum in which maximal First Amendment rights are afforded to individual speakers and the complete absence of First Amendment rights afforded to private parties where it is the government that is deemed the speaker.

39. Schauer, *supra* note 22, at 278.

40. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

41. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Christian Legal Soc'y Chapter of the Univ. of Cal., 561 U.S. 661 (2010).

42. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250-53 (2015).

43. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536 (2001).

A Registered Student Organization (RSO) program, in which a state institution confers benefits to school-approved student groups, may seem at first glance to be quite different from the traditional image of a public forum described by Justice Roberts in *Hague*. However, the Supreme Court has identified such a program as a *limited* public forum.[44] In *Christian Legal Society v. Martinez*, the Court addressed the constitutionality of a state law school's RSO policy. Hastings Law School conditioned official recognition of student groups on their agreement to accept "all-comers," which meant denying recognition to a religious organization that turned down students who did not share their beliefs about homosexuality.[45] By its very terms, the program established by the public law school in California had a relatively narrow purpose, "encourag[ing] students to form extracurricular associations that 'contribute to the Hastings community and experience.' "[46] This is not a public space *for all* to say virtually *anything* like an urban park. Its government-designed intent was to promote a forum for Hastings-related student expression that would support the underlying educational mission of the law school. Along with such status, official student organizations were afforded "channels of communication," such as an official Hastings organization email address and access to bulletin boards, a weekly newsletter, use of law school facilities, and an annual "student organizations fair."[47]

This broadly inclusive conception of the public forum was not new. Fifteen years earlier, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court similarly classified a student activities fund at a state institution in Virginia as a limited public forum. The Court quickly dispelled any doubt that even something as intangible as a monetary fund may constitute a public forum for First Amendment purposes. Justice Kennedy explained that the student activities fund "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."[48] In *Rosenberger*, the Court struck down as unconstitutional a policy excluding religious activities from fund eligibility. As a limited public forum, the university was not permitted to discriminate against pub-

44. Christian Legal Soc'y Chapter of the Univ. of Cal., 561 U.S. 661 (2010).

45. *Id.* at 668.

46. *Id.* at 669.

47. *Id.* at 669-670.

48. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

lications with a religious viewpoint while reimbursing printing costs for organizations expressing other non-religious perspectives.[49]

Although the Court has not fleshed out in all particulars when and where a limited public forum designation is appropriate, it has provided this definition: a limited public forum exists when governmental entities open property "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[50] As for its constitutional implications, in a limited public forum the government has greater, but far from complete, freedom to restrict speech: it may restrict both the content of expression and the identity of speakers allowed to utilize the forum, but may not impose restrictions that are unreasonable or viewpoint-based.[51] This test stands in contrast with the more rigorous traditional public forum standard, which prohibits restrictions that are content-based, are not "narrowly tailored to serve a significant government interest, [and which do not] leave open ample alternative channels of communication."[52] As we shall explore later, the middle-ground status of a system of RSOs is appropriate for the very same reasons it is arguably appropriate for public educational institutions at large. As Justice Stevens explains, "[t]he campus is, in fact, a world apart from the public square in numerous respects, and. . .[all] organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role."[53] As with the opinions a professor states in her classroom, academic freedom may extend to espousing a controversial viewpoint that is strongly opposed by the public at large, while at the same time not encompassing content that is irrelevant to the subject matter and scholarly discipline she was hired to teach and study. But before jumping ahead to the topic of academic freedom, let's turn first to circumstances in which the public forum doctrine was *not* utilized by the Court, and where, in its place, the government speech doctrine was utilized.

49. *Id.* at 837.

50. Christian Legal Soc'y Chapter of the Univ. of Cal., 561 U.S. at 679 n.11. (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).

51. *Id.* at 679.

52. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

53. *Christian Legal Soc'y Chapter of the Univ. of Cal.*, 561 U.S. at 702 (Stevens, J., concurring).

V.
GOVERNMENT SPEECH CASES

If there is scholarly agreement regarding the government speech doctrine, one consistent theme is that it is largely underdeveloped—Helen Norton has called it a doctrine "in transition."[54] This is hardly surprising; what is typically considered the seminal government speech case, *Rust v. Sullivan*, was decided just over twenty-five years ago, and it was only identified as a "government speech case" *retrospectively*.[55] It was 2001 when the Supreme Court explicitly labeled the decision as a government speech decision, representative of a distinct First Amendment doctrine.[56] What perhaps *is* surprising is that it took the Court so long to identify government speech after the Court first acknowledged the public forum doctrine more than three-quarters of a century ago. Government speech is effectively the limiting principle on that earlier doctrine. Nonetheless, in the past two decades, the Supreme Court has repeatedly affirmed that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[57] From advertisements for beef,[58] to permanently installed statues in public parks,[59] to license plates bearing a prescribed set of messages,[60] the government speech doctrine permits government to speak with one voice, without any First Amendment requirement that it welcome alternative viewpoints.

Rust involved a federal program that extended funds to health care providers to offer certain family planning related services.[61] The law stipulated that the funds were not to be used "in programs where abortion is a method of family planning."[62] At issue in *Rust* were the regulations promulgated to clarify how this prohibition was to take effect. These regulations explicitly prohibited "counseling, referral, and the provision of information regarding abortion as a method of family planning."[63] To the dissenters, this was noth-

54. Helen Norton, *Government Speech in Transition,* 57 S.D. L. Rev. 421, 426 (2012); *see also* Strasser, *supra* note 32, at 38.

55. Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental,* 83 N.Y.U. L. Rev. 605, 612 (2008).

56. *Id.*

57. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

58. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

59. *See* Pleasant Grove v. Summum, 555 U.S. 460 (2009).

60. *See Walker*, 135 S. Ct. at 2246.

61. Rust v. Sullivan, 500 U.S. 173 (1991).

62. *Id.* at 178.

63. *Id.* at 193.

ing short of a "direct regulation of dialogue between a pregnant woman and her physician [with] both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy"[64]—a clear violation of elementary First Amendment principles. To the majority, it was what would become known as government speech. Perhaps there was no need to slap a doctrinal label on its rationale, because it appeared so self-evident. The rule the *Rust* majority articulated was deceptively straight-forward: "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 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 another."[65]

If this is to be seen as an early iteration of the government speech doctrine, it illustrates how much further the Court would need to move before it would fully flower. The Court was suggesting, perhaps somewhat disingenuously, that there was no viewpoint discrimination here. This was just a matter of a government choosing to fund one "activity" and not another. It just so happened that this "activity" involved paying professional health care providers to say certain things, but not others, even if in their professional judgment—and according to their "viewpoint"—they would best serve their patient by saying such other things. As the Court eventually settled into the idea of the government speech doctrine, it would do away with the pretense that there must be something "viewpoint-neutral" about government expression.[66] *Rust* would evolve into the outright, unapologetic acceptance that a government takes viewpoint-specific positions when it enacts policies. These policies will frequently take the form of speech: expression that is exclusive, and exclusionary.

The second point one might make is how easily the stated rule in *Rust* could be applied to virtually any public forum context, and how, if so applied, it would lead to holdings that directly contradict the outcome of the Court's public forum precedents, and, at the same time, potentially decimate the expressive freedom they protect. To illustrate this point, here is the *Rust* rule with *Conrad*-like

64. *Id.* at 204.

65. *Id.* at 193.

66. *See* Pleasant Grove v. Summum, 555 U.S. 460, 467-468 (2009) (A government is free "to select the views that it wants to express . It is the very business of government to favor and disfavor points of view.").

facts inserted in italics: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest [*such as a program intended to make theatrical productions more accessible to a community by establishing a municipal theater dedicated to wholesome family entertainment*], without at the same time funding an alternative program which seeks to deal with the problem another way [*such as the establishment of a municipal theater that may be utilized for a mix of provocative adult-themed musicals and wholesome family entertainment*]."[67] The doctrinal flip from public forum to government speech would appear to turn entirely on how one chooses to frame the government action at issue. And as a relatively new, underdeveloped doctrine, this choice does not appear to turn on a consistent, principled assessment of qualitative attributes.

The flip seems to apply just as neatly to a limited public forum context like that in *Martinez*. Imagine, for example, if a public law school—with the ostensible concern that too few legal resources redound to the benefit of poor and marginalized Americans as a result of an elite legal culture dominated by a conservative pro-business perspective—established a registered student organization program to address this "problem." Suppose further that it limits participation to student organizations that do not seek to promote capitalism and the free-market economy. In both this and the municipal theater case, under the *Rust* rule one could palatably argue that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."[68] This latter student organization hypothetical might seem far-fetched, but it is in fact remarkably similar to an illustration the *Rust* majority cites to support its rule. It explained that "when Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[69]

Is the majority in *Rust* thus reading the public forum doctrine out of the First Amendment? Not quite. In a short passage near the end of its opinion, the Court qualifies its newly articulated rule, explaining that the mere fact of government funding of a particular project is not "invariably sufficient" to allow for control of expres-

67. *Rust*, 500 U.S. at 193 (1991) (italicized bracketed language is mine).

68. *Id.*

69. *Id.* at 194.

sion "outside of the scope" of that project.[70] As an example of the type of circumstances in which, in contrast to the facts in *Rust,* government may *lack* the power to squelch particular speech, the court raises the public forum scenario, briefly alluding to the traditional public forum of *Hague* as well as the possibility of a designated public forum.[71] This nod to the public forum doctrine, however, begs the most important question: How do we know when we are dealing with a public forum? As Frederick Schauer explains, the "problem of framing in law often arises as a consequence of multiple doctrinal approaches being potentially applicable to a single event or problem. Such doctrinal multiplicity . . . appears especially salient with respect to the First Amendment."[72] Here, the question of definition could not be more high stakes. The very opposite legal consequence would likely result were a court to declare this program a public forum. One could conclude that funding a range of expressive activities between a doctor and patient looks quite a bit like funding a range of expressive student organizations—which would, two decades later in *Martinez*, be declared to be a limited public forum. Granted, the limited public forum concept would continue to evolve in this period, and the *Rust* Court was perhaps constrained by the then-narrower understanding of forum analysis. Nonetheless, instead of acknowledging that government speech and the public forum are two sides of the same coin and tackling head-on the definitional challenges involved in differentiating these two doctrines as dichotomous concepts, the Court dodged, and for years to come confusion would reign.

The rigidity that accompanies the bimodal, either-or approach to government speech continues to this day, at times making justices on either side of the government speech aisle look like partisans who willfully disregard the inevitable nuance involved. For example, in the closely contested 5-4 decision of *Walker v. Sons of Confederate Veterans,*[73] the majority presents its conclusion that a specialty license plate program in Texas is government speech as constitutional common sense. The Court upheld the constitutionality of a decision by the Texas Department of Motor Vehicles Board to reject a proposed specialty license plate design portraying a Confederate battle flag,[74] despite the fact that motorists could "choose

70. *Id.* at 199.

71. *Id.* at 200.

72. Schauer, *supra* note 22, at 266.

73. Walker v. Tx. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

74. *Id.* at 2253.

from more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for profit businesses."[75] Granted, the majority articulates many legitimate reasons why such a program should be treated as government speech. Justice Breyer tells us that "forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."[76] Yet, the majority's simplistic dismissal of alternative characterizations feels vaguely dishonest. Can we truly say with a straight face that individual members of the public do not also speak when they voluntarily opt to install a select message on the back of their vehicle from among hundreds of choices? While it may have been appropriate to ultimately treat this as government speech for First Amendment purposes, this is clearly expression that falls along a government speech-forum continuum. It has attributes of *both* a public forum and government speech.[77]

Unfortunately, the dissenters in *Walker* are equally simplistic in their characterization. Writing for four dissenting justices, Alito's alarmist opinion warns that "the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages."[78] According to the dissenters, denying the Confederate Veterans the ability to post their message constitutes "blatant viewpoint discrimination."[79] If we place the majority and dissent next to one another we begin to see the futile circularity of their dichotomous arguments. The more the government does what the dissent presents as a constitutional *wrong* (discriminating on the basis of viewpoint), the stronger the majority's argument becomes that it is a constitutional *right* (because this increased discrimination shows us that it is the government, not the public, that is speaking). Nonetheless, for purposes of this Article, *Walker* is an illuminating case and, perhaps, an encouraging one. First, the confrontation between the majority and dissent is perhaps

75. *Id.* at 2257.

76. *Id.* at 2250.

77. Professor Caroline Mala Corbin has referred to this as "mixed speech." *See* Corbin, *supra* note 55, at 607-08. Alternatively, Helen Norton describes this as "joint speech." *See* Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 66 (2015), https://www.stanfordlawreview.org/online/government-speech-and-political-courage/ [https://perma.cc/W58Y-KTUM].

78. *See Walker*, 135 S. Ct. at 2255-56 (Alito, J., dissenting).

79. *Id.* at 2256.

the Court's most vivid illustration to date of how a continuum approach might bridge the inevitable collision of two critically important doctrinal concepts. Second, although the Court does not present the public forum doctrine and government speech as two poles of a continuum, the majority and dissent do frame the issue as a question to be answered by either one of these two doctrinal concepts. Considering the Court's past failure to acknowledge the important relationship between these two doctrines, this is a rare and refreshing move toward clarity.

VI.
EVADING BOTH THE PUBLIC FORUM AND GOVERNMENT SPEECH

As much as *Walker* might, in some small way, represent progress in the Court's willingness to acknowledge the inherent tension between the public forum doctrine and the government speech doctrine—if only for the fact that the majority and dissent took opposing positions on this front—there is unfortunately a large set of outstanding decisions that evade the doctrines completely. This section addresses these cases: circumstances in which use of the public forum or government speech doctrines would be particularly helpful. It also provides an illustration of how utilizing a government speech-forum continuum in a broad range of First Amendment cases would help clarify the constitutional interests at stake.

A. Subsidies for Legal Expression

A decade after *Rust* was decided, the Court in *Legal Services Corporation v. Velazquez* would reach the very opposite holding as *Rust*, despite the case's strikingly analogous facts. The Court would also remain even more opaque about the doctrinal basis for its decision, and once again skirt the public forum issue. In *Velazquez*, the Court addressed a government program that provided funding, not for the services of health care providers, but for lawyers who would represent indigent clients who were determined to be ineligible, or no longer eligible, for welfare benefits.[80] Akin to the limitation imposed on doctors in *Rust* with regard to abortion counseling, in *Velazquez* the government program prohibited representation that sought to challenge "the constitutional or statutory validity" of the welfare law itself.[81] The *Velazquez* Court—while affirming *Rust* as

80. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 538 (2001).
81. *Id.* at 539.

standing for the principle that viewpoint-based government speech is to be free from First Amendment scrutiny—struck down the law on First Amendment grounds, insisting that the legal advocacy funded here was not to be regarded as government speech.[82] The reason: the "program was designed to facilitate private speech, not promote a governmental message."[83] Scalia in dissent finds this supposed distinction from *Rust* "so unpersuasive it hardly needs a response."[84] Unfortunately, Scalia's approach is no more satisfactory.

The reality is, in most circumstances in which a government funds professionals to provide services, whether they are lawyers, doctors, architects or visual artists, government is facilitating private expression. At the same time, as acknowledged in *Rust*, there is typically a defined scope to the work. The government, in attempting to achieve a particular policy objective, will allocate finite funds to achieve a finite purpose. This suggests that such professionals will typically not be permitted to use these funds for any expressive purpose they wish; they will be expected to use their expressive skills to achieve only certain ends. Scalia's *Velazquez* dissent errs in seeing pure dichotomy rather than an issue that must be settled along a continuum. The majority errs in failing to choose a clear doctrinal path at all and refusing to see this program as a kind of public forum. Instead, the majority flails about in multiple directions, tossing out a series of ad hoc reasons for striking down what it essentially upheld ten years prior in *Rust*.

Scalia's dissent in *Velasquez* maintains that, because the legislation in question operated as a subsidy program, it should survive First Amendment scrutiny. Scalia likes tidy doctrinal solutions. A law is either a "subsidy program" or a "regulatory program," he tells us.[85] "Regulations directly restrict speech; subsidies do not," he authoritatively opines.[86] But things are not quite as simple as Scalia suggests. Even he is compelled to recall in the very same paragraph the time the Court declared a selective subsidy a viewpoint-based violation of the First Amendment. Alas, Scalia has a distinction for us: that case, *Rosenberger v. Rector and Visitors of the University of Virginia*, was one of the rare circumstances "when the government created a public forum."[87] A more illuminating way of phrasing this explanation however, might have been: this was one of those the

82. *Id.* at 541-543.
83. *Id.* at 542.
84. *Id.* at 554.
85. *Id.* at 552.
86. *Id.*
87. *Id.*

rare circumstances where we, the Court, decided to call a government subsidy program a public forum.

Scalia's brief attempt to define what should or should not be placed within the judicially created classification of a public forum proves wanting. He explains that the restrictions imposed on this legal aid funding program suggest that this subsidy was not intended to "encourag[e] a diversity of views"—ergo it is not a public forum.[88] However, here we return to the same circularity problem discussed above with regard to *Walker*. Furthermore, we might query: why not classify this as a *limited* public forum? The very definition of a *limited* public forum incorporates intentional restrictions on the public platform. It is certainly true that lawyers are constrained by professional responsibilities that require certain speech and forbid other speech—but an inclusive definition of a limited public forum, consistent with *Martinez* and *Rosenberger*, could incorporate such constraints. Recall that the Court has defined the limited public forum as one "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[89]

Some limitation on the diversity of views does not preclude the existence of a public forum. Indeed, the Court's recognized category of "limited public forum" should suggest the very opposite. Oxford dictionary defines a *forum* as "a meeting or medium where ideas and views on a particular issue can be exchanged."[90] That diversity of views is simply limited to a certain range of subject matter or speakers, like the registered student organizations in *Martinez*. Attorneys have a vast array of communicative styles and approaches. When the government establishes a program that funds legal services, it subsidizes a platform that must accommodate a diversity of professional legal expression. Scalia has himself acknowledged in other contexts the degree to which legal representation can take a remarkably diverse range of forms. The Court has held that erroneously depriving a defendant of his choice of counsel cannot be considered a "harmless error," and Scalia reasons that "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of jury, presentation of the witnesses, and style of witness examination

88. *Id.* at 553.

89. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 n.11 (2010) (quoting Pleasant Grove City v. Summum, 555 U.S. at 470).

90. *Forum*, Oxford Dictionaries, https://en.oxforddictionaries.com/definition/forum [https://perma.cc/Z3LW-V82V].

and jury argument."[91] Scalia's rejection of forum analysis rests on shaky ground.

In *Velazquez*, Scalia further protests that the law struck down by the majority did not "discriminate on the basis of viewpoint, since it funds neither challenges to nor defenses of existing welfare law."[92] As to those two expressive positions, perhaps one might agree with his conclusion; however, one could just as easily argue that the true viewpoint discrimination lies in the way the law treats differently the viewpoint of attorney 'A,' whose professional opinion is that it is not in her client's interests to argue either in favor of, or against the legality of the welfare law, and attorney 'B,' who believes that it is. In other words, contrary to Scalia's claim, if *Velazquez* had been analyzed under the limited public forum rubric, one could certainly make the case that this selective limitation on funding was a restriction based on viewpoint, and therefore constitutionally suspect. And although the majority did strike down the law, it did not do so on this basis.

The majority quite rightly points out that the government funding scheme for legal services in *Velazquez* "facilitate[s] private speech."[93] Troublingly, however, it outright refuses to characterize the program as a type of public forum. The majority delicately explains that because "this suit involves a subsidy, limited public forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction."[94] Why the reticence? Perhaps it is for fear of the clunky bimodal doctrinal structure it has constructed over time, and not a truly principled belief that because this is a so-called *subsidy case* it can't possibly be a *public forum case*. The truth is there is little reason to treat them differently. Even a traditional public forum will necessarily involve a government subsidy, at minimum the opportunity cost of not selling off that public park or using it for some other non-expressive purpose. In most cases, public fora require regular infusions of taxpayer funds, whether it is for maintenance, gardening, policing or event planning. Of course, if from the First Amendment perspective, the public forum, or even the limited public forum, were not treated as such an either-or doctrinal proposition, but instead understood as part of a governmental speech-forum continuum, the Court could honestly appraise the situation and draw lines sensitive to the nature of the particular governmental action. Ultimately the Court would then begin to de-

91. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006).
92. *Legal Servs. Corp.*, 531 U.S. at 553.
93. *Id.* at 542.
94. *Id.* at 544.

velop greater consistency with regard to its treatment of governmental behavior that falls somewhere in the space between public forum and government speech. Unfortunately, government funding cases have instead come to form their own loose category of First Amendment analysis, injecting an unnecessary level of complexity and confusion into a range of cases that all comfortably fall somewhere along the government speech-forum continuum.

B. Subsidies for Artistic Expression

Another example of the Court's evasion of both government speech and public forum analysis is found in the 1998 case *National Endowment for the Arts v. Finley*. There the Court tentatively upheld a federal arts subsidy that required applicants for funds to be judged, not purely on artistic merit, but also through "consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public."[95] There was political context to this relatively innocuous-sounding criterion for allocating funds to artists: two controversial artists had provoked a contentious national debate after receiving government money, ultimately inspiring this newly amended law.[96] In *Finley*, the majority awkwardly dances around the question of whether the law is viewpoint-based, rejecting a claim that the amendment is facially unconstitutional, but reserving the opportunity to revisit the question as-applied "where the denial of a grant may be shown to be the product of invidious viewpoint discrimination."[97] Without grounding the case in the space between government speech and the public forum, the Court scrambles in the doctrinal ether. It rejects the respondent's argument that the funding program should be considered a limited public forum, unconvincingly distinguishing arts funding from the student activities fund in *Rosenberger* and the municipal theater in *Conrad*. It also declines to categorize the program as government speech.

As to its rejection of the limited public forum framing, the Court reasons that the "NEA's mandate is to make aesthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* – which was available to all student organizations that were 'related to the educational purpose of the University,' . . . and from comparatively objective decisions allocating public benefits, such as access

95. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 576 (1998).
96. *Id.* at 574-75.
97. *Id.* at 587.

to . . . a municipal theater."[98] Assuming that some student organizations could be deemed *not* to further the educational mission of a state university, is a governmental judgment of artistic excellence—which also involves a programmatic cut-off at which many will not receive government largess—truly distinguishable from a governmental judgment of educational purpose? Is the finite availability of a performance space for only 'x' number of performances a year truly distinguishable from the finite funds to be received by 'x' number of artists? If anything, the Court unwittingly makes the point that what distinguishes a government subsidy that is a limited public forum from one that is not is a question of degree—an insight that is deserving of, quite frankly, much more analysis than the paltry one paragraph the Court devotes to the question.

At the same time that the Court blithely rejects the characterization of this fund as a limited public forum, it also fails to place the program in the category of government speech. Perhaps this should not be surprising; *Finley* was decided only six years after *Rust*, and as mentioned previously, it would take a good deal of time for the Court to firmly establish that case as representative of a discrete government speech doctrine. However, although the Court does not use the phrase "government speech," it turns for support to many principles that would prove to be the hallmarks of the doctrine. It emphasizes the vast discretion the government has in choosing to fund a particular art project, and the large number of considerations it may weigh in the process.[99] The Court explains that, among other possible factors, these may include "the anticipated public interest in or appreciation of the work, . . . its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form."[100] All of these criteria would seem to involve choosing one policy goal over another. Government might choose to promote the expression of rural artists but not urban ones; or to promote art accessible to the intellectually disabled but not to the blind or to children under the age of six. Like in *Rust,* the government could be said to be speaking by defining the scope and priorities of the program. Indeed, the Court concedes that "absolute neutrality is simply 'inconceivable.'"[101] Yet the Court, *sub silentio,* rejects charac-

98. *Id.* at 586 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824 (1995)).

99. *Finley*, 524 U.S. at 585.

100. *Id.*

101. *Id.* (internal citations omitted).

terizing this program as government speech. Instead it simply avoids the hard doctrinal questions, tells us that, when it comes to spending, "Congress has wide latitude,"[102] and implies all the while that viewpoint discrimination is still not permissible. Yet it does not adequately explain why the discretion involved in arts funding is somehow not viewpoint discrimination.

Once again, the case includes a refreshingly candid retort by Justice Scalia, who has the temerity to call this what it appears to be on its face: a viewpoint-based program. However, Scalia's prescription is both unacceptably simplistic and troublingly speech-suppressive. To Scalia, resolving the case is as simple as distinguishing a regulation from a subsidy. As the latter, "Congress did not *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of the statute."[103] Scalia brushes aside the challenger's assertion that the arts funding program should be treated like the student organization fund in *Rosenberger*.[104] As Scalia sees it, the only potential offense here is that some artists will be deprived of the benefit of having the people "taxed to pay" them to produce their art.[105] "It 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."[106] The problem with this eminently reasonable sounding argument, however, is that its logic would apply to any public forum. One could just as easily assert that New Yorkers have the right to speak freely, but do not have the right to have the city pay for them do so in Central Park. All public fora are, in effect, government subsidies. One might acknowledge that the public forum concept has been inadequately theorized. However, at core the public forum doctrine rests on the premise that the government has an important role to play as an affirmative speech facilitator. Given government's critical and monopolistic role in many spheres, in certain settings the First Amendment must be understood not just as a negative right, but a positive right as well. In short, *Finley* and other so-called subsidy cases should be viewed through the lens of a continuum in which a public forum and government speech are simultaneously at play. This would better facilitate an honest assess-

102. *Id.* at 588.
103. *Id.* at 595.
104. *Id.* at 598.
105. *Id.* at 586.
106. *Id.* at 598.

ment of how the particular constitutional dilemma should be resolved.

C. Trademark Registration on the Continuum

Unfortunately, the Court's most recent First Amendment decisions continue to reflect a stubborn resistance to doctrinal clarity in this area. In *Matel v. Tam*, the Court summarily rejects not just claims that the expression at issue constitutes government speech, but also that it should be treated as a government subsidy or—again *sub silento*—as part of a public forum.[107] A clause which had been part of federal law since 1946 barred "the registration of a trademark which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[108] On the basis of this provision, an Asian-American band called "The Slants" was denied registered trademark status.[109] The Court, in striking down the provision of federal trademark law, seemingly refuses to ground its decision in any established doctrine whatsoever, other than a context-free assertion that viewpoint-based discrimination is impermissible.

The Court's unmoored posture is evident from the very beginning of the opinion, when it conclusively declares that the law "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expressed ideas that offend."[110] If the late Justice Scalia were still alive to read such a declaration, one could imagine a snarky and unequivocal retort: of course, no speech whatsoever is being "banned" by virtue of this law. "The Slants" could go on calling themselves "The Slants" without any governmentally imposed adverse consequences. Under this law, they were not even denied potential trademark status. They were merely denied some of the legal perquisites that accompany federal registration.[111]

Trademark registration, like a large class of government action discussed above, falls somewhere along the government speech-forum continuum. Unlike the classic 'negative' application of the First Amendment, in which the government seeks to punish or restrain individuals from speaking, this is about selectively conferring an expressive benefit. It is about a 'positive' right. Remarkably, the Court seems to conflate these two different strands of the First

107. Matal v. Tam, 137 S. Ct. 1744, 1755 (2017).
108. *Id.* at 1753 (internal quotation marks omitted).
109. *Id.* at 1754.
110. *Id.* at 1751.
111. *Id.* at 1752-53.

Amendment jurisprudence. Indeed, the very structure of the Court's opinion exposes this profound deficiency. Section III of the opinion begins the Court's analysis of the constitutional issue: "Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment."[112] It then proceeds to explain that "*at the outset*, we must consider three arguments" made by the government in defense of the law. In turn, it rejects these three arguments—government speech, government subsidy, and a new government-program doctrine—in subsections A, B, and C. The final section (IV) of the majority opinion is devoted to "confront[ing] a dispute between the parties on the question of whether trademarks are commercial speech"—which it tells us "it need not resolve. . . because the disparagement clause cannot withstand" even the relatively relaxed commercial speech review.[113] This is a sleight of hand. The commercial speech doctrine has been used in the classic 'negative' rights setting in which certain forms of advertising are prohibited, not when the government simply fails to make certain advertising more effective through a benefit conferred by its laws.

The *Tam* Court, in other words, tells us only what doctrines *do not apply*. Surprisingly, it does not devote a single section of its opinion to the alleged doctrine that *does* apply. The only reference to forum analysis is in a brief three-sentence paragraph in which it acknowledges that its limited public forum cases are "[p]otentially . . . analogous."[114] It is unclear why the Court does not take the next step and identify federal trademark registration as a limited public form, a classification that would seem on its face to be a good fit, and would serve to ground its otherwise untethered First Amendment analysis in preexisting doctrine. At best, perhaps the Court's decision stands for a kind of blanket rule against "viewpoint" discrimination. But the cases and language it cites for this proposition are all inapposite—applying to circumstances where speech is "prohibited,"[115] not where speech is discriminated against in the context of an affirmative government program. Broadly applying such a rule to positive rights would appear to make little sense, for it would make the limited public forum doctrine (which prohibits viewpoint discrimination) utterly superfluous. As previously discussed, the government selectively confers private expres-

112. *Id.* at 1757.
113. *Id.* at 1764.
114. *Id.* at 1749.
115. *Id.*

sion-related benefits all the time, whether it is in the form of a financial subsidy for democracy-promoting organizations or a college alumni license plate design. *Tam* once again illustrates the critical need for a coherent approach.

VII.
THE CASE OF GOVERNMENT EMPLOYEES

This section addresses one final First Amendment area that would benefit from a continuum rubric. As with many of the cases discussed above, the Court's public employee speech jurisprudence is notable for a troubling absence: it lacks an explicit grounding in either the government speech or public forum doctrines—and, certainly, there is no acknowledgment of the continuum that is the logical synthesis of these two doctrines. In this section I argue that public employee speech fits well within either the government speech or public forum rubric, depending upon the contextual factors at play.

A. The Garcetti-Pickering *Landscape*

In *Garcetti v. Ceballos,* the Court narrowed the prevailing First Amendment standard for protecting public employee speech. The aggrieved employee, Ceballos, worked as a deputy district attorney in Los Angeles, and argued that his First Amendment rights were violated when he was retaliated against for writing a memo critical of certain actions taken by the office.[116] The majority rejected his argument, articulating a new bright-line rule denying First Amendment protection for public employee statements made "pursuant to their official duties."[117] Despite a failure to directly rely upon the government speech doctrine, a close reading of the controversial 2006 decision reveals a logic heavily informed by the budding doctrine. Indeed, the three *Garcetti* dissenters take time to briefly argue that construing the employee speech at issue in the case as "government speech" would be inappropriate[118]—implying that the unstated logic underlying the majority's opinion is in fact rooted in principles emanating from the government speech doctrine.[119] Perhaps the dissenters, who choose to refute the notion that such speech should be treated as the government's voice, fail to notice the absence of the phrase "government speech" in the majority

116. Garcetti v. Ceballos, 547 U.S. 410, 413-15 (2006).
117. *Id.* at 421.
118. *Id.* at 438 (Souter, J., dissenting).
119. Norton, *supra* note 10, at 4.

opinion; and nowhere within the majority's opinion does the Court cite the seminal government speech decision *Rust v. Sullivan*. Yet, the dissenters take on this argument nonetheless, asserting that "the interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*."[120]

It is also notable that the majority's opinion does not contain the phrase "public forum." However, as with the funding of the professional speech of attorneys in *Velazquez*, when the government subsidizes professional speech, whether through direct employment or indirect grants, it is arguably establishing a forum. In this forum, individual speakers must use their discretion—based upon their professional judgment and unique personal style—to express themselves in a manner that is not, in many respects, strictly dictated by the government. Granted, this forum is constrained in scope, and, in this regard, it is shaped by the government's policy objectives. But the government is hardly in complete control of the message. Indeed, Justice Breyer's dissent points out that professional "speech is subject to independent regulation by canons of the profession. These canons provide an obligation to speak in certain instances. And where this is so, the government's own interest in forbidding that speech is diminished."[121] A public employee, in other words, may not merely have important independent reasons for diverging from a single message her government employer would like her to convey. The nature of the job itself—based on professional norms, societal conventions, and deeply rooted traditions—may be tethered to exogenous expectations that the employee be free, to some extent, to make her own expressive choices.

No doubt, there is room for disagreement as to whether one believes there is an inherent need for particular free speech protections for particular publicly employed or subsidized professionals acting in particular public roles; or whether, in contrast, as an employer, government should have total control over expression that is made pursuant to an employee's official duties. But even if we agree with the latter proposition—as the *Garcetti* majority does—the potential public forum issue does not disappear. For public employees are also citizens, and, as citizens, they will likely also wish to express themselves outside of the context of their official duties. An employer may be just as likely to take retributive steps as a result of this sort of expression as with speech pursuant to official duties.

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

121. *Id.* at 446 (Breyer, J., dissenting).

And here, as I shall argue below, there are also strong reasons to characterize that expression as speech made under the protective shield of a limited public forum.

But for the moment, we should point out that public employee speech, rather than being understood as either a public forum or a government speech issue (or, in my terms, falling along the government speech-forum continuum), is currently treated as its own discrete area of First Amendment Law. Granted, like other categories of speech confronted by First Amendment law, there are distinctive attributes that attach to public employment. These qualities have historically shaped the Court's unique doctrinal approach to public employee speech but do not prevent a reconciliation between the public employee speech jurisprudence and the government speech-forum continuum.

The public employee speech doctrine was established in 1968 by Justice Marshall in *Pickering v. Board of Education*, well before the advent of an identifiable government speech doctrine. As the Court explained, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[122] In *Pickering*, a public high school teacher had been fired after sending a newspaper a letter critical of the Board of Education and district superintendent.[123] Unlike *Garcetti*, the Court held that, despite the fact that the appellant was a public employee, his First Amendment freedom of speech was violated when he was terminated.[124] The Court struggled to find an appropriate test that would accommodate the unique interests at stake. It recognized the legitimate interest all employers have, whether public *or* private, in regulating employee expression.[125] At the same time, it asserted that some limits on this power when it comes to *public* employers were mandated by the principles underlying the First Amendment: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[126] In this case, the Court reasoned that the teacher sought to communicate about a legitimate matter of public concern and that the interest of the school board in disciplining the em-

122. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
123. *Id.* at 564.
124. *Id.* at 565.
125. *Id.* at 568.
126. *Id.*

ployee was relatively minimal—i.e. the expression did not impede his performance or disrupt school operations.[127] While the specific interests at play in *Pickering* might be unique to the public employee context, the broader point that both private interests and government interests are at play in a wide range of first amendment questions is the essence of the government speech-forum continuum.

In arriving at its holding, the *Pickering* Court also considered the distinct kind of punitive action that is the natural occurrence in public employee cases—an employee is fired, demoted, or otherwise deprived of a valued benefit of the job. Historically, the assumption may have been that when the government acts as an employer, it creates a benefit, and it can therefore freely revoke or otherwise regulate how that benefit is exercised. As then Judge Oliver Wendell Holmes Jr. memorably put it in 1892, an officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . The servant cannot complain, as he takes the employment on the terms which are offered him."[128] Today, however, consideration of the nature of the government-imposed sanctions for objectionable expression often takes a back–seat as a variable in the Court's First Amendment decisions. It is typically the nature of and context in which the particular speech is being suppressed, and not the repercussions to the offending speaker, that has been determinative in the Court's modern free speech jurisprudence.[129] Of course, there are differences between criminal sanctions, such as significant jail time, pecuniary civil penalties and fines, and the mere inability to enjoy or participate in a governmental benefit, such as trademark registration status, a subsidy for artists, use of a municipal performance space, or public employment. However, for Marshall, the differences were not material to the First Amendment analysis. While criminal penalties and monetary awards may have a "different impact on the exercise of the right to freedom of speech . . . the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."[130]

The dismissive century-old Holmesian approach to positive rights and the First Amendment described above is, in fact, strik-

127. *Id.* at 571-573.

128. McAuliffe v. Mayor and Bd. of Aldermen of New Bedford, 115 Mass. 216, 220 (1892).

129. Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012).

130. *Pickering*, 391 U.S. at 574.

ingly similar to another statement by the preeminent judge, made both before he was a justice on the U.S. Supreme Court and before his conversion into a First Amendment champion. In *Commonwealth v. Davis*, a case decided in the pre-public forum period, Holmes blithely analogized government property ownership to the rights of private property owners: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[131] In other words, the ordinance—which prohibited public addresses without a permit—merely governed how property, here the Boston Common, could be used.[132] The advent of the public forum doctrine would eventually reverse this presumption regarding public parks, but the underlying logic was clear: where government *acts*, rather than *reacts*, free speech principles need not apply. A government employee, such as a police officer, or government-owned property, such as a public park, are a consequence of affirmative action by a government. Therefore, government may define the scope of such acts of governmental creation as it sees fit. Holmes was essentially laying out the core principle behind a government speech doctrine that would not be explicitly established by the Supreme Court for another hundred years.

Thus, when in *Pickering* Marshall points to the unique nature of the government sanctions imposed as a public employer, he is in truth addressing a characteristic that all issues falling along the government speech-forum continuum share in common; namely, a tension between a government's need to control its message by denying or depriving an individual of a governmental benefit and that individual's right to speak freely in the context of a governmental program. The *Garcetti* Court reverts to a position that hews closer to Justice Holmes' bright-line rule. It asserts that *Pickering's* careful balancing test, which might serve to protect a public employee from sanctions for their expression, does not apply where statements are made "pursuant to their official duties."[133] To the majority, common sense principles of principle-agent theory suggest that, public or private, "[e]mployers have heightened interest in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate,

131. Commonwealth v. Davis, 162 Mass. 510, 511 (1895).
132. *Id.* at 512.
133. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

demonstrate sound judgment, and promote the employer's mission."[134] Government employees are the face of government. Their speech may reasonably be understood as a direct statement of the message the government wishes to convey.

Of course, as Justice Souter points out in dissent, "[s]ome public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto."[135] Taken to the extreme, the majority's position could suggest that the mere choice to employ, or continue to employ, a particular individual, is itself a form of speech. After all, the type of people one employs—and viewpoints those people express in their spare time—might reasonably be seen as much a reflection of the employer as the employed. Thus, it is possible to view *Garcetti* as a clarification of the parameters of public employee speech along the government speech-forum continuum: when should public employee speech be treated as government speech, and when should it be treated like a limited public forum? *Garcetti* establishes a reasonable, but certainly debatable, standard for drawing the line. Some scholars have argued for a more nuanced assessment: while certain government employees' speech may constitute a near-perfect proxy for government expression, other government employees are not at all the face of government. Helen Norton proposes that the First Amendment should "be understood to permit government to claim as its own—and thus control as government speech free from First Amendment scrutiny—only the speech of public employees that it has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to the public's meaningful credibility and accountability checks."[136] Utilizing a government speech-forum continuum would allow for a doctrinal acknowledgment of this range of employee speech—on the public forum side, providing First Amendment protection to the independent speech of a public employee, and, on the government speech side, allowing the government to control its message when appropriate. Unfortunately, the Court in *Garcetti* studiously avoids directly referring to either doctrinal pole by name, yet tellingly, it cites a limited public forum case, *Rosenberger*, for support.[137]

134. *Id.* at 422-23.

135. *Id.* at 437 (Souter, J., dissenting).

136. Norton, *supra* note 10.

137. *Garcetti*, 547 U.S. at 422.

B. The Unexpected Public Forum: Government Employees Speaking Outside of their Official Duties

Other than its new bright-line carve out, *Garcetti* expressly maintains the *Pickering* balancing formulation in cases where "an employee speaks as a citizen addressing a matter of public concern."[138] Thus, with this precedent in mind, the remainder of public employee expression, that speech that is not made pursuant to official duties, should be seen as falling on the limited public forum side of the government speech-forum continuum. Norton and other critics of *Garcetti* might (perhaps rightfully) disagree with the line the *Garcetti* Court drew. Nonetheless, by upholding this aspect of *Pickering*, the Court confirms that at least *some* employee speech is, in fact, protected speech. It is protected not just in the sense that the Westborough Baptist Church is protected from civil liability for its hate-filled messages at military funerals,[139] or that Paul Robert Cohen is protected from a jail term for wearing a jacket bearing a vulgar message protesting an unpopular war,[140] but in ensuring that the government continues to provide a benefit that it was not required to provide in the first instance—public employment. As with a public park, the government has established (and then subsidized) something it had no constitutional obligation to establish: a particular category of public employment. As with a public park, however, once it did so, it effectively created a platform for speech which was previously unavailable.

Now, one might protest this assessment. One might point out that this hypothetical public employee always *had* the right to free expression outside his or her role as public employee, and that the government has therefore not created a new platform for speech at all in the way it does when, for example, it builds a new public park or establishes student organization funds at public colleges. The *Pickering* balancing test, and the part of *Garcetti* that leaves it in place, simply maintains the status quo, the argument might run. This is not so. While it may not typically be conceptualized in this way, the government does indeed establish a platform for speech—a limited public forum—for certain public employee expression outside of their job. It would be a *limited* public forum because, as described above, the *Pickering* test does not protect *all* speech outside of work, but only expression relating to legitimate matters of public concern that do not, on balance, unduly interfere with the

138. *Id.* at 423.
139. *See* Snyder v. Phelps, 562 U.S. 443 (2011).
140. *See* Cohen v. California, 403 U.S. 15 (1971).

government's interests as an employer.[141] Yes, a public forum may constitute a physical place, but as Justice Kennedy has reminded us, a forum may just as well exist in a "metaphysical [rather] than in a spatial or geographic sense."[142]

A forum is simply a context in which speech takes place. And as far as the First Amendment is concerned, a forum may be defined as any such context for speech that would not exist in its current form *but for* government action (the First Amendment, of course, does not concern itself with purely *private* fora). Just contrast a public employee speaking on his own time, removed from the ambit of his employment, with a private employee doing the same. The Constitution offers protection to the former, but not the latter. There is no constitutional right to private employment; the First Amendment does not protect private employees from retribution by their employer for the things they say outside of their cubical. The constitutional protection in the case of the public employee, to the extent that it exists, *is* the public forum. Where constitutional protection is absent, it must be because the government itself is deemed to be speaking—and with government speech the state *does* resemble a private employer: free to speak or not by hiring, firing or disciplining employees at will.

On the public forum side of the continuum however, the public creation—whether it be government employment or a traditional public forum like a municipal park—is fundamentally different from its private corollary. A public park like Union Square may resemble a private park like Gramercy Park in that they are both located in Manhattan, both pleasantly verdant in appearance, and both frequently used for neighborly socializing. This is similar, to cite just one example, to the way public employment may look a lot like private employment when it comes to the importance of managerial control discussed in *Garcetti*. The key difference is that the public park and public employment create a platform for free expression that is *not* established by a private park and private employment. Unlike with the public Union Square, the owners of the private Gramercy Park may refuse to readmit a park visitor who, for example, expressed a viewpoint outside the park that was critical of one of the park's influential owners. Unlike with a private employer, in accord with the *Pickering* balance, a public employer will likely *not* be permitted to terminate a public employee for expressing a viewpoint critical of an influential government official

141. *See* page 29 *supra*.

142. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

outside of work. In both the case of the public park and the public employee, the government has created a public forum for speech (even if it be a *limited* one) that would not exist, but for the fact *that it is the government that created it*. One might understandably protest that this framing gives the government too much credit: the state did not, after all, create the individual's opportunity to speak away from work. It did, however, create the right to speak away from work *without losing one's job,* a right, or forum for speech, noticeably absent in the private employment context. There is, in other words, every reason to treat public employee speech as falling along the government speech-forum continuum. While one might disagree with where the *Garcetti* Court drew its line to distinguish public employee expression that is to be treated as government speech from that which is protected by the shield of a limited public forum, the continuum rubric explains the framework within which the judgment must be made.

VIII.
THE CASE OF THE ACADEMIC PUBLIC EMPLOYEE

This brings us to the case of the public employee whose very business is the vigorous and open exploration, and subsequent communication, of ideas. As a concerned Justice Souter put it in his *Garcetti* dissent, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"[143] Souter had good reason to believe that, in the academic setting, the First Amendment equation must be different. Not only has the Supreme Court itself suggested that a special kind of constitutional solicitude applies to the academic realm, numerous Circuit Courts have relied upon the First Amendment to directly protect faculty who were disciplined for their speech by a state college or university.[144] Nonetheless, disagreement abounds both among the Courts and among constitutional scholars. Unfortunately, the arena in which these differing views are contested is typically defined by claims that are relatively unmoored to explicit First Amendment principles and doctrines.

As a broadly applicable principle, academic freedom in the United States has roots in the late nineteenth century, when the

143. *Garcetti*, 547 U.S. at 438 (Souter, J. dissenting) (internal citations omitted).

144. *See* Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J.L. & PUB. POL'Y 649, 658-63 (2016).

modern research university first began to emerge.[145] Prior to this period, higher education was dominated by what might be referred to as "proprietary" institutions, controlled by religious organizations, private industry, or others "devoted to the inculcation of ideas" rather than "to critical inquiry."[146] In the United States, the foundational statement on academic freedom was, and arguably remains, the American Association of University Professors' (AAUP) 1915 Declaration of Principles. There, the signatories, including luminaries such as John Dewey and Roscoe Pound, defined academic freedom as broadly constituting "three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action."[147]

The Declaration relies on a premise that is today deeply rooted in American culture, perhaps as deeply rooted as the quintessential public forum principle articulated by Justice Roberts in 1939—that an implicit public trust demands certain public spaces be preserved for free expression.[148] The widely-accepted premise of the Declaration was simply that "education is the cornerstone of the structure of society and [that] progress in scientific knowledge is essential to civilization."[149] According to the Declaration, the role of the faculty then is "to impart the results of their own and their fellow-specialists' investigation and reflection, both to students and to the general public, without fear or favor."[150] It goes on to analogize the academic freedom of faculty to the judicial independence of federal judges. "University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the [board of] trustees than are judges subject to the control of the President with respect to their decisions."[151]

Yet, if we fast forward to the present, there is a sharp split among scholars and jurists as to whether or not—and to what extent—the First Amendment should protect academic freedom.

145. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 237 (1990).

146. *Id.* at 227.

147. AAUP, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915) https://aaup.org.uiowa.edu/aaup-principles [https://perma.cc/Q4UE-9W9B] [hereinafter AAUP 1915].

148. KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 18-22 (2018).

149. *See* AAUP 1915, *supra* note 147, at 24.

150. *Id.* at 25.

151. *Id.* at 26.

Take, for example, the position of the constitutional scholar Kermit Roosevelt III, who rejects the claim that public university faculty should be exempt from the non-speech-protective *Garcetti* rule. His commonsensical observation "that the academic environment is one in which assessments of quality are vitally important"[152] would likely garner few objections. Thus, many would likely agree with Roosevelt's conclusion that "[t]here may be no such thing as a false idea, as far as the First Amendment is concerned, but in reality there is such a thing as a bad article or a soporific lecture, and schools cannot function if they are denied the ability to make that judgment."[153] On its face, the logic appears unassailable. Indeed, it is essentially the same argument made for the government speech doctrine: in order to be an effective employer and promote the policy it seeks to explicitly endorse, the government must be able to control the expression of its employees. Like defining the scope of the program in *Rust*—which provided funding for health care services *not* including abortion counseling—this will inevitably mean controlling and judging the content of speech. Yet Roosevelt does not identify faculty speech as "government speech" because, as discussed above, the Court itself never clearly frames its public employee speech doctrine in these terms.

More importantly, the intuitive, absolutist appeal of this government speech logic, whether or not explicitly addressed as such, begins to break down when it is viewed in broader doctrinal context. As repeatedly illustrated throughout this article, there is a fundamental tension between the very real need for government control over expression by government "agents" who to some degree and in some sense speak *for it* in the context of a government program, and the applicability of free expression principles *within the context* of a government program, whether it be a financial subsidy, a public park, or direct government employment. Without grounding one's analysis in the government speech-forum continuum, resolving the question of whether academic freedom should have a place in the Court's First Amendment jurisprudence becomes a game of pick-the-intuitive-argument-that-appeals-to-you-most.

Indeed, Roosevelt acknowledges the validity of the argument on the other side, the claim that "scholars should be free to explore controversial subjects, to criticize the government or other power-

152. Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 657 (2012).

153. *Id.*

ful figures, to follow their research wherever it leads."[154] But he concludes that the First Amendment is simply not the appropriate tool to address these concerns. But why not? As discussed above, in many other settings the Court has been willing to acknowledge the important role government plays in facilitating speech and the First Amendment protections that must extend to the fora it voluntarily establishes, including a fund for student organizations at public universities.[155] Considering the foundational principles of free and open inquiry, debate, and exploration of controversial ideas that underlie our understanding of how higher education ought to work, it is reasonable to conclude that a public college constitutes a self-consciously established government forum for certain types of free expression—what is sometimes referred to as a *designated* public forum. The Court has defined a designated public forum as "property that the State has opened for expressive activity by part or all of the public."[156] At the same time, as alluded to by scholars such as Roosevelt and Post, because college administrators must still reasonably exert significant control over many aspects of academic life, including the range of academic subjects covered or quality of instruction, there is good reason to conclude that academic scholarship and teaching at a state university should be treated as a *limited* public forum.

When a state, of its own volition, decides to establish or maintain an institution of higher learning, it presumably does so with the background knowledge of the basic precepts of academia in mind. As articulated in the AAUP's 1915 Declaration of Principles, the unimpeded search for truth, which is inherently expressive, is the well-established and long-standing essence of the university mission. Thus, when government overtly embarks on an academic endeavor with a tradition in which "the university teacher's independence of thought and utterance"[157] is central, there is every reason to believe that that government is establishing (or "designating," in the Court's terms) a limited public forum. If we add to that the explicit and implicit guarantees of a tenure system, the claim that the scholarship and teaching of tenured faculty constitutes a limited public forum becomes especially compelling, although we should not assume that the public forum is necessarily limited to tenured faculty. The academic setting stands in sharp contrast

154. *Id.*

155. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010).

156. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

157. *See* AAUP 1915, *supra* note 147.

from, for example, a 1992 case in which a plurality of the Court rejected the characterization of an airport terminal as a designated public forum.[158] In *International Society for Krishna Consciousness v. Lee*, the plurality reasoned that "the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor . . . have [they] been intentionally opened by their operators to such activity."[159] Of course, quite the contrary is true of the professoriate in the public university classroom, where there has been a longstanding historical tradition of intentionally granting broad expressive freedom both implicitly and explicitly (in the case of tenured faculty).

As confident as Roosevelt may be in concluding that academic freedom is generally not covered by the protections of the First Amendment, he exposes the inherent weakness of his seemingly clear-cut reasoning by conceding that this proposed exclusion of academic freedom from First Amendment protection would not, in fact, apply to every situation. He admits: "This is not to say that a tenure denial could never raise First Amendment concerns. Denying the math professor tenure because she criticized the governor in a letter to the editor would. . . . [S]ome degree of political partisanship in the assessment of academic merit would probably be unconstitutional."[160] This is a conclusion made in the doctrinal ether. It is also an excellent illustration of why utilizing a government speech-forum continuum would be so helpful. If there is indeed a line that may not be crossed, even in light of Roosevelt's curt conclusion that *Garcetti's* non-protective test should apply to faculty scholarship, what is the basis for this line? Why is partisanship the cardinal sin, but not controversial views on religion, climate change, sexuality or race? Ad hoc assertions should not determine if and when the First Amendment protects individual expression. A continuum that would be fleshed out by courts over time in a principled manner would avoid this conundrum.

There is, in other words, a better way. And, thanks to the Court's increased interest in elaborating on both the government speech and public forum doctrines in recent years, a doctrinal framework is already there. The public academic setting will necessarily include plenty of government speech that is outside of First Amendment scrutiny. The government must decide what kind of academic institutions to establish and maintain. Is there a need for an engineering program in the state? If not, few would deny that

158. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

159. *Id.* at 681.

160. Roosevelt III, *supra* note 152, at 657.

the government has the power to define the scope of a taxpayer-funded institution such that it excludes engineering as a topic of study. This is classic government speech. There are also, however, public fora to be found throughout the public campus. Yes, this may include a grassy quad where students and others rally, protest, and express their views, but it also would include the speech of a professor in her classroom. Granted, as a limited public forum, this professor might not enjoy the same level of freedom as someone voicing their opinion in a quintessential public forum like a sidewalk or town square. Even the AAUP's Declaration rejects the notion "that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university."[161] A faculty member at a state institution is, after all, paid in part by the taxpayers to serve a particular function. But even Roosevelt seems to concede that if the state government attempted to punish a professor for failing to toe the party line of whoever happens to be in power in the state government at the time—in their classroom or in their scholarship—the First Amendment should intercede. While we may certainly debate the contours of where the limited public forum begins and government speech ends, the government speech-forum continuum provides an effective doctrinal framework for evaluating when, where, and how the First Amendment applies in a state university setting.

IX.
ACADEMIC FREEDOM AS A CONSTITUTIONAL RIGHT?

It is notable that just four years after the AAUP published its Declaration of Principle, Justice Holmes penned his famous dissent in *Abrams v. United States*. Therein, he laid out a "theory of our Constitution" that bore some striking similarities with that document's justifications for academic freedom.[162] Holmes' theory was that an open marketplace of ideas was "the best test of truth," and that "we should be eternally vigilant against attempts to check the expression of opinion we loathe."[163] Similarly, the AAUP Declaration proclaims that "the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come

161. *See* AAUP 1915, *supra* note 147, at 38.

162. Rabban, *supra* note 145, at 240.

163. *Abrams*, 250 U.S. at 630.

into conflict with accepted opinion."[164] Of course, only the former statement professed to be constitutional interpretation. And one's instinct might be to keep these two lines of thought, while akin to each other in many ways, distinct. The principles articulated in the AAUP's declaration, after all, were never intended as legal analysis. But constitutional law does not occur in a vacuum. State action always has a context. And from airports to license plates to municipal theaters, context can make all the difference for compelling and legitimate reasons.

To what extent has the Court acknowledged a First Amendment right to academic freedom? Unfortunately, while the Court has at times loosely suggested that academic freedom is deserving of First Amendment protection, it has been far from clear as to how this protection works in practice. This is understandable. The Court is typically reticent about establishing new doctrines from scratch, particularly in areas as complex, sensitive and potentially intrusive as academic freedom. To enforce such a right, a court would be required to enmesh itself in the internal decision-making of a public university—parsing, for example, when it is or is not constitutional for university administrators or a state to discipline a faculty member for her speech. Presumably, courts would be required to wade into the innumerable factors that informed the decision: Did the expression take place inside or outside the classroom? Was the expression communicated in a piece of scholarly writing, in a letter to the editor of a local paper, on Facebook, or in a blog? Did the speech relate to the subject the professor was employed to teach and study? Was the retributive action viewpoint-based, content-based, or neither? All are challenging questions. However, the Court's increased acknowledgement and use of the government speech doctrine and a nuanced public forum doctrine should suggest a doctrinal landscape that will not tolerate a failure of clarity. When the state is expressively proactive, its actions must fall somewhere along the government speech-forum continuum. Either it is in control of its message, and therefore outside of First Amendment coverage, or it has established some form of limited or broadly inclusive forum for expression, and the First Amendment applies. These are the only options. Contrary to the protestations of those who would worry that courts should not enter the academic thicket by constitutionalizing academic freedom, the Court's current doctrinal trajectory essentially makes any other approach a form of willful avoidance.

164. *See* AAUP 1915, *supra* note 147, at 29.

So, when the Court has spoken on academic freedom and the First Amendment, what has it said? The first such instance was in 1957, in the case of *Sweezy v. New Hampshire*. At the time *Sweezy* was decided, the Court not yet created the government speech doctrine. Further, the Court's First Amendment jurisprudence was, as a whole, far less developed than it is today. It is thus unsurprising that the decision avoided a bold or specific doctrinal carve-out for First Amendment protection of academic freedom. Instead, while a plurality of the Court, in an opinion by Chief Justice Warren, emphasized the critical importance of academic freedom and suggested that it was protected by the Constitution, it did so in what was effectively dicta.[165] The case, a Red Scare era controversy in which a professor was extensively interrogated about the content of his lectures and contact with alleged Communists[166], was ultimately decided on due process grounds.[167] Thus, as Scott R. Bauries observes, "the decision itself was of less import than the rhetoric."[168]

Yet the Court's words, both in the plurality opinion by Warren and a concurrence by Frankfurter, suggested that academic freedom, in some capacity, falls within the ambit of the First Amendment. Warren proclaimed: "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which the government should be extremely reticent to tread."[169] This was followed by expansive language extolling both the essential role higher education plays in a democracy and the imperative that colleges and universities be intellectually free.[170] Justice Frankfurter's words are even more impassioned, perhaps reflective of his former life as a professor at Harvard Law School. The scholarly work of academics, Frankfurter pronounced, "must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."[171]

Even stronger language was used by Justice Brennan a decade later in *Keyishian v. Board of Regents*. There, the Court struck down

165. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

166. *Id.* at 242-244.

167. *Id.* at 254.

168. Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 88 Miss. L.J. 677, 690 (2014).

169. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

170. *Id.*

171. *Id.* at 262.

as unconstitutional a state law that, among other things, required each faculty member at public universities to sign a certificate attesting that he or she was not a Communist.[172] Once again, the Court's holding did not turn on a clearly articulated First Amendment doctrine addressing academic freedom. This time, the outcome was dictated by the potential chilling effect of a vague and overly broad law, as well as its deleterious imposition on associational rights.[173] The Court acknowledged the critical fact that the law pertained to public employees.[174] Because the decision was pre-*Pickering*, however, it did not rely upon that case's eponymous balancing test to resolve the matter. Instead, the Court simply cited the less ambitious conclusion that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[175] As was true for most of the Court's First Amendment jurisprudential history, it largely glossed over the very difficult questions that inhere to any situation in which the government is arguably either doing the speaking or using government resources to establish a circumscribed platform for speech. Nonetheless, Justice Brennan's powerful, and now famous, words on the relationship between the Constitutional protection of free expression and the domain of higher education contained little subtlety. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[176] What was unclear, however, was whether and to what extent this rhetoric would eventually translate into a First Amendment doctrine specifically tailored to academic freedom, and if so, how it might work in practice.

In the post-*Garcetti* world, we are confronted with a choice. A straightforward application of the *Garcetti* rule would mean that an academic working at a state university as a public employee,conducting research and teacheing classes pursuant to his official duties, receives no First Amendment protection in the areas traditionally understood to be protected under core precepts of ac-

172. Keyishian v. Board of Regents, 385 U.S. 589, 592 (1967).

173. *Id.* at 603-606.

174. *Id.* at 605.

175. *Id.* at 605-606.

176. *Id.* at 603.

ademic freedom.[177] The alternative view, one the Court in *Garcetti* reserved, would be that an exception to the rigid *Garcetti* rule should be carved out for academics. This approach was adopted by two circuit courts.[178] In *Demers*, the Ninth Circuit simply asserted "that *Garcetti* does not apply to 'speech related to scholarship and teaching."[179] Instead, the test in the case of public academics was to revert to a *Pickering* balance.[180] In *Adams*, the Fourth Circuit did acknowledge some nuance in its academic carve-out, asserting that "[t]here may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to specific instances of the faculty member's speech carrying out those duties."[181]

It is a sensible distinction. What goes unspoken is how well this logic would graft onto a government speech-forum continuum. The doctrinally unmoored exception these courts assert for academic scholarship and teaching has a "because-I-said-so" quality. Yes, because of everything we know and understand about the importance of academic freedom, we might feel comfortable with a carve-out for scholarship and teaching from *Garcetti's* clear-cut rule. We might feel that it is correct from the standpoint of public policy. But from a First Amendment perspective, is this anything more than an ad hoc distinction? Framing the issue as one falling along the government speech-forum continuum would avoid this troubling conclusion. There is a sound and principled basis for drawing such a line protecting academic speech, one that could not be critiqued as a mere judicial favor to academia.

When a professor speaks to his class or publishes the results of his research, the venue for his expression is a limited public forum—implicitly established by the state for certain limited purposes. If that professor were instructed to administer or declare a particular university policy, this might reasonably be understood as government speech, like the artist with strict instructions to paint "Speech Limit 65" on a road sign. Where a government-funded artist is granted broad artistic license, however, like a faculty member's

177. A similar approach was used by the Seventh Circuit in Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).

178. Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011) ("We are also persuaded that *Garcetti* would not apply in the academic context of a public university."); Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).

179. *Demers*, 746 F.3d at 406.

180. *Id.*

181. *Adams*, 640 F.3d at 563.

teaching and scholarship—a role informed by the deeply rooted understanding of academic freedom—the expression falls on the limited public forum side of the continuum. The continuum is a simple acknowledgment that such distinctions are inevitable when the government plays an affirmative role in establishing speech opportunities. Sometimes that speech will be strictly reflective of what the government wants to say; sometimes, due to the explicit or implicit expressive freedom inherent in the speech opportunity, that speech will be understood as expression occurring in a limited or full public forum. Academic speech fits well within this rubric.[182]

X.
CONCLUSION

This Article does not seek to answer all of the questions that would invariably arise if courts adopted the government speech-forum continuum framework. Indeed, such an ambition would be a fool's errand. This task must fall to the courts. Common law principles suggest that the courts are the ones best equipped to be responsive and sensitive to context and precedent, and over time case-by-case to put meat on the bones of constitutional principles. However, what I do seek to offer is a synthesis of doctrinal elements that are, in fact, already on the table. Such a synthesis, I argue,

182. Some might reject the government speech-forum continuum by pointing to the complex organizational structure of colleges and universities, with their many potentially conflicting "speakers." Academic freedom may in some cases be said to belong to the administration rather than individual faculty members. David Rabban has argued that "In order to engage in critical inquiry, professors need some degree of independence from their university employers, and universities need some degree of independence from the state. . . . [But in all cases] constitutional academic freedom promotes first amendment values of general concern to all citizens in a democracy." Rabban, *supra* note 145, at 230. In some cases it would clearly be impossible to provide First Amendment protection to *both* the university in its corporate capacity (i.e. the administration) and individual faculty members, because the two forms of academic freedom would come into direct conflict. However, the classic understanding of academic freedom, consistent with the foundational justification for tenure protection, suggests that it belongs primarily to individual professors. And even if, in some cases, a forum for administrators were deemed established, this would not present a unique or insurmountable jurisprudential challenge. It is a complexity that is arguably no different from that found in many of the public forum cases discussed previously. For example, in *Martinez*, Hastings Law School might have argued that in its corporate capacity it should, as a First Amendment speaker, be free to assert complete control over the expression of officially recognized student organizations. *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010). Courts would potentially be required to arbitrate conflicting speech claims under a government speech-forum continuum regime, but such conflicts would be nothing new.

would better ground a wide range of vexing First Amendment questions in a consistent and principled foundation, including the stubbornly unresolved issues surrounding academic speech at state institutions.

Many understandably welcome doctrinal advances that increase clarity in constitutional adjudication. When it comes to the First Amendment, I have argued that such advances can be found the Court's relatively recent acknowledgment of a government speech doctrine. Such progress can also be seen in the public forum area, where the Court has in recent years expanded upon the concept of the limited public forum. What is missing, however, is the realization that these doctrinal concepts—the public forum and government speech—are two sides of the same coin; and that this coin is the currency of a much larger swath of First Amendment law than previously acknowledged. This simple insight would help courts resolve many First Amendment questions.

Areas as diverse as trademark registration, government subsidies, public employment, and academic freedom, might all be said to fall along the same doctrinal government speech-forum continuum. Such a synthesis would promote quality First Amendment jurisprudence by cultivating a body of precedent that would constrain and focus courts, and reduce the need for ad hoc decision making. The benefits would also be significant in areas where courts already squarely characterize the expression as either government speech or as taking place in a protected public forum. As I have attempted to show throughout this Article, understanding these doctrines as simple dichotomous categories understates the tension inherent in expression-related government activity. Certainly, courts would still be tasked with determining where along the continuum the speech falls, and thus which First Amendment rule must apply. However, viewing government speech and public fora as two poles in perpetual tension, rather than as simply two discrete categories, would make for a more transparent and honest judicial calculus.

The government speech-forum continuum is premised on the notion that, even in the clearest of cases, a public forum is not *just* a public forum, and government speech is not *just* government speech. There is always some element of the other. A choice of more than 350 themed license plate messages is neither 100% government speech nor a pure public forum. Employing a professor at a state university to teach American politics (but not post-Soviet Russian politics) is neither absolute government speech, nor does it establish an unconstrained public forum for whatever about which that professor may choose to talk. If we are truly honest, we would

acknowledge that these examples, and many more, contain elements of each pole. The government *both* controls the message *and* facilitates private speech. Courts must draw lines along the continuum, and these lines must be justified on principled, sensible, and consistent grounds, depending upon where a given scenario falls. Such line-drawing may be sensitive to context such that a different analysis may apply to the individual components of a particular situation.Academic content in a classroom versus administrative content in that very same lecture hall, for example, may merit different First Amendment treatment. Currently, courts are wedded to discrete categories that do not adequately reflect reality—there is either a public forum, government speech, or neither. A better approach is to openly confront the inherent tension between these two doctrines, and determine where such expression falls along the government speech-forum continuum.