

# VIEWPOINT NEUTRALITY AND GOVERNMENT SPEECH

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**Abstract:** Government speech creates a paradox at the heart of the First Amendment. To satisfy traditional First Amendment tests, the government must show that it is *not* discriminating against a viewpoint. And yet if the government shows that it *is* condemning or supporting a viewpoint, it may be able to invoke the government speech defense and thereby avoid constitutional scrutiny altogether. Government speech doctrine therefore rewards what the rest of the First Amendment forbids: viewpoint discrimination against private speech. This is both a theoretical puzzle and an increasingly important practical problem. In cases like *Pleasant Grove City, Utah v. Summum*, the city's disagreement with a private message was the heart of its successful government speech argument. Why is viewpoint discrimination flatly forbidden in one area of First Amendment law and entirely exempt from scrutiny in another? This Article explores that question and why it matters, and suggests ways to reconcile these apparently incompatible principles.

## INTRODUCTION

It is a bedrock principle of the First Amendment that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>1</sup> And yet, “the Government’s own speech . . . is exempt from First Amendment scrutiny,” even when it has the effect of limiting private speech.<sup>2</sup> The upshot of these apparently con-

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<sup>1</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972); *see also* U.S. CONST. amend. I; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) (“Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.”).

<sup>2</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005). There are, however, some “external” constitutional constraints. *See Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (“For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”); Daniel W. Park, *Government Speech and the Public Forum: A Clash Be-*

flicting principles is that, pursuant to government speech doctrine, the government may be able to restrict private expression “because of its message, its ideas, its subject matter, or its content,” so long as in so doing it is expressing its own viewpoint.<sup>3</sup> Why is viewpoint discrimination flatly forbidden in one area of First Amendment law and entirely exempt from scrutiny in another?<sup>4</sup> Has government speech doctrine undermined the First Amendment’s seemingly inviolable viewpoint neutrality requirement?<sup>5</sup>

Government speech doctrine is young, and its youthful exuberance and ambition—not to mention its adolescent awkwardness—has become cause for some parental concern. In 2009, in *Pleasant Grove City, Utah v. Summum*, the U.S. Supreme Court’s most recent government speech case, Justice Souter warned, “it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored.”<sup>6</sup> As the doctrine grows, the constitutional exemption it receives is increasingly bumping into another apparently absolute First Amendment principle—the requirement that the government be viewpoint neutral when it restricts private speech.<sup>7</sup> The prevention of viewpoint discrimination has long been considered *the* central concern of the First Amendment,<sup>8</sup> and yet in some cases government speech doctrine seems to allow—if not outright encourage—viewpoint discrimination in the extreme. Indeed, one way for the government to prevail in a government speech case is to show that a private speaker’s message is contrary to, and interfering with, its own.<sup>9</sup>

This does not (yet) mean that government speech doctrine has swallowed the rest of the First Amendment by permitting unchecked

*tween Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 145 (2010) (“The only clear limit on government speech is the Establishment Clause of the U.S. Constitution.”).

<sup>3</sup> See *Mosley*, 408 U.S. at 95.

<sup>4</sup> Helen Norton, *Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1319 (2004) (“Under prevailing doctrine, government’s viewpoint-based regulation of private speech is constitutionally suspect, while government is largely free to determine which views it will itself express.”).

<sup>5</sup> See *infra* notes 37–194 and accompanying text.

<sup>6</sup> *Summum*, 129 S. Ct. at 1141 (Souter, J., concurring).

<sup>7</sup> See, e.g., *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (“No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’ and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.”).

<sup>8</sup> See *infra* notes 42–65 and accompanying text.

<sup>9</sup> See, e.g., *Summum*, 129 S. Ct. at 1138 (upholding the government’s right to reject a private monument donated for placement in a public park).

viewpoint discrimination against private speakers.<sup>10</sup> Many incidents of government speech arguably can be viewpoint neutral, at least from the government's point of view. Although the government speech doctrine does not permit total bans on the expression of a private viewpoint, it does allow what had previously been thought forbidden: the burdening, even if not silencing, of private viewpoints *because* the government disagrees with them.

*Summum* provides a perfect example. In that case, a religious order called the Summum sought to erect a monument in a public park that already contained other privately donated monuments.<sup>11</sup> Pleasant Grove City rejected the monument on the grounds that it was not consistent with the city's purported message of celebrating local history and community.<sup>12</sup> The city argued that the placement of monuments in a public park was not susceptible to public forum analysis, but was instead an incident of government speech and therefore exempt from scrutiny under the Free Speech Clause.<sup>13</sup> The Court agreed, holding that "the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause . . . ."<sup>14</sup>

Although some have described *Summum* as an "easy" case,<sup>15</sup> others are made uneasy by the fact that it blessed a government action that was for all intents and purposes indistinguishable from viewpoint discrimination in a public park—the prototypical example of impermissible speech regulation.<sup>16</sup> What this discrepancy illustrates is that some

<sup>10</sup> See *infra* notes 54–62 and accompanying text; see also, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547–49 (2001); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

<sup>11</sup> *Summum*, 129 S. Ct. at 1129–30.

<sup>12</sup> *Id.* at 1130 ("The City denied the requests and explained that its practice was to limit monuments in the Park to those that 'either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.'" (quoting app. at 61)).

<sup>13</sup> See *id.* at 1131.

<sup>14</sup> *Id.* at 1138.

<sup>15</sup> Helen L. Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 913 (2010).

<sup>16</sup> See, e.g., Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 426–27 (2009) (suggesting that *Summum* may permit governments to engage in what would otherwise be "blatantly unconstitutional form[s] of viewpoint discrimination," for example by adopting demonstrations as their own speech). For my own thoughts on *Summum*, see generally Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413 (2011) [hereinafter Blocher, *Government Property and Government Speech*], available at [http://scholarship.law.duke.edu/working\\_papers/37/](http://scholarship.law.duke.edu/working_papers/37/); Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY 83 (2009) [hereinafter

criticisms of government speech—and there have been many trenchant criticisms<sup>17</sup>—have failed to grasp fully the nature of the beast. It is generally supposed that government speech is dangerous because it threatens to drown out or distort private discourse due to the government's limitless resources and powerful platforms for communication.<sup>18</sup> This supposition may well be true, but it understates the problem. Government speech not only distorts the marketplace of ideas, in many cases it directly *regulates* individual private speakers—either forbidding them to express viewpoints they support or compelling them to express viewpoints they do not support. Government speech doctrine, after all, is an absolute government *defense* to First Amendment claims by individuals.<sup>19</sup> Thus, government speech doctrine increasingly threatens First Amendment values both as a practical matter—because the government is doing more and more “speaking”<sup>20</sup>—and as a theoretical matter, because the interests the Amendment has long been thought to protect are precisely those threatened by the doctrine's expansion.<sup>21</sup> Lacking guidance from the Supreme Court, federal appellate courts have struggled to articulate consistent rules reconciling these apparently incompatible principles.<sup>22</sup>

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Blocher, *Property and Speech in Summum*], available at <http://www.law.northwestern.edu/lawreview/colloquy/2009/31/>.

<sup>17</sup> A comprehensive listing is impossible, but any sampling would have to include: Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); and Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008); as well as insightful works on unconstitutional conditions and subsidized speech such as David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); and Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

<sup>18</sup> See, e.g., Lee C. Bollinger, *Epilogue* to ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 313 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (“[T]he massive presence of government in the society presents extraordinary opportunities for it to distort the marketplace of ideas.”); Cole, *supra* note 17, at 682 (“[T]he root of the problem lies in the paradoxical fact that government-funded speech both creates possibilities for a more democratic and inclusive public debate and threatens to dominate the market and overwhelm individual autonomy with its vast resources.”); Robert Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1105–06 (1979).

<sup>19</sup> See *Johanns*, 544 U.S. at 571 (Souter, J., dissenting).

<sup>20</sup> See Norton, *supra* note 17, at 588 (noting the increasing number of government speech cases).

<sup>21</sup> See *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1293 (2010) (“Expansion of the government speech doctrine therefore threatens to erode constitutional protections by allowing the government to discriminate based on viewpoint in an increasingly wide range of circumstances.”).

<sup>22</sup> The most obvious examples of this inconsistency are the license plate cases. Although the facts of the cases differ slightly, it is notable that four U.S. courts of appeals

This Article aims to address the conflict first by identifying and describing it, and then by offering some possible solutions. Part I first sets the stage by introducing the protagonist and antagonist: government speech doctrine and the First Amendment's commitment to viewpoint neutrality.<sup>23</sup> It then shows how the former conflicts with the latter—not only, as is often supposed, by flooding the marketplace with powerful government messages and thereby drowning out private viewpoints, but also by permitting the regulation of private speakers who wish to express viewpoints that conflict with those of the government. This Article is especially concerned with the latter scenario, which arises whenever the government displaces, burdens, or limits private speech on the grounds that it conflicts with the government's own message.<sup>24</sup> Such a practice is not simply distortion of the marketplace; it is viewpoint discrimination.<sup>25</sup> Part I therefore recasts the problem of government speech as one of viewpoint-based government regulation, a problem that cannot be avoided by simply characterizing government speech as a form of “subsidy.”

These doctrinal difficulties are caused by underlying and unresolved theoretical questions, three of which are addressed in Part II.<sup>26</sup> First, what does it mean for the government to have a viewpoint? Most laws presumably have a “purpose,” but if that is sufficient to characterize them as government speech then the First Amendment's protections all but vanish, as it would only apply to purposeless restrictions of private speech. Even so, some First Amendment scholars (including

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have found license plates to be private speech. See *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008); *Sons of Confederate Veterans*, 288 F.3d at 621. By contrast, more recently, the U.S. Court of Appeals for the Fourth Circuit held that license plates are a hybrid of government and private speech, and the U.S. Court of Appeals for the Sixth Circuit also determined them to be government speech. See *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379–80 (6th Cir. 2006); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 799 (4th Cir. 2004).

<sup>23</sup> See *infra* notes 37–194 and accompanying text.

<sup>24</sup> Naturally, in some instances the government itself arguably has no particular “viewpoint” other than an informational one—a weather or defense alert, for example. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 6–10 (1983); Cole, *supra* note 17, at 702. To engage in that kind of “informative” speech, the government may need to temporarily displace private speakers, but it will not necessarily have done so for viewpoint-based reasons. See, e.g., *Tinker*, 393 U.S. at 513 (permitting public school officials to suppress student speech in school if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others”).

<sup>25</sup> See Cole, *supra* note 17, at 703–04.

<sup>26</sup> See *infra* notes 195–307 and accompanying text.

then-professor Elena Kagan<sup>27</sup>) have advocated (and claimed to identify in current doctrine) a “purposivist” approach that evaluates speech regulations based on whether they are motivated by the government’s hostility toward private speech, as opposed to some other neutral reason. Such purposivism has great value in many areas of First Amendment law, but it is not particularly useful in defining government viewpoint. The aim of purposivist analysis is, after all, to identify invidious viewpoint discrimination, which is precisely what government speech doctrine permits.

The difficulty of defining government viewpoint suggests a second, somewhat exasperating, question: Is it even possible for the government to have a viewpoint? The central assumption of government speech doctrine is that the government must be able to transmit messages without “distortion” by private speakers.<sup>28</sup> Even so, many scholars, judges, and justices have argued persuasively that it is impossible, as both a practical and theoretical matter, to speak of a law or constitutional provision as having a single coherent “purpose.”<sup>29</sup> And if it is impossible for the government to have a single purpose when enacting a law, it seems equally impossible for it to have a particular viewpoint or message embodied in that law that is worth protecting through the constitutional exemption given to government speech.

This question flows into a third: Does current government speech doctrine actually require the government to have a viewpoint? This turns out to be a surprisingly interesting and difficult question. On the one hand, the rationale behind the government speech exception seems to require that the government have a viewpoint worth protecting.<sup>30</sup> On the other hand, as current doctrine does not even require the government to identify itself as a speaker,<sup>31</sup> it is difficult to see how it could require the government to identify—or perhaps even to hold—a viewpoint. And, if there is no such requirement, then there may be

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<sup>27</sup> See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

<sup>28</sup> See Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1311 (2010) (arguing that courts must “restrict the application of the government speech doctrine to situations where the exercise of free speech rights by private citizens would thwart the government’s ability to communicate with the public”).

<sup>29</sup> See *Sumnum*, 129 S. Ct. at 1134; *Sons of Confederate Veterans, Inc.*, 288 F.3d at 619–20; Kagan, *supra* note 27, at 413–15; Post, *supra* note 17, at 181–83; *infra* notes 217–261 and accompanying text.

<sup>30</sup> See *Sumnum*, 129 S. Ct. at 1138; *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991); *infra* notes 262–307 and accompanying text.

<sup>31</sup> See *Johanns*, 544 U.S. at 564 n.7.

reason to doubt the theoretical justification for exempting government speech from the First Amendment in the first place. If the government is not expressing any kind of viewpoint, and cannot even show if and when it is expressing a viewpoint, then what is there to “protect” from distortion by private speakers?

And yet government speech, and specifically government expression of viewpoint, is not an unredeemable villain. To the contrary, “[i]t is the very business of government to favor and disfavor points of view . . . .”<sup>32</sup> Moreover, not all incidents of government communication limit private expression in any meaningful way. A presidential press conference, for example, may be government speech, and it may limit private access to the President’s podium, but it does not seem like much of a restriction on the marketplace of ideas.<sup>33</sup> Although the doctrine of government speech is somewhat troubling, the concept itself is not—the bathwater may need to be thoroughly changed, but we need not throw the baby out with it. Part III therefore offers a few preliminary thoughts about how to untangle the doctrinal and theoretical conflict without giving up entirely on government speech.<sup>34</sup> The suggestions it proposes acknowledge both the necessity and the apparent incompatibility of viewpoint neutrality and government speech doctrine.<sup>35</sup> To reconcile them, Part III builds on the notion of adequate alternatives that has long been central to time, place, and manner analysis and other First Amendment doctrines. At least three potential solutions emerge. First, the government speech defense could be limited to situations in which the government’s speech leaves adequate alternatives for private speakers. Second, the defense could be limited to situations in which the government would otherwise lack adequate alternatives for communication. Finally, government speech could be allowed only where the government affirmatively provides equal alternatives for private speakers against whose viewpoints it has discriminated.

These are but three solutions; others are possible.<sup>36</sup> Ultimately, however, it is becoming increasingly important that one be selected. If the First Amendment is to maintain its claimed commitments to both viewpoint neutrality and government speech, then free speech theory

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<sup>32</sup> Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment).

<sup>33</sup> See Cole, *supra* note 17, at 703–04.

<sup>34</sup> See *infra* notes 308–404 and accompanying text.

<sup>35</sup> See *infra* notes 308–404 and accompanying text.

<sup>36</sup> *E.g.*, Cole, *supra* note 17, at 716; Post, *supra* note 17, at 152.

and doctrine must be able to accommodate their absolute but conflicting demands.

## I. PRIVATE VIEWPOINTS AND GOVERNMENT SPEECH

Although there is very little agreement about the core “purpose” of the First Amendment,<sup>37</sup> there is near unanimity that *one* such purpose—and certainly a core function—is to protect private viewpoints from government regulation. Thus the Amendment flatly prohibits the government from engaging in viewpoint discrimination,<sup>38</sup> even within classes of speech that could otherwise be completely proscribed.<sup>39</sup> At the same time, the government’s expression of its own viewpoints is exempt from First Amendment scrutiny, even where such expressions have the incidental effect (or, arguably, the outright purpose) of limiting private speakers.<sup>40</sup> And that paradox leads to the central puzzle with which this Article is concerned: government may not restrict speech simply because it disagrees with a particular viewpoint; and yet if it characterizes such a restriction as being the government’s own expression, it may be completely exempt from constitutional scrutiny.<sup>41</sup> The first Part of this Article aims to flesh out this paradox, and to explain why and how the government’s viewpoint matters in analyzing government speech. Part I.A establishes the centrality of viewpoint neutrality to the purpose of the Free Speech Clause. Government speech, however, often contravenes this purpose. Part I.B examines the ways in which government speech limits private speech—by drowning it out, restraining it, or compelling it—often in ways that are viewpoint based.

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<sup>37</sup> For a very, very small sampling, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105 (1980) (focusing on the value of the First Amendment to political democracy); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 79 (1960) (“The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.”); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982) (emphasizing importance of individual efforts to obtain “self-realization”); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215–20 (1972) (focusing on individuals’ “autonomy” interests).

<sup>38</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>39</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391–92 (1992) (holding that a state may not selectively ban fighting words on the basis of viewpoint, even though it may ban fighting words entirely).

<sup>40</sup> See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

<sup>41</sup> See *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1138 (2009).



### A. *Protecting Private Viewpoints Is a Primary Purpose of the Free Speech Clause*

The first rule of free speech theory and doctrine is that the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint.<sup>42</sup> As the Supreme Court has stated: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>43</sup>

This principle is more than a rhetorical commitment; it is manifested in many of the First Amendment’s most recognizable rules.<sup>44</sup> In 1992, in *R.A.V. v. City of St. Paul, Minnesota*, the U.S. Supreme Court held that even speech which might otherwise be flatly prohibited—in other words, speech that falls outside the reach of the First Amendment—may not be treated differently on the basis of the viewpoint it expresses.<sup>45</sup> Thus, for example, the state can ban all fighting words,<sup>46</sup> but not only those fighting words directed at Democrats.<sup>47</sup> Put simply: “The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.”<sup>48</sup> The Court has suggested that a speech regulation may be held unconstitutional if

<sup>42</sup> See *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>43</sup> *Id.*

<sup>44</sup> See Kagan, *supra* note 27, at 443.

<sup>45</sup> *R.A.V.*, 505 U.S. at 383–84. In *R.A.V.*, the majority stated:

What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

*Id.*; see *id.* at 406 (White, J., concurring in the judgment) (“Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest.”).

<sup>46</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.*

<sup>47</sup> See *R.A.V.*, 505 U.S. at 391–92.

<sup>48</sup> *Id.* at 386; see *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) (“Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.”).

viewpoint discrimination is so much as a part of the motivation for passing it.<sup>49</sup> Even those First Amendment rules that say nothing about protecting viewpoints may in fact be designed to smoke out bad government purposes and identify viewpoint discrimination.<sup>50</sup> For example, First Amendment doctrine supposedly draws a distinction between viewpoint-based restrictions (which, of course, the Amendment flatly forbids) and “content”-based restrictions (which may be acceptable in some circumstances).<sup>51</sup> And yet, the boundary between content and viewpoint discrimination is more slippery than at first it might seem.<sup>52</sup> As Richard Fallon notes, “many content-based and effects-based tests can reasonably be viewed as surrogates for purpose tests.”<sup>53</sup> Content-based tests, in other words, may in fact provide mechanisms for determining whether the governmental purpose behind a law is impermissible—whether, for example, it is premised on viewpoint discrimination.

Free speech scholars—not by nature an agreeable bunch—have for the most part endorsed the primacy of the viewpoint neutrality principle: “[V]irtually all of the leading theories would find it impermissible—albeit for different reasons—for the government to attempt to stifle communication based on its hostility to particular ideas.”<sup>54</sup> Viewpoint neutrality and the relationship between public and private viewpoints play a particularly interesting role in the “purposivist” approach to the First Amendment.<sup>55</sup> Advocating such an approach, then-

<sup>49</sup> See Kagan, *supra* note 27, at 443 (“Let us accept that the First Amendment prohibits restrictions on speech stemming, even in part, from hostility, sympathy, or self-interest.”); see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (“[R]egulation of communication may not be *affected* by sympathy or hostility for the point of view being expressed by the communicator.” (emphasis added)).

<sup>50</sup> See Kagan, *supra* note 27, at 414–15.

<sup>51</sup> See *id.* at 443 (“The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law.”).

<sup>52</sup> See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (stating that the distinction between content and viewpoint discrimination “is not a precise one”); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 105 (1998) (“[I]t is hardly clear that the line between viewpoint and other forms of content discrimination can be sustained, except possibly in extreme cases.”).

<sup>53</sup> Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 94 (1997).

<sup>54</sup> Fallon, *supra* note 53, at 100; see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 195–97 (1992) (stating that viewpoint discrimination is constitutionally impermissible); Kathleen M. Sullivan, *Artistic Freedom, Public Funding, and the Constitution*, in *PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS* 80, 89–90 (Stephen Benedict ed., 1991) (arguing that viewpoint discrimination is a “cardinal sin against the First Amendment” even when used to make decisions about the receipt of government funds); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 611–12 (1990).

<sup>55</sup> See Kagan, *supra* note 27, at 414.

professor Elena Kagan argued that “most of First Amendment doctrine constitutes a highly, but necessarily, complex scheme for ascertaining the governmental purposes underlying regulations of speech.”<sup>56</sup> Jed Rubenfeld similarly argued that the solution to the First Amendment’s “doctrinal problems . . . is not complicated. All the difficulties disappear as soon as First Amendment analysis takes up what the Supreme Court has ostensibly sought to foreclose: an open and direct inquiry into the law’s purpose.”<sup>57</sup>

The viewpoint neutrality principle clearly applies where the government totally forbids the expression of a disfavored viewpoint.<sup>58</sup> But it also applies where the private viewpoint is partially stifled, rather than totally silenced.<sup>59</sup> After all, the principle that “[t]he government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed”<sup>60</sup> is not the same as the notion that the government may regulate speech based on hostility towards the underlying message so long as it does not completely mute the message.<sup>61</sup> Part III.B.1 evaluates whether partial government regulation of speech that, although grounded in government hostility to the message, amounts to only a partial restriction might be a doctrinal solution to the theoretical problems with government speech doctrine.<sup>62</sup> Even if such partial stifling were permissible, it would not be the same as saying that government speech is not a viewpoint-based regulation of private speech. At the very least, if the purposivists are correct and what matters is the motivation behind a speech regulation (i.e., whether it tar-

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<sup>56</sup> Kagan, *supra* note 27, at 516; see Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 127 (noting, though not necessarily endorsing, the notion that “the form of a regulation—content-specific or content-neutral—matters mostly as evidence of its purpose, but purpose is the predominant consideration”).

<sup>57</sup> Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 768 (2001); see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 332 (1997) (arguing that although the flag-burning cases “used the language of strict scrutiny, these cases are clearly about illegitimate purposes”); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court’s Jurisprudence*, 12 CONST. COMMENT. 401, 420 (1995) (“[T]he Supreme Court seems to have chosen a fairly coherent and sensible (albeit somewhat unexplicit) middle path: Incidental restrictions *sometimes* raise a First Amendment concern, depending on the likelihood of a speech-suppressive administrative motivation.”).

<sup>58</sup> See *Johnson*, 491 U.S. at 414.

<sup>59</sup> See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (applying reasonable time, place, and manner restrictions to a public demonstration).

<sup>60</sup> *R.A.V.*, 505 U.S. at 386.

<sup>61</sup> See *infra* notes 343–367 and accompanying text.

<sup>62</sup> See *infra* notes 343–367 and accompanying text.

gets a particular viewpoint), then it should not matter whether the effect of the regulation is to silence the viewpoint's expression completely or simply to burden it.

Of course, like everything even tangentially related to the First Amendment, it may properly be questioned whether commitment to the principle of viewpoint neutrality has been more rhetorical than real.<sup>63</sup> It is part of the project of this Article to argue that the commitment is certainly not real, and that the more tightly we embrace government speech doctrine the less we can even think of it as rhetorical. In any event, it suffices to say that—real or not—viewpoint neutrality has long been *thought* to be an animating principle of First Amendment doctrine, and in a broader sense it undoubtedly *is* an animating principle of our First Amendment culture.<sup>64</sup>

The First Amendment is like a scholarly Midas: every rule it touches turns to theory. And yet the bar on viewpoint discrimination itself does not vary according to one's preferred First Amendment theory, nor—with the glaring exception of government speech doctrine—do courts vary in their avowed obeisance to it.<sup>65</sup> The viewpoint neutrality requirement is therefore both fundamental to free speech and agnostic to free speech theory.

### B. *Government Speech Limits Private Speech on the Basis of Viewpoint*

This Section addresses and explores a simple but under-recognized proposition: government speech often (albeit not always) limits private expression. It may not totally forbid a private speaker from expressing a particular viewpoint, but it either forces people to express viewpoints they do not support or prevents them from expressing viewpoints they do. Government speech cases, after all, arise when a private individual whose speech has been limited brings a First Amendment challenge, and the government relies on government speech doctrine as a de-

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<sup>63</sup> To take just one example, “the Court’s First Amendment doctrine already permits government employers to make viewpoint-specific distinctions when punishing on-duty speech that may disrupt workplace operations—such as speech critical of a government employer.” Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 62 (2009). See generally Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

<sup>64</sup> See SMOLLA, *supra* note 54, at 195–97.

<sup>65</sup> See *Rosenberger*, 515 U.S. at 828–29; *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991); *Cole*, *supra* note 17, at 680–81; *Sullivan*, *supra* note 56, at 127–28; *infra* notes 327–404 and accompanying text.

fense.<sup>66</sup> Of course, not all of these challenges succeed, and not all government speech directly limits private expression. Government-sponsored anti-drug advertisements and presidential press conferences, for example, do not meaningfully limit private speakers.<sup>67</sup> For precisely that reason, however, those situations are generally not implicated in government speech cases.<sup>68</sup> Moreover, it is not impossible to preserve these important and useful incidents of government speech while still recognizing that the doctrine limits private viewpoints in other circumstances.

Recasting government speech as a limitation on private speech demonstrates the futility of asking whether a particular action is government speech “or” a regulation of private speech in a public forum.<sup>69</sup> There are not two sides to the coin. And even if there were, flipping it would do no good; it would stubbornly land on its edge each time. Far better simply to recognize that government speech often *is* a limitation (even if not a total ban) on private expression, and to deal honestly and straightforwardly with the consequences. Perhaps the most serious of these is the central problem this Article addresses: the fact that government speech involves government expression of viewpoint. Because government speech often amounts to speech regulation, and is itself viewpoint-based, it follows that government speech is a viewpoint-based

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<sup>66</sup> See *Johanns*, 544 U.S. at 571 (Souter, J., dissenting).

<sup>67</sup> See Cole, *supra* note 17, at 703–04.

<sup>68</sup> See *id.*

<sup>69</sup> See generally Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953 (1998) (analyzing the First Amendment protections available for speech that the government, as a “secondary” speech entity speaking through individuals, “selects”).

An entire federal circuit tore out its collective hair over this exact problem. In 2002, in *Sumnum v. City of Ogden (City of Ogden)*, the U.S. Court of Appeals for the Tenth Circuit concluded that permanent monuments on the lawn of a municipal building constituted a nonpublic forum. 297 F.3d 995, 1002 (10th Cir. 2002). In 2006, the U.S. District Court for the District of Utah in *Sumnum v. Pleasant Grove City* relied on the reasoning in *City of Ogden* to conclude that the public park was a nonpublic forum in which content-based restrictions were permissible if reasonable and viewpoint neutral. See *Sumnum*, 483 F.3d at 1051–52; *City of Ogden*, 297 F.3d 1002. On appeal, however, the Tenth Circuit disagreed, striking down the city’s action on the grounds that the park constituted a public forum and that the exclusion of the monument did not meet strict scrutiny. *Sumnum*, 483 F.3d at 1050–52. A divided vote of the Tenth Circuit refused to rehear that conclusion en banc. *Sumnum v. Pleasant Grove City*, 499 F.3d 1170, 1171 (10th Cir. 2007). Judge Carlos F. Lucero dissented from the denial of rehearing, arguing that the park was a limited public forum and not a public forum. *Id.* at 1171 (Lucero, J., dissenting). Judge Michael W. McConnell also dissented, arguing that the monuments were government speech. *Id.* at 1175 (McConnell, J., dissenting). The Supreme Court granted certiorari and ultimately reversed, largely for the reasons advocated by Judge McConnell. See *Sumnum*, 129 S. Ct. at 1138.

regulation on speech. This Section attempts to establish that proposition; Part II attempts to deal with the consequences.

## 1. Government Speech Limits Private Speech

Government speech is not, strictly speaking, a First Amendment “right” of the government,<sup>70</sup> but rather a doctrine that allows the government to justify what otherwise might be unconstitutional interference with private speakers. Drawing this distinction is important because the very concept of “government speech” seems to suggest that government actors, like private speakers, may seek constitutional protection from speech regulations—in other words, that the government can raise First Amendment claims against itself.<sup>71</sup> Instead, government speech doctrine provides a defense to First Amendment challenges brought by private individuals whose speech has been limited by the government.<sup>72</sup> Government speech itself can therefore limit private speech in at least two ways: by drowning it out or, perhaps less recognized but more troubling, by explicitly regulating it.

### a. *Government Speech Drowns Out Private Speech*

By now it is well recognized that protecting government speech means running the risk that the government will drown out dissenting private voices due to the volume of its voice and the power of the outlets through which it can communicate.<sup>73</sup> This was one of the insights of the first major scholarly work on government speech, Mark Yudof’s *When Government Speaks*, which preceded the first major government speech case, the U.S. Supreme Court’s 1968 decision in *Rust v. Sullivan*, by almost a decade.<sup>74</sup> Yudof contended that the government “speaks” in all kinds of unrecognized and underappreciated ways, from disseminating health warnings to setting public school curricula.<sup>75</sup> He noted

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<sup>70</sup> See Bezanson & Buss, *supra* note 17, at 1508 (“[V]iewing government as a First Amendment right holder is not supported by, and is inconsistent with, the text of the First Amendment and the purposes underlying the text.”).

<sup>71</sup> See YUDOF, *supra* note 24, at 6–10.

<sup>72</sup> See *Johanns*, 544 U.S. at 571 (Souter, J., dissenting).

<sup>73</sup> Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 961–62 (1984) (“A prominent theme in this ‘government speech’ debate is that the government’s powerful voice can easily overwhelm weaker private voices, creating a monopoly of ideas and inhibiting the dialectic on which we rely to reach decisions.” (internal citations omitted)).

<sup>74</sup> *Rust*, 500 U.S. at 193. See generally YUDOF, *supra* note 24.

<sup>75</sup> YUDOF, *supra* note 24, at 6–10 (describing various ways in which the government can speak).

that government speech can drown out private voices, and that it has the democracy-distorting effect of creating a “falsified majority” by using government communication to ensure support for government policies.<sup>76</sup> Yudof’s concern, in other words, was not with the legal effect of government speech doctrine—which was not yet a glimmer in the justices’ eyes—but with the practical effect of government speech.

The reason for this practical problem is not difficult to perceive. The government has access to methods of speech that the rest of us do not—platforms such as presidential press conferences,<sup>77</sup> for example, and subtler but perhaps more powerful mechanisms such as school curricula.<sup>78</sup> So long as government’s use of these mechanisms is transparent,<sup>79</sup> any harm to the market may be minimized—people can identify the government’s voice and, if they disagree with its message, vote out the governmental actors responsible.<sup>80</sup> And yet the problem does not entirely disappear, because the “political” solution is itself imperfect. If the Democrat-controlled Department of Education decided that all federally funded schoolchildren should be taught that Republicans are vile racists, Republicans would presumably not be satisfied to know that they could change the curriculum (and thus the government’s speech) simply by winning more elections. In other words, the government’s unique position in the marketplace of ideas carries with it special risks of distortion and dominance, risks that are multiplied by the expansion of government speech doctrine.

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<sup>76</sup> *Id.* at 31–37, 152–57.

<sup>77</sup> See Cole, *supra* note 17, at 703–04; Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 116–17 (2004).

<sup>78</sup> See Cole, *supra* note 17, at 715.

<sup>79</sup> One of the most notable shortcomings of current government speech doctrine is that it fails to require such transparency, a point made at length by others. See, e.g., *Johanns*, 544 U.S. at 571–72 (Souter, J., dissenting); Lee, *supra* note 17, at 988 (“[W]hen the government participates in public debate, it should make the fact of its participation transparent.”). As Justice Souter has written:

[I]f government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is currently willing to invest with power.

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

<sup>80</sup> For more on the feasibility of the “political solution” to the government speech problem, see *infra* notes 130–142 and accompanying text.

b. *Government Speech Is Akin to Speech Regulation*

Government speech raises a second threat, one that is less recognized but theoretically and doctrinally more nefarious than the first: even holding aside the distortive power of the government's speech, government speech doctrine permits the government to directly limit the speech of private individuals.<sup>81</sup> In that way, the problem is not one of distortion but of speech regulation, plain and simple. As Steven Gey rightly notes, "[o]ne feature of the Court's most recent government speech cases is that when the Court gives the government the right to speak, the Court simultaneously gives the government the right to silence private speakers who disagree with the government."<sup>82</sup>

The posture of government speech cases illustrates the problem. Such cases arise, almost inevitably, in situations where a private party has been *prevented* from speaking in his or her chosen method or setting. In other words, holding aside those relatively rare cases involving government speech that is itself constitutionally prohibited (speech that violates the Establishment Clause is the only clear example<sup>83</sup>), government speech actually involves limitations on private speech. Thus it makes sense that almost all of the Supreme Court's government speech cases originated when private parties wished to speak and were told that they could not: for example, doctors in the 1991 case of *Rust v. Sullivan* who wanted to give their patients information about abortion;<sup>84</sup> lawyers in the 2001 case of *Legal Services Corp. v. Velazquez* who wanted to argue for changes in government entitlement programs;<sup>85</sup> and most recently, members of a religious order in the 2009 case of *Pleasant Grove City, Utah v. Summum* who wanted to erect a monument celebrating their Seven Aphorisms.<sup>86</sup> In each of those cases, the government informed private parties that they could not engage in their preferred expression, and in two cases the government prevailed.<sup>87</sup> *Velazquez* is the exception, and the

<sup>81</sup> See David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. REV. 1637, 1640 (2006) ("Government can speak, but its possession of coercive authority along with its ability to shape public discourse makes it unlike any other speaker.").

<sup>82</sup> Gey, *supra* note 28, at 1268–69.

<sup>83</sup> See *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) ("For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."); *Johanns*, 544 U.S. at 553; *Park*, *supra* note 2, at 145.

<sup>84</sup> 500 U.S. at 192.

<sup>85</sup> 531 U.S. at 542–43.

<sup>86</sup> 129 S. Ct. at 1129–30.

<sup>87</sup> See *id.* at 1138 (holding that the selection of privately donated monuments in a public park constituted government speech); *Rust*, 500 U.S. at 193–94 (holding that prohibi-



Court's opinion in that case suggests that its ruling was largely limited by the specific context of the attorney-client relationship.<sup>88</sup>

Government speech thus involves the government entering and effectively occupying "private" spheres of discourse. At oral argument in *Sumnum*, the government's attorney embraced this point, arguing that government speech "turns on control, right? So once the Government takes control of something, says this is our speech, then it's the Government speaking."<sup>89</sup> And just as the Fifth Amendment does not recognize half-takings,<sup>90</sup> government speech doctrine recognizes *either* private or public speech, but not a hybrid of the two (much to the chagrin of some scholars<sup>91</sup> and Supreme Court justices<sup>92</sup>). In other words, once the government is speaking, speakers cannot assert *any* First Amendment claim to stop it from doing so, nor do they have a First Amendment right to oppose the government's speech by whatever method they choose. Of course, private speakers remain free to agree or disagree with the content of the government's message. But they cannot express that disagreement in their preferred way, much like Suzette Kelo remains free to live in *a* house, just not the one whose physical taking the Supreme Court upheld in the 2005 case of *Kelo v. City of New London*.<sup>93</sup>

No matter how one characterizes the government and private interests at stake, the basic conclusion is unavoidable: government speech

tions on counseling, referral, and provision of information about abortion as a condition for healthcare providers to receive Title X government funding constituted government speech). *But see Velazquez*, 531 U.S. at 547–49 (holding unconstitutional a condition on funding that prevented Legal Services Corporation-funded attorneys from addressing the validity of welfare laws).

<sup>88</sup> 531 U.S. at 542–43 ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.").

<sup>89</sup> Transcript of Oral Argument at 32, *Sumnum*, 129 S. Ct. 1125 (No. 07–665), 2008 WL 4892845, at \*32.

<sup>90</sup> *See* U.S. CONST. amend. V; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1991); *see also* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>91</sup> Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) ("We generally characterize speech as either private or governmental, and this dichotomy is embedded in First Amendment jurisprudence.").

<sup>92</sup> Transcript of Oral Argument, *supra* note 89, at 10–11 (Justice Souter: "Isn't the tough issue here the claim that there is—is in fact a mixture, that it is both Government and private[?]" ); *id.* at 23–24 (Justice Breyer: "[T]he problem I have is that we seem to be applying these subcategories in a very absolute way. Why can't we call this what it is—it's a mixture of private speech with Government decisionmaking . . . ?").

<sup>93</sup> *See* 545 U.S. 469, 488–90 (2005) (holding that the city of New London's decision to take private property for economic development satisfied the Fifth Amendment's public use requirement); *Rust*, 500 U.S. at 193–94.

directly limits private speech.<sup>94</sup> Whether that limitation is justifiable, or whether it simply represents the permissible denial of a subsidy, is a separate question addressed in more detail below.<sup>95</sup>

c. *Government Speech Is Akin to Compelled Speech*

There is another side to the relationship between government speech and private expression, one that is equally problematic as a matter of First Amendment doctrine: government speech not only limits private speech, but it also sometimes compels it.

In landmark cases like *Wooley v. Maynard* in 1977<sup>96</sup> and *West Virginia Board of Education v. Barnette* in 1943,<sup>97</sup> the U.S. Supreme Court established that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”<sup>98</sup> As a practical matter, a private speaker will probably only bring a First Amendment challenge if he or she has been forced to express a viewpoint he or she does not support. But compelled speech may be impermissible whether or not it expresses a particular “viewpoint” with which the compelled speaker disagrees.<sup>99</sup>

The relationship between government speech and compelled speech is a complicated one, in part because so many government actions effectively “compel” taxpayers to “express” messages with which they disagree. Of course, the First Amendment cannot give all taxpayers a right to withhold funds for programs they do not support, or else government itself would grind to a halt.<sup>100</sup> The limitations on taxpayer

<sup>94</sup> See *Rust*, 500 U.S. at 193–94.

<sup>95</sup> See *infra* notes 96–114 and accompanying text.

<sup>96</sup> *Wooley v. Maynard*, 430 U.S. 705, 713–14, 717 (1977).

<sup>97</sup> 319 U.S. 624, 642 (1943).

<sup>98</sup> *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 633–34).

<sup>99</sup> *Developments in the Law—State Action and the Public/Private Distinction*, *supra* note 21, at 1300 (arguing that the ban on compelled speech “can rationally exist” even if the right against viewpoint discrimination were to be “peeled away”). The same passage goes on to argue that the prevention against compelled speech “is a more central element of freedom of speech” than the ban on viewpoint discrimination, and that it is in fact “the core free speech right.” *Id.* But for all the reasons given in Part I.A, it seems to me that viewpoint discrimination is a far more central—and common—First Amendment concern. See *supra* notes 42–65 and accompanying text.

<sup>100</sup> *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) (“To govern, government has to say something, and a First Amendment heckler’s veto of any forced contribution to raising the government’s voice in the marketplace of ideas would be out of the question.” (internal citation omitted)).

standing go a long way towards preventing this problem from arising,<sup>101</sup> and the government speech cases go even further by recasting government programs as government speech free from the usual ban on compelled speech. In 2005, in *Johanns v. Livestock Marketing Ass'n*, for example, the U.S. Supreme Court considered the case of a group of beef producers who objected to the requirement that they pay a certain amount of money each year to the Beef Council, a government-run organization responsible for the familiar “Beef. It’s What’s For Dinner” advertisements and other pro-beef propaganda.<sup>102</sup> These particular beef producers claimed that they did not agree with this message because it failed to differentiate their own products, such as grain-fed beef or other specialty meats.<sup>103</sup> They argued that by forcing them to fund and associate with a message they did not support, the compulsory advertising amounted to compelled speech.<sup>104</sup> But in keeping with the basic notion that government speech operates as an exception to otherwise rigid rules of free speech doctrine, a divided Court held that the beef advertisements were the government’s own speech and therefore exempt from First Amendment scrutiny.<sup>105</sup> In other words, despite the fact that the ads amounted to viewpoint-specific compelled speech, government speech doctrine blocked private individuals from successfully invoking the principle of viewpoint neutrality.

On that note, it should be emphasized that much of what passes for compelled speech could just as accurately be described as viewpoint-based limitations on speech. Along with *Barnette*, which struck down a school’s requirement that students recite the Pledge of Allegiance,<sup>106</sup> *Wooley* is generally seen as the origin of the prohibition on compelled speech. In *Wooley*, the plaintiff, George Maynard, used tape to cover the words “Live Free or Die” on his state-issued New Hampshire license plate because he “consider[ed] the . . . motto to be repugnant to [his]

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<sup>101</sup> See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (limiting taxpayer standing to Establishment Clause violations and a few other narrowly defined scenarios); see also *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (declining to extend *Flast*’s “narrow exception” to the taxpayer standing rule).

<sup>102</sup> *Johanns*, 544 U.S. at 553–56.

<sup>103</sup> *Id.* at 556.

<sup>104</sup> *Id.* at 564.

<sup>105</sup> *Id.* at 560, 564–65 (rejecting respondent’s various arguments that the promotional campaign was not government speech).

<sup>106</sup> 319 U.S. at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

moral, religious, and political beliefs.”<sup>107</sup> He was fined for doing so, and brought a First Amendment challenge.<sup>108</sup> The Supreme Court held in his favor on the grounds that being forced to display the state motto on his license plate effectively compelled Maynard to express a message with which he did not agree.<sup>109</sup> Citing *Barnette*, the Court emphasized that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”<sup>110</sup> *Wooley* was decided well before *Rust* and its progeny, so the Court did not address whether the government has some kind of speech “right” to express its motto on license plates.

Although it is probably true that having the state motto emblazoned on his license plate forced Maynard to express something against his will, that is not the only way to conceptualize the First Amendment harm he suffered, nor is it necessarily the best one. After all, it could just as easily be said that the motto conveyed no message at all because anyone seeing it would know that Maynard was required to have a license plate on his car and that the act of doing so was therefore non-volitional and unexpressive. But even if the license plate itself conveyed no message, that would not mean that Maynard had no First Amendment claims. Whether or not he was forced to say something with which he disagreed, Maynard was *prevented* from engaging in expressive conduct—the act of covering up the motto on his license plate.<sup>111</sup> Thus his claim was not only one of compelled speech, but also of speech regulation.

Nor is this the only interesting complication in the compelled speech/government speech interface. If the *Wooley-Barnette* principle is extended to cover government speakers, then it would seem that the government has a right to prevent “ventriloquism”—to avoid, in other words, having private speech mistakenly attributed to it.<sup>112</sup> New Hampshire, for example, might argue that Maynard’s defaced license plate conveyed the misleading message that the state had no pride in its motto, thus “compelling” the government to express a viewpoint it did not hold. Although the Supreme Court has yet to rest a holding squarely on

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<sup>107</sup> 430 U.S. at 707.

<sup>108</sup> *Id.* at 708.

<sup>109</sup> *See id.* at 713.

<sup>110</sup> *Id.* at 714 (citing *Barnette*, 319 U.S. at 633–34).

<sup>111</sup> *See id.* at 713 (citing the district court’s framing of the harm Maynard suffered as suppression of individual, symbolic expression).

<sup>112</sup> *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 49–52 (2000); Norton, *supra* note 4, at 1323–24.

this principle, it has caught the attention of some appellate judges<sup>113</sup> and is of special interest to those judges and scholars who would recognize a category of “hybrid” speech that is simultaneously private and governmental.<sup>114</sup>

Thus, even compelled speech can effectively be recast as speech regulation, which in turn means that cases like *Johanns* are in many ways equivalent to those like *Summum*. The result is that whether conceived as regulations of private speech or as compelled speech, government speech represents the kind of viewpoint-based interference with private speakers that is generally thought to raise problems under the Free Speech Clause.

## 2. Government Speech Limitations Are Often Viewpoint Specific

In *Summum*, the Supreme Court warned that government speech doctrine should “not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”<sup>115</sup> The justices can rest easy: no “subterfuge” is necessary, for the doctrine is refreshingly transparent in this regard. Its very *raison d’être* is to “favor[] certain private speakers over others based on viewpoint.” The point cannot be overstressed: the function, and often the purpose, of government speech doctrine is to disfavor private speakers as a result of their viewpoints.<sup>116</sup> No matter how one conceptualizes the limitations that government speech places on private speech—as drowning out, restraining, or compelling it—private speech that is affected will be that with which the government disagrees.

This is not some unforeseeable or avoidable byproduct of government speech. It is the very heart of the doctrine. Consider what would have happened if Pleasant Grove City had justified its rejection of the

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<sup>113</sup> See, e.g., *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting from the denial of rehearing en banc) (“I would have hoped, if rehearing were granted, that we would consider the government’s interest in avoiding ‘speech by attribution;’ that is, the government’s right not to be compelled to speak by private citizens.”); *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 827 (9th Cir. 1991) (recognizing a school’s interest in “disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is”).

<sup>114</sup> See generally Corbin, *supra* note 91 (advocating for recognition of “mixed speech” as a category).

<sup>115</sup> *Summum*, 129 S. Ct. at 1134.

<sup>116</sup> As Part III.A discusses in more detail, government speech can also be justified on the basis of the government’s need to convey information, not viewpoints. See *infra* notes 315–326 and accompanying text. This Section focuses on the latter.

Summum monument on some viewpoint-neutral ground—because it would interfere with soccer games in the park, for example. In that case, the Summum would, somewhat paradoxically, have had a *stronger* First Amendment claim. At the very least, the city would have had to satisfy the time, place, and manner test, which requires the government to show that a regulation is content *neutral*, narrowly tailored to serve a significant government interest, and preserves adequate alternative channels of expression.<sup>117</sup> But because the city claimed that the monument's message would have interfered with its own, it was able to avoid even this relatively forgiving standard.<sup>118</sup> Indeed, from a free speech perspective, the government speech tag is a fate worse even than the nonpublic forum label<sup>119</sup> because at least the latter requires viewpoint neutrality.<sup>120</sup> In 2002, in *Summum v. City of Ogden*, in fact, a panel of the U.S. Court of Appeals for the Tenth Circuit ruled in Summum's favor despite characterizing the park as a nonpublic forum because the city's action was not viewpoint neutral.<sup>121</sup>

In other words, government speech doctrine alters a fundamental assumption of First Amendment doctrine. For decades it has been thought that the best way to save a speech regulation from constitutional challenge was to characterize it as viewpoint neutral.<sup>122</sup> Under government speech doctrine, however, one can avoid First Amendment scrutiny altogether by embracing the fact that a regulation is viewpoint specific.<sup>123</sup> One answer to this apparent problem might be that in government speech cases the government is not seeking to limit dissenting

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<sup>117</sup> *Clark*, 468 U.S. at 293. By invoking the test, I do not mean to endorse it. There are problems with the time, place, and manner approach that are far beyond the scope of this Article to address. See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1261 (1995) (describing the test's application as "an unmitigated disaster").

<sup>118</sup> See *Summum*, 129 S. Ct. at 1137. I believe it quite likely that the city could have prevailed under a time, place, and manner analysis for precisely the same reasons as it prevailed under government speech doctrine—allowing a proliferation of monuments would create clutter and effectively close the park to all private speakers. See *id.*; see also *supra* note 117.

<sup>119</sup> Cf. *Gey*, *supra* note 28, at 1306 (noting that, "[f]rom a free-speech perspective," a court's characterization of a state specialty license plate program as government speech would be the worst possible outcome because it would permit some controversial ideological messages in the prime expressive forum, but only those with which the government agrees).

<sup>120</sup> See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998) (distinguishing between nonpublic forums, in which viewpoint neutrality is required, and government enterprises that are not forums, in which it is not).

<sup>121</sup> See *City of Ogden*, 297 F.3d at 1002, 1006.

<sup>122</sup> See Fallon, *supra* note 53, at 91–92; Sunstein, *supra* note 54, at 611–12.

<sup>123</sup> See *Summum*, 129 S. Ct. at 1138.

viewpoints, but rather to express its own. And yet the very nature of government speech doctrine makes it almost impossible to draw a line between the government's expression of its own viewpoints and the suppression of those with which it disagrees. That is, government speech permits—indeed rewards—the disfavoring, if not outright silencing, of private viewpoints that would interfere with the government's own expression.<sup>124</sup> Inevitably, the private viewpoints that will be silenced are those with which the government disagrees. Thus it might be said with some force that the purpose, and not merely the function, of government speech doctrine is to censor certain private viewpoints.

At risk of belaboring the point: no one need worry that government speech will be used as “subterfuge for favoring certain private speakers over others.”<sup>125</sup> The current doctrine encourages government to be open, consistent, and sincere in its effort to do so. That said, a final word of qualification may be appropriate. Although the discussion here has focused on the many ways in which government speech discriminates against private viewpoints, there also might be situations in which it is either viewpoint neutral or nondiscriminatory.<sup>126</sup> For example, to the degree that the government seeks only to inform citizens about a national emergency, it may not be expressing a “viewpoint” on any particular controversy.<sup>127</sup> And, when the President takes the podium to present the State of the Union address, it may be argued that he is not in any meaningful sense “discriminating” against private speakers, even though they cannot occupy the podium at the same time.<sup>128</sup> These are strong points, not to be taken lightly, and are addressed in more detail in Part III.B.<sup>129</sup>

### 3. A Transparency Requirement Would Lessen the Problem, but Would Not Solve It

It has been argued that transparency is, or at least should be, the hallmark of government speech doctrine.<sup>130</sup> So long as the government

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<sup>124</sup> See Bezanson, *supra* note 69, at 959 (discussing government-as-editor cases and concluding that “[t]he idea that an editor is ‘free’ to exercise editorial judgment without the capacity to engage in viewpoint discrimination is vacuous”).

<sup>125</sup> See *Summun*, 129 S. Ct. at 1134.

<sup>126</sup> See *infra* notes 262–307 and accompanying text.

<sup>127</sup> See Cole, *supra* note 17, at 681; *infra* notes 262–307 and accompanying text.

<sup>128</sup> See Cole, *supra* note 17, at 703–04.

<sup>129</sup> See *infra* notes 327–404 and accompanying text.

<sup>130</sup> See, e.g., *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); Lee, *supra* note 17, at 988; Norton, *supra* note 17, at 597.

identifies itself when speaking, the public can hold government speakers politically accountable and curb their excesses.<sup>131</sup> Thus the Supreme Court has said that “[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”<sup>132</sup>

There is, however, a well-recognized flaw in this supposed political solution: government speech doctrine does not require the government to identify itself when speaking.<sup>133</sup> As a result, voters will not necessarily even know when the government is speaking, and therefore cannot hold it accountable for whatever message it is conveying. This was the major issue that divided the majority and dissenting opinions in *Johanns*.<sup>134</sup> Justice Souter—whose unease with government speech doctrine continued right up through his concurring opinion in *Summum*<sup>135</sup>—argued in dissent that “if government relies on the government speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message.”<sup>136</sup> Justice Scalia, writing for the majority, responded that “the dissent cites no prior practice, no precedent, and no authority for this highly refined elaboration—not even anyone who has ever before thought of it.”<sup>137</sup>

But many scholars have supported Justice Souter’s position and argued (rightly, in my opinion) for a functional transparency requirement, which would enable voters to respond to, and control, government speech.<sup>138</sup> This kind of political process solution has much to recommend it. It would surely go a long way towards ensuring that messages the government claims to be expressing in the name of voters are messages the voters actually support. And if the government must

<sup>131</sup> See *Southworth*, 529 U.S. at 235.

<sup>132</sup> See *id.*

<sup>133</sup> See *Summum*, 129 S. Ct. at 1134 (rejecting *Summum*’s suggestion that the city be required to pass an ordinance formally adopting the other monuments in the park); *Johanns*, 544 U.S. at 553–55 (concluding that beef advertisements constituted government speech even though they only stated “Funded by America’s Beef Producers”); see also Post, *supra* note 17, at 172–75 (noting that, after the *Rust* Court upheld regulations requiring health care professionals to respond to inquiries about abortion by saying that it was not recommended, patients might well attribute the government’s views to their doctors).

<sup>134</sup> Compare 544 U.S. at 564 n.7, with 544 U.S. at 571 (Souter, J., dissenting).

<sup>135</sup> See *Summum*, 129 S. Ct. at 1142 (Souter, J., concurring) (advocating a “reasonable observer” test for determining when monuments are government speech).

<sup>136</sup> *Johanns*, 544 U.S. at 571 (Souter, J., dissenting).

<sup>137</sup> *Id.* at 564 n.7.

<sup>138</sup> See Lee, *supra* note 17, at 988; Norton, *supra* note 17, at 597.



have the power to impose viewpoint-based limitations on private speech, then surely, at the very least, it would make sense for the government to identify itself when doing so.

But even if the Court does eventually incorporate a transparency requirement, that development alone will not solve the problem of government speech. Government speech doctrine must not only be attuned to the issue of government transparency, but also to the very real issue of viewpoint neutrality.<sup>139</sup> The doctrine must be sensitive to the issue of government viewpoint because democratic control of the political process is not the only value threatened by government speech and it likewise cannot be the only solution.<sup>140</sup> The majority is almost certain to *agree* with the government's message, and therefore does not suffer the specific harms of government speech, unless elected officials have misjudged public opinion. Rather, the harm is to the dissenting minority that wishes to be heard, but whose First Amendment claim fails because the government asserts the government speech defense.<sup>141</sup> In that instance, what the would-be private speaker has suffered is not a failure of the political process, but simple viewpoint discrimination.

The political factors that lead to such discrimination are not difficult to comprehend. The government is rarely in the business of making unpopular statements; elected officials likely understand their role as expressing and effectuating voters' viewpoints and desires.<sup>142</sup> Unless the legislature has simply misjudged public opinion, as it sometimes does, it is almost certain that the government's speech *is* popular. Thus, the only people with the clout to invoke the political process solution—the voting majority—are those who have no interest in employing it. Meanwhile, the minority dissenters—those who have been silenced by the invocation of government speech—have no hope of employing the remedy because they lack the needed political power.

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<sup>139</sup> See *Sumnum*, 129 S. Ct. at 1134 (“Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”).

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*; see also YUDOF, *supra* note 24, at 31–37, 152–57.

<sup>142</sup> See ELY, *supra* note 37, at 135 (“No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account.”).

### C. Government Speech as Government "Subsidy"

One response to the government speech problem described here is to deny its existence by saying that the "regulations" it involves are nothing more than permissible viewpoint-based allocations of government subsidies.<sup>143</sup> Surely, the argument goes, there is a difference between the government choosing to limit those speakers with whom it does not agree and choosing to support those speakers with whom it does.<sup>144</sup> But despite its intuitive appeal, it is unclear that such a distinction can be maintained and even less clear that it compels us to permit viewpoint discrimination for the latter, but not for the former. Indeed, the longer one contemplates the question, the more it becomes clear that government speech cannot be distinguished from viewpoint-based discrimination in any meaningful way. Like an optical illusion, they are two distinct things at once.

#### 1. The Subsidy Characterization Does Not Solve the Problem

The first, and perhaps most attractive, way to avoid the government speech/viewpoint neutrality paradox is to deny that any paradox exists at all: the government speech cases do not involve "regulation," let alone viewpoint-based discrimination, because the government has not deprived private speakers of anything that was ever theirs. The *Summun*, for example, never had a right to speak in Pleasant Grove City's park, and therefore no speech right was regulated in that case.<sup>145</sup> Similarly, Congress was under no obligation to fund any doctors' speech, and thus the doctors in *Rust* could not have complained that they were prevented from using government funds to deliver a message the government itself opposed.<sup>146</sup>

There is intuitive appeal to the notion that the government can, like anyone else, choose to support some messages and not others. As Oliver Wendell Holmes famously said in rejecting a policeman's claim that he was unconstitutionally denied employment because of his political beliefs, "The petitioner may have a constitutional right to talk

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<sup>143</sup> See *Summun*, 129 S. Ct. at 1137–38; *Rust*, 500 U.S. at 198; *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892); see also Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 549 (1986) (addressing the argument that the denial of a subsidy can be distinguished from the violation of a right).

<sup>144</sup> See Redish & Kessler, *supra* note 143, at 549.

<sup>145</sup> See *Summun*, 129 S. Ct. at 1137–38.

<sup>146</sup> See *Rust*, 500 U.S. at 198–200.

politics, but he has no constitutional right to be a policeman.”<sup>147</sup> The government speech doctrine reflects this apparently commonsense rule, and, in Helen Norton’s records, “already permits government employers to make viewpoint-specific distinctions when punishing on-duty speech that may disrupt workplace operations—such as speech critical of a government employer.”<sup>148</sup> Similar thinking has influenced the Court’s treatment of the line between government speech and public forum analysis. At the oral argument in *Summum*, for example, the justices repeatedly voiced their concern that the government, by accepting one monument, would have to accept them all.<sup>149</sup> The Court held that the U.S. government’s acceptance of the Statue of Liberty did not compel it to provide “a comparable location in the harbor of New York for other statues of a similar size and nature (for example, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).”<sup>150</sup> To avoid that state of affairs, the Court determined that Pleasant Grove City could effectively make viewpoint-based decisions in accepting certain monuments and not others.<sup>151</sup>

But for all of its intuitive appeal, the “subsidized speech” model is also deeply unsatisfactory in this context. For one thing, the distinction between a punishment and the denial of a subsidy is not always as clear as it may appear.<sup>152</sup> As David Cole notes: “Every decision to subsidize a particular message has the effect of ‘singling out a disfavored group on the basis of speech content,’ namely the group that does not receive the subsidy because it seeks to express a different message.”<sup>153</sup> This observation rings particularly true when it comes to the viewpoint-based denial of a government-provided benefit that has traditionally been accorded without reference to viewpoint and upon which private parties

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<sup>147</sup> *McAuliffe*, 29 N.E. at 518.

<sup>148</sup> Norton, *supra* note 63, at 62 (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

<sup>149</sup> See, e.g., Transcript of Oral Argument, *supra* note 89, at 35 (Chief Justice Roberts: “[D]o we have to have a statue of despotism? Do we have to put any president who wants to be on Mount Rushmore?”); *id.* at 29 (Justice Kennedy: “Does the law always require an all-or-nothing position?”); *id.* (Justice Scalia: “You can’t run a museum if you have to accept everything, right?”).

<sup>150</sup> *Summum*, 129 S. Ct. at 1137–38.

<sup>151</sup> See *id.*

<sup>152</sup> See Cole, *supra* note 17, at 690; Post, *supra* note 17, at 179.

<sup>153</sup> Cole, *supra* note 17, at 690.

have come to rely.<sup>154</sup> Such denials may be the functional equivalent of a direct regulation of speech.<sup>155</sup>

Evaluating these intuitions and doctrinal rules in a more rigorous fashion requires some understanding of “baselines,” so that one can characterize a particular denial as either the withholding of a benefit or the imposition of a viewpoint-based punishment. Scholars attempting to make sense of the notion of “unconstitutional conditions” have struggled with this question,<sup>156</sup> and it is not my aim to try to improve on their efforts. But it seems relatively uncontroversial to assume that the “baseline” of free speech includes a private right to articulate a viewpoint.<sup>157</sup> This assumption is in keeping with the ideal of the speech market as a place that, like the economic market, is presumptively private, even when speech acts take place on public property. Thus, for example, “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”<sup>158</sup>

In any event, one need not have a fully satisfactory account of unconstitutional conditions to see that there are also shared intuitions that reflect discomfort with the subsidy argument.<sup>159</sup> Most citizens would agree that there are some reasons that are insufficient to justify even the denial of a “benefit.”<sup>160</sup> For example, the government has no

<sup>154</sup> Post, *supra* note 17, at 179 (invoking the example of inexpensive second-class postage); see Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2097 (1991) (arguing that such a denial is “roughly equivalent to that of a criminal prosecution”).

<sup>155</sup> See Post, *supra* note 17, at 179.

<sup>156</sup> See Cole, *supra* note 17, at 679 (defining unconstitutional conditions); Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 13–14 (1988). The best account remains Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

<sup>157</sup> See Epstein, *supra* note 156, at 13–14 (discussing possible baselines for assessing the “coercive effects of government action”).

<sup>158</sup> *Id.*

<sup>159</sup> See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 613 (1998) (Souter, J., dissenting).

We [have] recognized that the government may act on the basis of viewpoint when the State is the speaker or when the State disburses public funds to private entities to convey a governmental message. But . . . [w]hen the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.

*Id.* (internal quotation marks and citations omitted); see Schauer, *supra* note 52, at 96 (“When government is operating in its subsidizing mode and not in its speaking mode, the existing caselaw supports the view that viewpoint-based distinctions are impermissible . . .”).

<sup>160</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969) (concluding that the “benefit” of a public education cannot be conditioned on the abandonment of First Amendment rights); see also Redish & Kessler, *supra* note 143, at 549

affirmative duty to provide Medicare. But having done so, it cannot deny Medicare only to African-Americans.<sup>161</sup> The same reasoning applies—with reference to different background principles, of course—in the context of free speech. The government has no affirmative obligation to fund universities, but, having done so, it may not fire professors simply because they are critical of government policies.<sup>162</sup>

This intuition, too, has some support in doctrine, dating back to *Rust*, the very first government speech case, in which the Court upheld a federal law that denied federal funds to doctors who gave their patients information about abortion.<sup>163</sup> In doing so, the *Rust* court bent over backwards to disclaim any approval of viewpoint discrimination.<sup>164</sup> Indeed, the Court warned that its opinion should not be read to “suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression.”<sup>165</sup>

*Rust* is not the only case to indicate that viewpoint-based distinctions are impermissible even when it comes to subsidies. In 1972, in *Healy v. James*, the U.S. Supreme Court held that denying school affiliation to a student group based on that group’s objectionable philoso-

(pointing out that the government may not choose welfare recipients based on race, even though no one has a constitutional right to receive welfare payments).

<sup>161</sup> See U.S. CONST. amend. XIV, § 1; Redish & Kessler, *supra* note 143, at 549; see also *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (making clear that racial discrimination in public services will not be constitutionally tolerated).

<sup>162</sup> See U.S. CONST. amend. I; Redish & Kessler, *supra* note 143, at 549; see also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (“The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” (internal quotation marks and citations omitted)).

<sup>163</sup> 500 U.S. at 193. *Rust* was not explicitly premised on the doctrine of government speech, but the Court itself has come to treat it that way. See *Velazquez*, 531 U.S. at 541 (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”).

<sup>164</sup> See *Rust*, 500 U.S. at 193; see also *Cole*, *supra* note 17, at 689 n.47 (concluding that, despite the Court’s efforts to “avoid the conclusion that the regulations were viewpoint-based . . . the Title X regulations were, in fact, aimed at suppressing a particular idea, the idea that abortion is a legitimate option for a pregnant woman”); Post, *supra* note 17, at 170 (“The Court in *Rust* in effect stated that regulations within managerial domains would not be deemed viewpoint discriminatory so long as they were necessary to accomplish legitimate managerial ends.”).

<sup>165</sup> *Rust*, 503 U.S. at 199; see also *Cole*, *supra* note 17, at 693 (“*Rust* does not in fact hold that the selective subsidization of speech can never infringe the first amendment, nor that the government is free to impose any substantive speech restrictions it chooses on the use of its funds.”).

phy—hardly a complete ban on private expression—was unconstitutional because it meant “restrict[ing] speech or association simply because [the college] finds the views expressed by [the] group to be abhorrent.”<sup>166</sup> Similarly, in 1981, in *Widmar v. Vincent*, the Court struck down a public university rule that prohibited registered student groups from using classrooms for religious teaching or worship.<sup>167</sup> The Court described this rule as “violat[ing] the fundamental principle that a state regulation of speech should be content-neutral . . . .”<sup>168</sup> Again in 1995, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the government was providing a “benefit” that was not constitutionally mandated—funding for student organizations—and yet the Court held that the funds must be allocated on a viewpoint-neutral basis.<sup>169</sup> Indeed, even the public forum cases support this intuition, for they involve private expression on and through government-owned forums. As Robert Post notes, Supreme Court doctrine indicates that “when the state attempts to restrict the independent contributions of citizens to public discourse, even if those contributions are subsidized, First Amendment rules prohibiting content and viewpoint discrimination will apply.”<sup>170</sup>

The general unease with viewpoint-based allocation of so-called subsidies thus has both intuitive appeal and doctrinal support. Indeed, no matter the angle from which one views them—effects- or purpose-based, listener- or speaker-focused—subsidies and regulations look a lot alike. First Amendment theories that focus mainly on the *effect* of a government action are unlikely to put much stock in the subsidy/regulation distinction because their primary concern with government speech is the possibility that it may distort the marketplace of ideas and drown out other voices.<sup>171</sup> The government can distort the marketplace of ideas—

<sup>166</sup> 408 U.S. 169, 187–88 (1972).

<sup>167</sup> 454 U.S. 263, 277 (1981).

<sup>168</sup> *Id.*; see *Southworth*, 539 U.S. at 233 (upholding the university’s decision to subsidize some student groups over others, but noting that it could not “prefer some viewpoints to others” when distributing funds).

<sup>169</sup> 515 U.S. at 834 (“Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights . . . we reaffirmed the requirement of viewpoint neutrality in the Government’s provision of financial benefits . . .”).

<sup>170</sup> Post, *supra* note 17, at 155. Post goes on to note, for reasons discussed below, that “[t]he general principle forbidding viewpoint discrimination must therefore be false with respect to such subsidized speech.” *Id.* at 165.

<sup>171</sup> Cole, *supra* note 17, at 680 (“From the perspective of the audience, the danger lies not in the coercive effect of the benefit on speakers, but in the indoctrinating effect of a monopolized marketplace of ideas.”).

In light of the controversy surrounding the Supreme Court’s decision in *Citizens United v. FEC*, which struck down restrictions on corporate political giving, it may be important to remember that “[g]overnment-funded speech poses an even greater threat than corporate

drowning out other voices with the power of its own—just as effectively through subsidies as through regulations. In fact, when it comes to the effects of government speech on would-be speakers, it does not matter whether a particular limitation on speech is characterized as a regulation or as the government’s own speech. The latter tends to look like nothing more than a justification for the former. Consider again the facts of *Summum*: a group wants to engage in a speech act (building a monument) on public property and is told that it cannot.<sup>172</sup> From the group’s point of view, how is that anything but a “regulation”? As David Cole explains, “[f]rom the listener’s perspective, the dangers posed by selective support of expression differ only in degree, not kind, from the dangers posed by selective prohibitions on speech.”<sup>173</sup> Thus the subsidy distinction is particularly unsatisfying with regard to effects-based First Amendment theories, whether those theories are concerned with effects on speakers or on listeners.<sup>174</sup>

Just as effects-based tests struggle to draw meaningful lines between regulations and subsidies, so too do purpose-based tests and theories tend to collapse the distinction. In 1992, in *R.A.V.*, the U.S. Supreme Court held that even if a certain category of speech is “unprotected,” the government may not draw viewpoint-based distinctions within it.<sup>175</sup> In other words, the government may criminalize all fighting words, but it may not criminalize only those fighting words that are directed at, for example, racial minorities, or Democrats, or Catholics.<sup>176</sup> This suggests a strong viewpoint neutrality principle, one that prevents the government from purposefully discriminating on the basis of viewpoint even when dealing with speech that is not protected by the First Amendment. Even speech that falls “outside” the bounds of the First Amendment cannot be limited on the basis of the viewpoint it expresses.

Under the *R.A.V.* approach, the subsidy/regulation distinction seems to disintegrate entirely. The whole purpose of the “subsidy”

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speech; its aggregations of wealth dwarf those of corporations, and it has a much more immediate self-interest in seeking to dominate the marketplace of ideas.” Cole, *supra* note 17, at 707. See generally *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>172</sup> See *Summum*, 129 S. Ct. at 1131.

<sup>173</sup> Cole, *supra* note 17, at 705.

<sup>174</sup> See Fiss, *supra* note 154, at 2096 (“A denial of a grant does not have the brutal consequences for the individual that might, on the worst of days, attend a criminal prosecution for obscenity, when the artist languishes in prison. From the perspective of the public, however, its effect is similar: It keeps art from us.”).

<sup>175</sup> 505 U.S. at 383–84.

<sup>176</sup> *Id.* at 391–92 (“St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”).

characterization, after all, is to remove certain speech acts from the ambit of the First Amendment by recharacterizing them as government-supported.<sup>177</sup> But as *R.A.V.* shows, removing speech acts from the reach of the Amendment does not remove them from the viewpoint neutrality requirement. Nor is *R.A.V.* the only case to suggest as much; the Court has invoked the neutrality principle even in cases involving government “benefits” like funding for student organizations.<sup>178</sup> This suggests that, in keeping with the unconstitutional conditions doctrine (such as it is),<sup>179</sup> viewpoint discrimination cannot be made permissible simply by saying that it involves subsidies rather than regulations.<sup>180</sup>

Thus, whether one believes that the free speech guarantee is intended to protect speakers or listeners, or to prevent bad effects or purposes, the subsidy/regulation distinction is unsatisfactory. It may be possible to maintain some distinction between regulations and subsidies, but they certainly are not different enough to justify wildly different First Amendment treatment. If viewpoint-based distinctions are entirely banned when characterized as regulations, then it makes little sense for them to receive no constitutional scrutiny when characterized as subsidies.

## 2. The Duck-Rabbit of Government Speech and Government Regulation

Many judges and scholars have dealt with the conflict between the viewpoint neutrality requirement and government speech doctrine by, in effect, shutting their eyes to it.<sup>181</sup> Sometimes government speech is referred to as a “glaring exception to the First Amendment norm that the government must be viewpoint neutral,”<sup>182</sup> thus suggesting that government speech is the outlier and that the viewpoint neutrality requirement tends to occupy the field. Other scholars treat the two categories as simply independent.<sup>183</sup> In either case, the assumption seems

<sup>177</sup> See *McAuliffe*, 29 N.E. at 518; Norton, *supra* note 63, at 62.

<sup>178</sup> See, e.g., *Rosenberger*, 515 U.S. at 828; *Widmar*, 454 U.S. at 267–70.

<sup>179</sup> Generally, the doctrine “maintains that government may not condition benefits on the forfeiture of constitutional rights.” Cole, *supra* note 17, at 679. Whether the doctrine has ever been coherent is another matter entirely. See Sunstein, *supra* note 54, at 595–608 (arguing that the unconstitutional conditions doctrine is an “anachronism”).

<sup>180</sup> See e.g., *Rosenberger*, 515 U.S. at 828; *Widmar*, 454 U.S. at 267–70.

<sup>181</sup> See *infra* notes 182–185 and accompanying text.

<sup>182</sup> See *The Supreme Court—Leading Cases—G. Freedom of Speech and Expression*, 119 HARV. L. REV. 277, 283 (2005).

<sup>183</sup> See Dolan, *supra* note 77, at 72; Park, *supra* note 2, at 129.



to be that the two categories can be differentiated.<sup>184</sup> But there is good reason to believe that this assumption is flawed. Like an optical illusion that is two different images at once—a duck and a rabbit, for example<sup>185</sup>—a principled method of distinguishing between government speech and viewpoint discrimination seems impossible to articulate.

The “subsidy” characterization has been perhaps the most popular and effective blinder when it comes to papering over the government speech/government regulation problem.<sup>186</sup> The *Rust* Court, for example, turned backflips to decide that by denying funding to doctors who expressed viewpoints different from the government’s, “the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”<sup>187</sup> The failure of this subsidy characterization to answer the First Amendment problem is captured most clearly in the (by now well-recognized<sup>188</sup>) inconsistency of the *Rust* and *Rosenberger* lines of cases.<sup>189</sup> In the former, the Court rejected a First Amendment challenge to the government’s viewpoint-based exclusion of doctors from a public funding stream.<sup>190</sup> In the latter, it treated public funding as a public forum in which viewpoint-based discrimination was impermissible.<sup>191</sup> Any distinction between the two is so subtle as to be unhelpful at best.

But one need not contrast different cases to find inconsistencies—individual decisions have proven capable of internal incoherence. *Summum* provides a useful example of the duck-rabbit illusion. The fact that the Summum were denied the right to build a monument in Pleasant Grove City’s park could be characterized not as exclusion from a public forum but as denial of a benefit (access to the park) to which the Summum were never entitled.<sup>192</sup> Access to the park, in other words, was a

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<sup>184</sup> Norton & Citron, *supra* note 15, at 929 (“To be sure, determining if the government is speaking for itself or if it is instead censoring viewpoints is sometimes difficult.”).

<sup>185</sup> See Eric W. Weisstein, *Rabbit-Duck Illusion*, WOLFRAM MATHWORLD, <http://mathworld.wolfram.com/Rabbit-DuckIllusion.html> (last visited Apr. 1, 2011).

<sup>186</sup> See *infra* notes 188–192 and accompanying text.

<sup>187</sup> See *Rust*, 500 U.S. at 193.

<sup>188</sup> See, e.g., Bezanson & Buss, *supra* note 17, at 1382 (arguing that the distinction between the cases rests on “an incoherent theoretical premise”); Post, *supra* note 17, at 170 (same).

<sup>189</sup> See *Rosenberger*, 515 U.S. at 828; *Rust*, 500 U.S. at 178.

<sup>190</sup> See *Rust*, 500 U.S. at 178.

<sup>191</sup> *Rosenberger*, 515 U.S. at 828 (holding that public universities must provide student activities fees to student organizations on a content- and viewpoint-neutral basis); see *Southworth*, 529 U.S. at 230 (“[T]he viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students.”).

<sup>192</sup> See *Summum*, 129 S. Ct. at 1131.

government “benefit” the government was not required to provide.<sup>193</sup> And surely the government is, at the very least, entitled to express its own viewpoint when it doles out government benefits. In other words, we have a duck. So far, so good.

But what happens if one ceases to assume that the government had the right to exclude the Summum?<sup>194</sup> That, after all, was the issue in the case, not the starting point. Surely if the government has a “right” to exclude unwanted speakers, then its doing so might well be expressive, but that is just assuming the conclusion. If the government does not have that right, then the exclusion of the Summum from the public park becomes a regulation rather than a denial of a “benefit.” No facts have changed; only the baseline assumption has. And yet the duck has become a rabbit.

The point is simply that the standard either/or distinction is ultimately unsatisfying. It either rests on implausible premises—that there is a meaningful difference between regulations and subsidies in this context—or makes impermissible assumptions—that the government has a right to regulate private viewpoints. If government speech doctrine and the viewpoint neutrality requirement are to be reconciled, theory and doctrine must be able to recognize both their incompatibility and their interdependence.

## II. THE ROLE OF GOVERNMENT VIEWPOINT IN GOVERNMENT SPEECH

Part I illustrates a basic problem: government speech doctrine rewards precisely what the rest of the First Amendment forbids—viewpoint-based limitations on private speech. And yet government speech itself is too valuable to jettison. The government must be able to express viewpoints, both as ends in themselves and because nearly every act of meaningful governance requires the government to do just that.<sup>195</sup> Recognizing the importance of both government speech and the viewpoint neutrality principle suggests another fundamental inquiry: what is the role of government viewpoint in government speech cases? After all, as we have seen, free speech doctrine is deeply concerned with the protection of private viewpoints. It seems to follow that government speech doctrine should be concerned with protecting gov-

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<sup>193</sup> See *id.*

<sup>194</sup> I explore this question in detail elsewhere. See generally Blocher, *Government Property and Government Speech*, *supra* note 16.

<sup>195</sup> See YUDOF, *supra* note 24, at 6–10; Cole, *supra* note 17, at 703–04.

ernment viewpoint. And yet the role—or even the existence—of government viewpoints remains obscure.

Exploring the role of government viewpoint in government speech cases leads to at least three different questions: What does it mean for the government to have a viewpoint? Is it possible for the government to have a viewpoint? Does current government speech doctrine require the government to demonstrate a viewpoint? This Part attempts to answer those questions and to suggest a possible resolution of the relationship between government viewpoint and government speech.

### A. *What Does It Mean for the Government to Have a Viewpoint?*

The first question is easily framed, but deceptively hard to answer: What does it mean for the government to have a viewpoint, and is the government's expression of a viewpoint enough to demonstrate government speech? Scholars have struggled to define "viewpoint" and "viewpoint neutrality" in the course of analyzing government regulations of private speech.<sup>196</sup> The inquiry, it turns out, is if anything more difficult in the context of government speech.

On the one hand, it seems self evident that any government regulation that purposefully discriminates against private viewpoints is itself an expression of viewpoint. That is, if the government passes a regulation criminalizing a particular viewpoint because the government disagrees with it (and not, say, because of its harmful side effects), it follows naturally that by doing so the government has expressed its disagreement with that viewpoint. The Supreme Court has not devised a test by which to determine whether a particular government action is expressive.<sup>197</sup> But there can be no doubt that nearly all laws banning speech—indeed, laws banning any kind of conduct—are expressive enough to satisfy any

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<sup>196</sup> See Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGEORGE L. REV. 69, 104 (1997) ("The supposedly rigid and formulaic jurisprudence that centers around the deceptively clear categories of content-neutral, content-based, and viewpoint-based laws is . . . increasingly malleable and amorphous."); Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 132–34 (2008) (arguing that the Court has used various definitions of the terms "viewpoint," "content," and "perspective" to yield inconsistent results); Cass R. Sunstein, *Pornography and The First Amendment*, 1986 DUKE L.J. 589, 615 (suggesting that "the distinction between content-based and viewpoint-based restrictions is at best elusive and more likely nonexistent" and that the "distinction itself will depend on viewpoint"); see also Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 698 (1996) (defining viewpoint discrimination simply as "allowing speech that adopts one point of view while prohibiting speech that takes a contrary position . . .").

<sup>197</sup> See Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 369–71 (2009) (discussing the lack of a uniform test for identifying government speech).

of the various tests the Court has devised for determining whether *private* actions qualify as expression under the First Amendment. In its 1974 decision in *Spence v. Washington*,<sup>198</sup> for example, the Court held that nonverbal conduct will be considered “communicative” enough to fall within the First Amendment where “[a]n intent to convey a particularized message was present, and . . . [where] the likelihood was great that the message would be understood by those who viewed it.”<sup>199</sup> Nearly any imaginable regulation banning a private party from speaking in a particular forum would probably satisfy this standard, even if it was not accompanied by a specific statement of reasons. And if that is enough to characterize the regulation as “expressive” government speech—and therefore render it exempt from the First Amendment—then the Amendment’s protections are vanishingly small indeed.

But surely it cannot be that only unexpressive or purposeless laws are subject to constitutional scrutiny. First Amendment doctrine, after all, is constructed around the premise that speech regulations *can* be viewpoint neutral.<sup>200</sup> To be a valid time, place, and manner restriction, for example, a law must be viewpoint- and content-neutral, in addition to leaving adequate alternative avenues for expression.<sup>201</sup> Some laws clearly meet this test.<sup>202</sup> Were it otherwise, the viewpoint neutrality requirement would swallow every speech-limiting rule. Perhaps it is possible to back into a definition of viewpoints by examining what it means to discriminate against them—by exploring viewpoint neutrality.

There are at least two ways to be viewpoint “neutral”: in purpose and in effect. That is, a law can be viewpoint neutral because its passage was not motivated by any particular government viewpoint (or animosity towards any particular private viewpoint), or it can be viewpoint neutral because it does not have the effect of muzzling private viewpoints. Say a city passes an ordinance prohibiting speeches on a particular corner that, it turns out, is generally used by anti-abortion protestors.

<sup>198</sup> 418 U.S. 405 (1974).

<sup>199</sup> *Id.* at 410–11; see *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>200</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790–803 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293–99 (1984); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes [an] essential right.”); *Boos v. Barry*, 485 U.S. 312, 319–20 (1988) (holding that the statute was viewpoint neutral but still content based).

<sup>201</sup> *Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

<sup>202</sup> See, e.g., *Ward*, 491 U.S. at 790–803 (upholding a municipal sound amplification guideline); *Clark*, 468 U.S. at 293–99 (upholding a National Park Service regulation limiting camping to designated sites against a challenge by demonstrators staging a political event).

There are many ways to ask whether the action is viewpoint neutral: Is the government seeking to squelch the anti-abortion viewpoints?<sup>203</sup> Or, even if it is not so motivated, will the regulation have the effect of limiting anti-abortion viewpoints?<sup>204</sup>

Some Supreme Court justices have focused on effect, arguing, for example, that a content-based restriction should be unconstitutional “regardless of the motivation that lies behind it.”<sup>205</sup> But that approach has not prevailed. Instead, in current First Amendment doctrine, the primary concern with regard to viewpoints is whether the government has an improper purpose, not whether its “neutral” regulations have the effect of limiting some viewpoints more than others.<sup>206</sup> For example, the Court has held that “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>207</sup> That approach suggests that First Amendment doctrine is, and should be, properly concerned (even if not explicitly so<sup>208</sup>) with smoking out invidious government purpose.<sup>209</sup> In his concurring opinion in 2010, in *Christian Legal Society v. Martinez*,<sup>210</sup> Justice Kennedy noted that “the school policy in question is not content based either in its formulation or evident pur-

<sup>203</sup> See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 763 (1993) (upholding an injunction preventing protests at an abortion clinic because the order did not aim to eliminate anti-abortion viewpoints, but rather aimed to limit interference with the clinic’s lawful operations).

<sup>204</sup> See *id.* at 793 (Scalia, J., dissenting) (arguing that the injunction, whether or not it targeted speech-based content, nevertheless had the effect of suppressing anti-abortion viewpoints).

<sup>205</sup> *Boos*, 485 U.S. at 336 (Brennan, J., concurring, joined by Marshall, J.).

<sup>206</sup> See Kagan, *supra* note 27, at 414; Rubinfeld, *supra* note 57, at 798 (“If the purpose behind a law is to punish people for engaging in protected speech, the state is acting unconstitutionally.” (emphasis omitted)).

<sup>207</sup> *Ward*, 491 U.S. at 791; accord *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2996–97 (2010) (Stevens, J., concurring) (“[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination.”); *Madsen*, 512 U.S. at 763 (“[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.”).

<sup>208</sup> The Court in the 1968 case of *United States v. O’Brien*, for example, declared that “under settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional,” despite the fact that, as Jed Rubinfeld notes, “the *O’Brien* test itself is centrally concerned with legislative purpose, despite the Court’s protests to the contrary.” *United States v. O’Brien*, 391 U.S. 367, 383 (1968); Rubinfeld, *supra* note 57, at 775–76.

<sup>209</sup> See *Christian Legal Soc’y*, 130 S. Ct. at 2996–97 (Stevens, J., concurring); *Madsen*, 512 U.S. at 763; *Ward*, 491 U.S. at 791; see also Kagan, *supra* note 27, at 414 (“[T]he application of First Amendment law is best understood and most readily explained as a kind of motive-shunting.”).

<sup>210</sup> See *Christian Legal Soc’y*, 130 S. Ct. at 2998 (Kennedy, J., concurring).

pose; and were it shown to be otherwise, the case likely should have a different outcome.”<sup>211</sup> Thus, the effects of a government regulation are relevant insofar as they lead to the real goal—the identification of improper government motivation, which in turn means punishing somebody for “speaking.”<sup>212</sup>

If viewpoint neutrality means lacking certain purposes, then perhaps the converse is true, and having these purposes is equivalent to having a viewpoint. But clearly the two categories cannot entirely overlap. If only purposeless laws are viewpoint neutral, then the reach of government viewpoint and therefore the problem of government speech is far larger than anyone has imagined. Moreover, it seems clear that the government can pass a law that does not intentionally express a viewpoint, even if it does have a purpose. For example, if Congress passes a law limiting anti-abortion speech, it surely intends to do just that. In other words, it has a “purpose.” But that does not necessarily mean that it has—or at least is expressing—a viewpoint. It may seek to limit such speech simply because it has concluded that the abortion debate is counterproductive and harmful, and should be silenced for a few years to give each side a cooling off period.

What this shows is that there may be a distinction between a law’s “purpose”—the reason for its existence—and its “viewpoint.”<sup>213</sup> So what kinds of purposes demonstrate a viewpoint? The analysis above has effectively brought us back to our initial question: What does it mean for a regulation to be viewpoint based? As Robert Post puts it, “In ordinary language, we would say that . . . a viewpoint-based regulation is one that intervenes into a specific controversy in order to advantage or disadvantage a particular perspective or position within that controversy.”<sup>214</sup> Taking the terms of this definition and bending them slightly,

<sup>211</sup> *Id.* at 2999; see also *id.* at 3001 (Alito, J., dissenting) (“[T]he Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination.”).

<sup>212</sup> See 130 S. Ct. at 2999 (Kennedy, J., concurring).

<sup>213</sup> Although this Article attempts to draw a line between viewpoint and purpose, I follow the lead of those before me and do not attempt to draw any distinctions between “purpose,” “intent,” “motive,” “reason,” and so on. See Kagan, *supra* note 27, at 426 n.40 (disclaiming any effort to distinguish between such terms, and noting that “[t]he Court has used these terms interchangeably, in First Amendment jurisprudence and elsewhere”); see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1217–21 (1970) (criticizing attempts to draw such lines); Post, *supra* note 117, at 1268 (“There is a pervasive ambiguity as to whether courts are to assess the *justification* for a regulation (the reasons that can be adduced for its passage) or the *motivation* for a regulation (the actual psychological intentions of those who enacted it).”).

<sup>214</sup> Post, *supra* note 17, at 166.

one might say that a viewpoint is a particular perspective or position within a specific controversy. A government viewpoint, therefore, is the government's perspective or position within a specific controversy. Of course, this presumes that "perspective" and "controversy" can usefully be defined. But at the very least, this definition suggests that government viewpoints are those that the government holds independently of any private speakers. In other words, to qualify as government speech, the government's viewpoint may not simply be, "We disagree with Private Speaker A." As a practical and doctrinal matter, this would mean focusing attention again on whether the reasons for a regulation are pretextual, and whether the government could show that it held a particular position before (or independently of) its efforts to silence a particular private speaker expressing a contrary one.<sup>215</sup>

This definition is anything but satisfactory. At best, it simply means that the government must "actually" have some kind of motivation besides limiting a private viewpoint. At worst, it is empty—another duck-rabbit.<sup>216</sup> Nevertheless, if protecting private viewpoints is the central concern of the First Amendment, and government speech doctrine is entitled to "protection" under the Amendment, then it would seem to follow that government must be able to have viewpoints, and that we must be able to identify them. The following Section addresses the identification issue.

### B. *Is It Possible for the Government to Have or Demonstrate a Viewpoint?*

The previous Section demonstrated that government viewpoint is difficult to define. The purpose of this Section is to show that even if it can be defined, it may not be possible to identify—indeed, it may not be possible for it to exist.

The Supreme Court has suggested its awareness of these problems by disclaiming its own ability to divine legislative intent.<sup>217</sup> For example, in 1968, in *United States v. O'Brien*, the Court stated that "[i]nquiries into

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<sup>215</sup> Cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 687 (2000) (Stevens, J., dissenting) ("[T]he organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.").

<sup>216</sup> See *supra* notes 181–194 and accompanying text.

<sup>217</sup> See *O'Brien*, 391 U.S. at 383–84; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., dissenting) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . ."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective purpose of a statute . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.").

congressional motives or purposes are a hazardous matter,"<sup>218</sup> and that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."<sup>219</sup> Whether this statement can or should be taken at face value is somewhat unclear. As noted above, then-professor Elena Kagan and others have argued that First Amendment doctrine is in fact primarily concerned with rooting out improper government purpose.<sup>220</sup> At the very least, however, the Court's disclaimer in *O'Brien* properly highlights the theoretical and practical difficulties of the government viewpoint-based approach.<sup>221</sup>

### 1. Theoretical Problems

Despite constitutional law's occasional searches for government motive,<sup>222</sup> there are strong arguments that such inquiries are doomed, and that there is no such thing as a coherent purpose or "viewpoint" behind any given government action.

One strong version of the argument is that it is impossible to identify the purpose (let alone viewpoint) of a legislative body made up of legislators whose purposes—assuming that they are coherent to begin with—cannot be assembled together into a meaningful picture.<sup>223</sup> It is difficult enough to identify a particular "purpose" behind an individual legislator's vote.<sup>224</sup> A representative might vote in favor of a speech-restricting bill not because she disagrees with or disapproves of the speech it restricts, but solely because by doing so she can win support for reelection or for another piece of legislation that matters more to her. What is the "purpose" or "viewpoint" represented by such a vote? And even assuming that our representative—and every single one of her colleagues—truly does have a viewpoint on the issue and intends her vote to be evidence of that viewpoint, how are those votes to be aggregated in any meaningful way? The 218 members of a 435-member

<sup>218</sup> 391 U.S. at 383–84.

<sup>219</sup> *Id.* at 383.

<sup>220</sup> See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN L. REV. 585, 590 (1975) (arguing that *O'Brien* actually shows that "some motives are unconstitutional"); Post, *supra* note 117, at 1256 ("[A] close analysis of these cases indicates that they almost invariably turn on judicial scrutiny of the purposes served by the regulation at issue.").

<sup>221</sup> See 391 U.S. at 383–84.

<sup>222</sup> See Bhagwat, *supra* note 57, at 312–19.

<sup>223</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 213–21 (2d ed. 1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 38–57 (1985). *But see infra* notes 249–261 and accompanying text.

<sup>224</sup> See DWORKIN, *supra* note 223, at 38.



legislature needed to pass a bill will never have identical viewpoints on any given issue.<sup>225</sup> And, even if one could somehow measure legislators' viewpoints, it is dubious whether these viewpoints could ever amount to a singular and cohesive "legislative intent."<sup>226</sup>

One answer to these theoretical difficulties might be to say that the intent of the individual legislators is irrelevant, because such intent does not exist, or at least not in any useful way.<sup>227</sup> Instead, perhaps what matters is the viewpoint a law will be understood to communicate by those who hear or see it.<sup>228</sup> And yet there is reason to doubt that this approach works in the context of government speech. First, it would involve an odd pairing of purposivist and listener-focused approaches to speech. The focus on "understanding" in constitutional originalism, after all, has proven popular precisely because it lessens the fruitless search for "intent."<sup>229</sup> Second, if we abandon the speaker-centered approach and focus purely on the audience, it is unclear whether the very justification for government speech survives. That is, it seems odd to construct doctrine allowing the government to defend a "viewpoint" it might not even hold, and which is defined solely by what the public believes the government's viewpoint to be.

<sup>225</sup> BICKEL, *supra* note 223, at 214–215; DWORKIN, *supra* note 223, at 38.

<sup>226</sup> See, e.g., Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328, 342–43 (1950) (describing mathematically—and much more elaborately—that there is no voting system that can result in optimum social preference when there are three or more choices, unless the system violates one or more "fairness" conditions); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 537–39 (1983); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 249–50 (1992).

<sup>227</sup> Cf. Rubinfeld, *supra* note 57, at 796.

Ultimately, . . . judicial determinations of legislative purpose must be recognized for what they often are—legal constructions, as opposed to determinations of the actual, "subjective" intentions of the legislators. The purpose that judges are looking for is the purpose that constitutional law should regard as the legislation's purpose—the purpose that should be imputed to the legislation.

*Id.*

<sup>228</sup> A similar move has proven fruitful for constitutional originalists. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 9 (2009) (explaining the differences between "original meaning" and "original intent").

<sup>229</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) ("[O]riginalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking then subjective intentions of the framers."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004) ("[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.").

Thus, it is problematic enough to try to define the government's viewpoint or purpose when one focuses solely on the government's attempts to craft a coherent message of its own. And increasingly, government speech claims arise in cases that involve both public and private actors.<sup>230</sup> In 2009, in *Pleasant Grove City, Utah v. Summum*, Justice Breyer wondered aloud, "Why can't we call this what it is—it's a mixture of private speech with Government decisionmaking."<sup>231</sup>

The issue of specialty license plates provides perhaps the clearest and most high-profile example. As many scholars and commentators have noted, specialty license plates raise difficult issues of government speech because they involve both the state government, which issues the plates and whose name appears on them, and private actors, who either propose a new specialty plate or wish to purchase the plates and display them on their cars.<sup>232</sup> To deal with these scenarios, scholars and judges have increasingly expressed a wish (or at least willingness) to recognize the existence of "mixed" public-private speech.<sup>233</sup>

The recognition of hybrid speech has much to recommend it, as the mixture of public and private speech is an unavoidable reality that doctrinal rules poorly obscure.<sup>234</sup> And yet if hybrid speech were to be recognized, it would further complicate the search for a meaningful government "viewpoint." Assuming that viewpoints can be identified, then as long as the government and a private party express the same one, it might be possible to identify what that viewpoint is. On the other hand, the problem of a coherent "group" viewpoint, discussed above in the context of multi-member legislatures,<sup>235</sup> would seem to be even more difficult when the group includes both public and private actors. A private group that donates a Ten Commandments monument to a public park, for example, almost surely intends to convey its support for the Commandments as a religious matter. The town that accepts the monument, however, must (in order to comply with the Establishment

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<sup>230</sup> See *Developments in the Law—State Action and the Public/Private Distinction*, *supra* note 21, at 1291–1302.

<sup>231</sup> Transcript of Oral Argument, *supra* note 89, at 24.

<sup>232</sup> See, e.g., Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 Nw. U. L. REV. 1357, 1378–81 (2001); Norton & Citron, *supra* note 15, at 917–19.

<sup>233</sup> See *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 247 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en banc) ("I have stated herein that the speech at issue is hybrid in nature . . ."); *id.* at 252 (Gregory, J., dissenting from denial of rehearing en banc) (lamenting the failure to recognize the "blurry and sometimes overlapping line between private and government speech"); Corbin, *supra* note 91, at 607.

<sup>234</sup> See Corbin, *supra* note 91, at 607.

<sup>235</sup> See *supra* notes 225–226 and accompanying text.

Clause) be able to say with a relatively straight face that it has some other purpose in accepting and displaying the monument—expressing respect for the area’s historical heritage, for example.<sup>236</sup>

Of course, many of these theoretical problems are not limited to the identification of government viewpoint in government speech cases. They arise—at the Court’s insistence—in equal protection and other cases.<sup>237</sup> And yet they remain problematic, particularly in the context of government speech.

## 2. Evidentiary Problems

Even assuming that the government can have a viewpoint in theory, it is not clear whether it can ever be identified as a matter of practice. Searching for government viewpoint using the usual tools of statutory interpretation may be equivalent to searching for water with a divining stick—the quarry exists, but the tool will not locate it.

Evidence of intent behind a statute may consist “of what fewer than a handful of Congressmen said about it,”<sup>238</sup> and, of course, “[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.”<sup>239</sup> Where even this scant evidence is lacking, as is often the case, one must attempt to divine legislative intent based on the act itself.<sup>240</sup> Consider again Pleasant Grove City’s rejection of the Summum monument.<sup>241</sup> Summum argued that if the city wanted to claim the rejection as “speech,” then at the very least it should pass an ordinance or put up a plaque formally adopting the other monuments and thus presumably explicitly express some view-

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<sup>236</sup> See *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (holding that the Ten Commandments monument had borne historical significance apart from its religious message, and therefore did not violate the Establishment Clause); see also *Summum*, 129 S. Ct. at 1138 (upholding a city’s refusal—on the basis of lack of historical or community connection to the city—to accept an additional private religious-themed monument).

<sup>237</sup> Whereas “[l]ittle more than a quarter century ago, the Supreme Court could claim with some plausibility that the government’s actual purposes in enacting legislation were constitutionally irrelevant,” today “numerous constitutional doctrines explicitly inquire whether the government has acted for forbidden reasons.” Fallon, *supra* note 53, at 90–91. See generally Bhagwat, *supra* note 57, at 316. The focus on purpose is of course particularly prevalent in equal protection analysis. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 222 (1997) (“[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . . .”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (reaffirming the necessity of discriminatory purpose for violation of the Equal Protection Clause).

<sup>238</sup> *O’Brien*, 391 U.S. at 384.

<sup>239</sup> *Id.*

<sup>240</sup> See BICKEL, *supra* note 223, at 214–15.

<sup>241</sup> See *Summum*, 129 S. Ct. at 1129–30.

point that would be tarnished by the inclusion of the Summum monument.<sup>242</sup> The Court refused to impose this requirement on the city, saying it “fundamentally misunderstands the way monuments convey meaning.”<sup>243</sup> Similarly, in 2005, in *Johanns v. Livestock Marketing Ass’n*, the U.S. Supreme Court held that the government must “claim” every word of a message for it to count as government speech.<sup>244</sup> And yet the Court also held that the government need not identify itself as the speaker.<sup>245</sup>

As a result, government speech doctrine itself precludes the kind of evidence one would need to even have a chance at identifying the government’s viewpoint. There may be an underlying reason for this—courts generally try to avoid asking whether the government’s asserted reasons for an action are pretextual.<sup>246</sup> Indeed, one of the concerns with purpose analyses in constitutional law is that “the requisite inquiries may be embarrassing for a court to make, because they involve questions about the constitutional good faith of government officials.”<sup>247</sup> Thus, in government speech cases, courts may claim agnosticism about the government’s “true” viewpoint because they do not want to put themselves in the uncomfortable position of disagreeing with the government’s assertion of what that actual viewpoint is.<sup>248</sup>

### 3. Possible Solutions

Assume for a moment that these theoretical and practical objections are correct, and that the search for a government viewpoint is as doomed as the search for the “message” behind a statute. What would that prove? On the one hand, it would certainly make things more difficult for purposivist analysis—if the government cannot rightly be said

<sup>242</sup> See Transcript of Oral Argument, *supra* note 89, at 42 (Pamela Harris, attorney for respondent).

<sup>243</sup> *Summum*, 129 S. Ct. at 1135.

<sup>244</sup> 544 U.S. 550, 562 (2005) (“When . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine . . .”).

<sup>245</sup> *Id.* at 564 n.7 (chastising the dissent for citing “no prior practice, no precedent, and no authority” for a requirement that the government identify itself when speaking).

<sup>246</sup> See Fallon, *supra* note 53, at 72.

<sup>247</sup> *Id.*; accord Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1285 (1986) (“[T]he Justices no doubt feel some disinclination to accuse state officials of improper purposes . . .”).

<sup>248</sup> See Fallon, *supra* note 53, at 72; Regan, *supra* note 247, at 1285; cf. *Sutcliffe v. Town of Epping*, 584 F.3d 314, 337 (1st Cir. 2009) (Torruella, J., dissenting) (expressing concern that a finding of government speech would “permit[] a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact”).

to have a purpose, then creating doctrine to search for it is, at best, a waste of time.

On the other hand, despite their strength, these objections and concerns are not necessarily insurmountable and it may be possible to identify some kind of government viewpoint sufficient to justify (and identify) government speech. After all, purposivists continue to ply their trade in other realms of statutory and constitutional law,<sup>249</sup> and free speech doctrine itself sometimes ascribes a “viewpoint” to *private* collectives like corporations and other organizations.<sup>250</sup>

So might it also be possible to identify a government “viewpoint” using a similar approach? Kagan’s statement of the question (which she answers affirmatively) is worth quoting at length:

Let us accept that the First Amendment prohibits restrictions on speech stemming, even in part, from hostility, sympathy or self-interest. And let us accept that the difficulty of proving this impermissible motive—resulting, most notably, from the government’s ability to provide pretextual reasons—gives rise to a set of rules able to flush out bad motives without directly asking about them. What would these rules look like?<sup>251</sup>

To oversimplify only slightly, Kagan’s answer is that such rules would be constructed to smoke out invidious purpose without actually asking directly about it, and that in fact this is precisely the structure of current First Amendment doctrine: “These rules—the rules that would be devised to flush out illicit purpose—in fact constitute the foundation stones of First Amendment doctrine. Examining their structure reveals that the search for impermissible motive animates the doctrine, as the doctrine implements the search for motive.”<sup>252</sup>

The question of identifying motive is not unique to First Amendment cases, nor are the tools with which courts seek to answer it.<sup>253</sup> Jus-

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<sup>249</sup> See Rubinfeld, *supra* note 57, at 793–97 (noting that “governmental purposes are difficult to ascertain,” but arguing that “the mysteriousness of legislative purpose is overrated”); see also Bhagwat, *supra* note 57, at 323 (arguing that “the process of attributing purposes to the actions of lawmaking bodies is implicit in the legal method” and that attempts to identify government purpose lead to “a reasonably consistent account in most cases”).

<sup>250</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (corporation); *Dale*, 530 U.S. at 644 (organization); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995) (organization).

<sup>251</sup> Kagan, *supra* note 27, at 443.

<sup>252</sup> *Id.*

<sup>253</sup> See Rubinfeld, *supra* note 57, at 794 (“Relevant evidence will include the law’s language, its effects, its legislative history, the circumstances surrounding its enactment, and

tice O'Connor has described the primary function of strict scrutiny analysis as "smoking out" improper governmental purposes.<sup>254</sup> Ashutosh Bhagwat argues that "it is not particularly difficult to make reasonable judgments about the motivations behind legislation in most cases. Statutory text and structure, legislative history, and an examination of political context provide strong and generally adequate tools with which to make these determinations."<sup>255</sup> Indeed, he goes further to say that "[t]he relative expertise and constitutional role of the Court make it better suited to purpose scrutiny than to the means scrutiny that has dominated constitutional analysis since the New Deal."<sup>256</sup>

Others have suggested that the answer lies in drawing a distinction between the "objective" and "subjective" purposes of a statute.<sup>257</sup> Justice Scalia, for example, has argued that "while it is possible to discern the objective purpose of a statute . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."<sup>258</sup> By "objective purpose," Justice Scalia means the purpose that is supposedly evident from the text of the statute itself.<sup>259</sup> By relying on the enacted words themselves, a committed textualist can uncover a "purpose" that reflexively helps reveal the meaning of the words.<sup>260</sup> Where such words are available—that is, where a speech regu-

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common knowledge."); *see also* *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (identifying factors such as impact, historical background, and legislative history to determine whether there was a discriminatory intent in the equal protection context).

<sup>254</sup> *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., concurring).

[T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

*Id.*

<sup>255</sup> Bhagwat, *supra* note 57, at 322.

<sup>256</sup> *Id.* at 368.

<sup>257</sup> *See Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (Scalia, J., dissenting); *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

<sup>258</sup> *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (Scalia, J., dissenting).

<sup>259</sup> *See Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

<sup>260</sup> *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 355 (2005). For more on the textualist-purposivist debate, which is far beyond the scope of this Article, *see generally* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Nelson, *supra*.

lation is enacted as a statute or ordinance that contains sufficient words to run through the textualist mill—this approach may prove fruitful.

Thus it appears that the search for government viewpoint, though plagued with problems, may not be doomed to inevitable failure. Assuming that this is so, how well does it account for the current state of government speech doctrine? Kagan and others have argued that First Amendment doctrine is an elaborate construction designed to reveal governmental purposes.<sup>261</sup> Does government speech doctrine do as much for government viewpoints?

### C. *Does Government Speech Doctrine Currently Require the Government to Demonstrate a Viewpoint?*

The previous Sections demonstrate why the search for government viewpoint is likely to be frustrating and difficult, if not outright impossible. It may be somewhat unsurprising, then, that contemporary government speech doctrine often does not require the government to articulate its viewpoint.<sup>262</sup>

Present government speech doctrine is generally agnostic as to the government's viewpoint. Effectively, the government need only assert that it has *a* message; it need not show what that message is. As Steven Gey notes, "The larger problem with the Court's theory of government speech, however, is that in many cases in which the Court has implemented its theory of government speech the government is not really saying anything."<sup>263</sup> As the government is not even required to identify itself as the party delivering a message,<sup>264</sup> it follows naturally that its viewpoint need not be identified, either. Perhaps as a result, many cases implicating government speech end up in different constitutional boxes. For example, in the 2000 case of *Cuffley v. Mickes*, decided by the

<sup>261</sup> See, e.g., Kagan, *supra* note 27, at 414 (advocating a purposivist approach to the First Amendment); Rubinfeld, *supra* note 57, at 768 (same).

<sup>262</sup> See, e.g., *Summum*, 129 S. Ct. at 1134–37 (holding that the city need not articulate the message expressed through the public park and suggesting that it may even change over time); see also Gey, *supra* note 28, at 1269.

In each of the six manifestations of government speech that the Court has recently addressed, the government either has nothing to say, wants to say something that it is not allowed to say, wants to say something that no conceivable conception of a domestic political process would allow it to say, or speaks in such a garbled manner that no one can determine what it is saying.

Gey, *supra* note 28, at 1269 (internal citations omitted).

<sup>263</sup> Gey, *supra* note 28, at 1262–63.

<sup>264</sup> See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564 n.7 (2005) (suggesting that the government need not identify itself when speaking).

U.S. Court of Appeals for the Eighth Circuit, Missouri did not use government speech as a defense to its decision to reject the Ku Klux Klan's application to participate in the state's Adopt-A-Highway program, which would have led to a sign noting the Klan's participation.<sup>265</sup> Instead, the state's decision was evaluated under the unconstitutional conditions doctrine.<sup>266</sup>

Perhaps courts avoid inquiring into the government's specific motivations because they realize the futility of doing so. As explained in Section B, it may be impossible, as a theoretical or practical matter, to define government "viewpoint."<sup>267</sup> And if it is true that government speech doctrine does not require—and does not even encourage—the government to reveal its viewpoint, then it seems to be an exception to Kagan's general argument that "the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."<sup>268</sup> But Kagan's point is that, as a descriptive matter, the First Amendment is *actually* about a search for improper government motive, despite its own protestations to the contrary.<sup>269</sup> Is it possible that government speech is similarly constructed?

Certainly, the fact that government speech doctrine does not explicitly require the government to articulate viewpoints cannot be conclusive proof that the doctrine is not designed to identify them. It may simply be implicit that when, for example, the government excludes an unwanted private speaker from government property, the government is expressing disapproval of that speaker.<sup>270</sup> After all, the notion that exclusion conveys, protects, or *is* a message is plainly correct and is not unique to government speech doctrine.<sup>271</sup> The closest analogues may be expressive association cases like the 2000 U.S. Supreme Court case

<sup>265</sup> See 208 F.3d 702, 711 (8th Cir. 2000) ("[T]he State admitted repeatedly in depositions that it does not view the erection of an Adopt-A-Highway sign as an endorsement or promotion of the adopter.").

<sup>266</sup> *Id.* at 709.

<sup>267</sup> See *supra* notes 217–261 and accompanying text.

<sup>268</sup> Kagan, *supra* note 27, at 414.

<sup>269</sup> See *id.* at 427 (discussing what constitutes an impermissible government motive).

<sup>270</sup> This assumption is implicit in First Amendment analysis. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.").

<sup>271</sup> See *Christian Legal Soc'y*, 130 S. Ct. at 2994 (holding that a university antidiscrimination policy was viewpoint neutral where the school's Christian Legal Society sought to exclude certain members in order to convey its religious message); *Dale*, 530 U.S. at 653 (holding that the right to freedom of association allowed the Boy Scouts to exclude homosexual members). For a more extensive attempt to deal with the expressiveness of exclusion, see generally Blocher, *Government Property and Government Speech*, *supra* note 16.



*Boy Scouts of America v. Dale*, which upheld the Boy Scouts' decision to refuse membership to a gay scoutmaster.<sup>272</sup> In *Dale*, the Court concluded that the Boy Scouts' being forced to retain the scoutmaster would send the message "that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."<sup>273</sup> And just as government need not articulate a viewpoint when excluding others, it is unclear whether the *Dale* rule actually requires the excluding organization to identify the viewpoint that is being threatened.<sup>274</sup> In dissent, Justice Stevens argued that "the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude."<sup>275</sup> But the majority deferred to the Boy Scouts' assertion that they had a message, and that the message would be threatened if the organization was forced to admit openly gay scoutmasters: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."<sup>276</sup> The same deference seems to apply implicitly in government speech cases with respect to viewpoint and exclusion.<sup>277</sup>

A related and difficult question involves the government's interest in avoiding the expression of a viewpoint, whereby the government "speaks" not by communicating any particular affirmative viewpoint, but by declining to speak at all. To avoid having a private message mistakenly attributed to it, the government may sometimes need to silence private speakers. Along these lines, Helen Norton argues that "[t]he absence of a transparent viewpoint that government seeks to protect may not always defeat the government's ability to establish an expressive threat," because the government may have made a conscious deci-

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<sup>272</sup> 530 U.S. at 640.

<sup>273</sup> *Id.* at 653.

<sup>274</sup> See *Sumnum*, 129 S. Ct. at 1134–37 (holding that no articulated viewpoint is necessary when asserting a government speech defense); *Dale*, 530 U.S. at 651 ("We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."); see also *Dale*, 530 U.S. at 653 (asserting deference to an association's expression of viewpoints).

<sup>275</sup> *Dale*, 530 U.S. at 687 (Stevens, J., dissenting); see also Norton, *supra* note 63, at 60 ("The off-duty speech of a 'quintessentially public servant' is most likely to pose a substantial threat to government's own expressive interests when it clashes with a message that government has articulated and for which it can thus be held politically accountable.").

<sup>276</sup> *Dale*, 530 U.S. at 653.

<sup>277</sup> See *Sumnum*, 129 S. Ct. at 1134–37 (holding that though no specific viewpoint need be identified with respect to the public park, the city rightfully excluded the monument in furtherance of this viewpoint).

sion to remain silent or to reserve judgment on a public debate.<sup>278</sup> That, after all, was the central argument in *Summum*.<sup>279</sup> In other words, the government may make an argument akin to that raised by private individuals in the 1943 and 1977 Supreme Court cases of *West Virginia Board of Education v. Barnette* and *Wooley v. Maynard*—that it has a “right” not to be “compelled” to speak.<sup>280</sup>

This compelled speech argument has become perhaps most notable in the context of government speech claims involving public employees.<sup>281</sup> In those cases (which are generally not grouped with traditional government speech cases, but are certainly part of the same genre), courts have increasingly rejected public employees’ free speech claims not because their speech interferes with their workplace, but because the government should be permitted to “exercise . . . employer control over what the employer itself has commissioned or created.”<sup>282</sup> In 2006, in *Garcetti v. Ceballos*, a five-justice majority of the Supreme Court held that the government could punish an assistant district attorney who wrote a memorandum informing his superiors of apparently fraudulent statements used to support a search warrant in a pending criminal case.<sup>283</sup> The principle behind that decision appears to be that public employees’ speech made “pursuant to their official duties”

<sup>278</sup> Norton, *supra* note 63, at 63; *see also Sons of Confederate Veterans*, 305 F.3d at 249 (Niemeyer, J., dissenting from denial of rehearing en banc) (“The State . . . has not taken a position on this controversial symbol; rather it has removed itself from the fray, simply refusing to authorize the Confederate Flag logo on license plates issued by it.”).

I would have hoped . . . that we would consider the government’s interest in avoiding “speech by attribution;” that is, the government’s right not to be compelled to speak by private citizens . . . [which] demonstrates the tricky interplay and relationship between the concepts of private and government speech.

*Sons of Confederate Veterans*, 305 F.3d at 252 (Gregory, J., dissenting from denial of rehearing en banc).

<sup>279</sup> *See Summum*, 139 S. Ct. at 1134–37 (silencing the Summum religion to achieve government speech).

<sup>280</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943); *see supra* notes 96–98.

<sup>281</sup> *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (holding that government could restrict a government employee’s speech). *See generally* Norton, *supra* note 63 (discussing government restriction of employee speech).

<sup>282</sup> *Garcetti*, 547 U.S. at 422; *see Norton, supra* note 63, at 3 (“[A]lthough past courts focused on whether and when public employers’ interest in managerial control and operational efficiency outweighed workers’ speech interests, courts now concentrate on—and defer to—government’s claim to control the speech of its workers to protect its own expression.”).

<sup>283</sup> 547 U.S. at 421–22.

receives no First Amendment protection, and therefore an employee can be disciplined because of it.<sup>284</sup>

The underlying principle of *Garcetti* is in many ways a concomitant of the principle in the Court's 1968 decision in *Rust v. Sullivan*.<sup>285</sup> In *Rust*, the Court recognized that when the government speaks, it must do so through individuals—doctors, in that particular case.<sup>286</sup> In *Garcetti*, the Court essentially considered the reverse problem: individuals attempting to speak for themselves may be mistaken for mouthpieces of the government. As the majority recognized, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . .”<sup>287</sup> Courts have extended this reasoning, permitting the government to control even off-duty speech by public employees.<sup>288</sup> As Helen Norton notes, “these decisions appear to reflect courts’ intuition that the public will inevitably associate government employees’ off-duty expression with the agency that employs them in a way that may undermine government’s ability to communicate its own views effectively.”<sup>289</sup>

The government’s interest in avoiding speech-by-attribution is undoubtedly a strong one, and for that reason government employment cases raise more difficult problems in terms of identifying government viewpoint. Perhaps the government need not assert a specific viewpoint to justify its desire to avoid speech by attribution any more than a private speaker must do so to prevail on a compelled speech claim.<sup>290</sup> The

<sup>284</sup> *Id.* at 421.

<sup>285</sup> Compare *id.* (restricting government employee speech with respect to official government duties), with *Rust v. Sullivan*, 500 U.S. 173, 173 (1991) (restricting the speech of doctors who receive federal funding).

<sup>286</sup> See 500 U.S. at 196–200 (holding that doctors’ speech can be restricted to the extent it is inconsistent with the U.S. Government’s Title X program); *id.* at 209 (Blackmun, J., dissenting) (“The regulations are also clearly viewpoint based. While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other.”).

<sup>287</sup> *Garcetti*, 547 U.S. at 421.

<sup>288</sup> See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 81–84 (2004) (per curiam) (holding that firing a police officer for off-duty maintenance of a sexually explicit website was not a First Amendment violation); see also Norton, *supra* note 63, at 18 (indicating that lower courts have utilized *City of San Diego v. Roe* to “permit the firing of government workers for a variety of off-duty speech that makes no reference to the government”).

<sup>289</sup> Norton, *supra* note 63, at 16.

<sup>290</sup> See *Sumnum*, 129 S. Ct. at 1134–37 (holding that the government speech defense does not require an articulated viewpoint); *Developments in the Law—State Action and the Public/Private Distinction*, *supra* note 21, at 1300 (establishing that compelled speech violates the First Amendment regardless of whether the speech expresses a viewpoint with which the speaker disagrees).

complaints in *Barnette* and *Wooley* were undoubtedly filed because private individuals disagreed with the messages they were being compelled to communicate, but the results of the cases did not turn on that fact.<sup>291</sup> Rather, the Court invoked the simple principle that “the right . . . protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.”<sup>292</sup> Perhaps the same type of viewpoint-agnostic rule should apply when the government seeks to avoid speech-by-attribution. Even so, Norton concludes that “[n]ormally” the First Amendment “should require government to communicate clear expectations about the message that it seeks to protect . . . .”<sup>293</sup>

In any event, not all courts have been entirely agnostic as to government viewpoint. Prior to *Johanns*, and in an apparent effort to fill the gap left by the Supreme Court’s failure to define government speech, some U.S. courts of appeals have embraced a four-factor test for characterizing government speech, the first factor of which seems to suggest the relevance of government viewpoint:

(1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker”; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech . . . .<sup>294</sup>

It is unclear whether the test survived *Johanns*.<sup>295</sup> And yet *Johanns* itself arguably increased the doctrinal emphasis on government purpose. Though the opinion “did not offer a comprehensive analytical definition of ‘government speech,’”<sup>296</sup> it did emphasize two factors that are particularly useful in identifying it: whether the government estab-

<sup>291</sup> See *Wooley*, 430 U.S. at 714 (holding that the First Amendment right includes the right to abstain from speaking); *Barnette*, 319 U.S. at 642 (stating a similarly definitive rule against compelled speech: “If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>292</sup> *Wooley*, 430 U.S. at 714.

<sup>293</sup> Norton, *supra* note 63, at 63.

<sup>294</sup> *Sons of Confederate Veterans*, 288 F.3d at 618; accord *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001) (describing a similar test).

<sup>295</sup> *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008) (questioning the vitality of a four-factor test in light of *Johanns*); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006) (same).

<sup>296</sup> 2 RODNEY SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH §§ 19:25.50, 19:60.2 (2007).

lished the message, and whether it approved “every word” of the message.<sup>297</sup> Scholars, too, have called for increased attention to the actual viewpoint the government has expressed,<sup>298</sup> especially in certain limited contexts such as where the government is seeking to limit public employee speech.<sup>299</sup>

Why have these calls for increased identification of viewpoint gone largely unheeded? For one thing, the government often has ample incentive to obscure its viewpoint.<sup>300</sup> This is especially true in government speech cases, like *Sumnum*, involving religious speech that might violate the Establishment Clause if the government were so to claim.<sup>301</sup> Notwithstanding the Establishment Clause (the one clear limitation on government speech<sup>302</sup>), the government may also wish to avoid proclaiming a viewpoint for the simple reason that doing so risks emphasizing the government’s disagreement with the private speaker and thereby characterizing the government’s action as viewpoint discrimination.<sup>303</sup> Moreover, it may be that in some situations the government can more effectively advance its purposes by disguising its voice. In the *Rust* scenario, for example, preventing doctors from expressing a pro-choice “viewpoint” may have been more effective in discouraging abortions than requiring those same doctors to read out a statement saying that abortions are sinful. The latter prac-

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<sup>297</sup> *Johanns*, 544 U.S. at 562.

<sup>298</sup> See, e.g., Bezanson & Buss, *supra* note 17, at 1384 (suggesting that government speech includes only “purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government’s message”).

<sup>299</sup> Norton, *supra* note 63, at 68.

More careful attention to what it is that government seeks to express—and whether that expression is actually threatened by contested employee speech—can help capture and accommodate those interests more precisely while providing greater protection for workers’ own free speech rights as well as the public’s interest in transparent government.

*Id.*

<sup>300</sup> See Gey, *supra* note 28, at 1263 (noting that government can limit speech without having to justify the limitation).

<sup>301</sup> *Id.* (“In *Sumnum*, the Court enhances the government speech category of First Amendment law to the point that the government can evade other First Amendment restrictions on its behavior without engaging in the communicative behavior that supposedly justified the evasion in the first place.”); see *Sumnum*, 129 S. Ct. at 1142 (Souter, J., concurring).

<sup>302</sup> See *Johanns*, 544 U.S. at 553 (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”).

<sup>303</sup> Such viewpoint discrimination would implicate the First Amendment and be subject to strict scrutiny. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (holding that viewpoint discrimination resulted in a denial of free speech).

tice, though more viewpoint-transparent, might have come across as overly paternalistic and therefore less effective in shaping behavior.<sup>304</sup>

Another possible explanation for the government speech doctrine's ambivalence about government viewpoint may be that government speech is not always about government viewpoint. Instead, government may attempt to invoke the doctrine in some cases where it seeks to do nothing more than remain silent or neutral on a controversy to avoid having a private viewpoint imputed to it. Or perhaps the doctrine does (or should) cover all government "communication" including such putatively viewpoint-neutral messages as weather reports and other information.

And yet, for all the reasons laid out above, viewpoint discrimination is the very heart of much government speech. If Pleasant Grove City, in an effort to establish its viewpoint neutrality, were to disclaim any expressive interest in Pioneer Park, then it would simultaneously be disclaiming government speech. That is, the very justification for government speech operating outside the First Amendment is the government's need to clearly express its viewpoints.<sup>305</sup> And yet courts and scholars have tried to claim simultaneous fidelity to both the government speech doctrine and the principle of viewpoint neutrality.<sup>306</sup>

The hesitation to recognize government viewpoint, and to recognize that its expression can require limits on private viewpoints, could as a rhetorical matter reflect a general discomfort with viewpoint discrimination, or with the related difficulty of drawing lines between government speech and public forum doctrine.<sup>307</sup> The final Part of this

<sup>304</sup> See Gey, *supra* note 28, at 1273 ("[I]f the government candidly said what it really meant, the message would be totally ineffective with members of the target audience, who are unlikely to take kindly to the government's blunt moral paternalism."); see also Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 381 (1983) (reviewing YUDOF, *supra* note 24) ("[A]ntigovernment biases may be so great, particularly with reference to the veracity of political leaders, that much government speech may encounter a public strongly predisposed to disbelief.").

<sup>305</sup> Cf. Park, *supra* note 2, at 123–24 (noting that "[t]he rationale for this unusual freedom of action is that government can only promote and support its programs and policies by presenting its point of view to the exclusion of opposing viewpoints" and also the necessity of government speech to promote programs and regulate content to maintain a clear message).

<sup>306</sup> See *supra* notes 222–248 and accompanying text.

<sup>307</sup> The two difficulties are related, of course, because the viewpoint neutrality requirement only comes into play if one decides that government speech is *not* at issue. See *Sumnum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

[C]ourts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye towards their purposes—lest we turn "free speech" doctrine into a jurisprudence of

Article suggests that the best way to solve this doctrinal mess is to embrace it—to admit that the First Amendment permits viewpoint discrimination and to establish conditions governing it.

### III. A WAY FORWARD

Solving the problems described above essentially means reconciling two incompatible concepts: government viewpoints and viewpoint neutrality.<sup>308</sup> This Part offers some tentative suggestions for a solution. The argument proceeds in two Sections. Section A argues that, despite the problems described in the first two Parts,<sup>309</sup> government speech can play a valuable and perhaps essential role in the functioning of a democracy.<sup>310</sup> Section B first outlines previous attempts to reconcile government speech and viewpoint neutrality.<sup>311</sup> It then suggests a few possible changes. Subsection B.1 suggests that government speech should only be allowed when adequate alternatives exist for private speech, or when government speech has only a de minimis effect on private speech.<sup>312</sup> Alternatively, subsection B.2 proposes that government speech should apply only when the government has no adequate alternatives for communication.<sup>313</sup> Finally, subsection B.3 posits that the government must affirmatively provide adequate alternatives when invoking government speech doctrine.<sup>314</sup> These changes might help reconcile an Amendment that requires the government to be neutral as to viewpoints and a political system that requires it to engage with them.

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labels. . . . [Looking beyond categorization] helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.

*Id.* (internal citations omitted).

<sup>308</sup> *Cf.* Cole, *supra* note 17, at 709 (“The two foundations of First Amendment jurisprudence appear at odds. One envisions government staying out of the marketplace of ideas altogether, and the other suggests that government is most legitimate when it seeks to influence the marketplace of ideas through persuasion.”).

<sup>309</sup> *See supra* notes 37–194 and accompanying text (arguing that government speech is at odds with First Amendment jurisprudence); *supra* notes 195–307 and accompanying text (demonstrating the difficulty in ascertaining government viewpoint).

<sup>310</sup> *See infra* notes 315–326 and accompanying text.

<sup>311</sup> *See infra* notes 327–342 and accompanying text.

<sup>312</sup> *See infra* notes 343–367 and accompanying text.

<sup>313</sup> *See infra* notes 368–393 and accompanying text.

<sup>314</sup> *See infra* notes 394–404 and accompanying text.

### A. *Preserving a Place for Government Expressions of Viewpoint*

The story up until now has generally cast government speech as a villain. But, as is often the case, at the end of this particular story the villain turns out to have some redeeming qualities.

First, government speech is simply necessary—the government must be able to express viewpoints in order to function at all.<sup>315</sup> As Randall Bezanson and William Buss note in their comprehensive survey of government speech doctrine: “Democratic governments must speak, for democracy is a two-way affair . . . . Speech is but one means that government must have at its disposal to conduct its affairs and to accomplish its ends.”<sup>316</sup> To be successful, a First Amendment theory must come to grips with this basic fact.<sup>317</sup> Doing so may mean formally jettisoning the (supposed) commitment to viewpoint neutrality.<sup>318</sup> As Robert Post notes, “it is probably not too outlandish an exaggeration to conclude that government organizations would grind to a halt were the Court to seriously prohibit viewpoint discrimination in the internal management of speech.”<sup>319</sup> And Steven Shiffrin argues that “[i]f government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs . . . government must be able to communicate.”<sup>320</sup>

Second, government speech is not always a necessary evil; often it is a necessary good. Writing a decade before even Mark Yudof, and thus well before modern government speech doctrine, Thomas Emerson concluded that government speech “enables the government to in-

<sup>315</sup> *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1131 (2009) (“Indeed, it is not easy to imagine how government could function if it lacked this freedom.”); *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990) (“If every citizen were to have the right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”).

<sup>316</sup> Bezanson & Buss, *supra* note 17, at 1380; *accord* Bezanson, *supra* note 69, at 980 (“Perhaps the most compelling reasons supporting the government’s power to engage in protected expression are purely practical. Without the capacity to act as a speaker, government could not do many of the things it does and must do.”).

<sup>317</sup> Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 Sw. U. L. REV. 237, 244 (1978) (“Nor can an acceptable free speech theory demand that government be an ideological eunuch . . .”).

<sup>318</sup> *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from prescribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” (internal citations omitted)).

<sup>319</sup> Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1825 (1987).

<sup>320</sup> Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980).



form, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force . . . . In short, government expression is a necessary and healthy part of the system.”<sup>321</sup> Abner Greene has also pointed out similar benefits of government speech: “[G]overnment speech can help foster debate, fleshing out views, and leading towards a more educated citizenry and a better chance of reaching the right answer.”<sup>322</sup> At the very least, as Shiffrin argues, transparent and clear government speech should aid democratic accountability by giving the public “the advantage of knowing the collective judgment of the legislature and of knowing the views of its representatives, which would in turn be useful for evaluating them.”<sup>323</sup>

This promotion of an educated citizenry is of course tied to the “democratic” justification for government speech’s exemption from the First Amendment. So long as the government openly communicates with citizens, they can presumably evaluate the government’s actions and hold their representatives accountable at the ballot box.<sup>324</sup> Norton suggests that government speech “derives its constitutional salience primarily, if not exclusively, from its instrumental value in facilitating listeners’ informed decisionmaking.”<sup>325</sup> Of course, as noted above, the democratic rationale for government speech is undercut by the fact that government speech doctrine does not require the government to identify itself when speaking.<sup>326</sup> But this obscuring of government speech, in turn, does not necessarily mean that there are no democratic reasons to value government speech. The information it conveys may not be perfectly transparent, but it can still contribute to informed self-governance.

### B. Possible Solutions

The government’s need to express its viewpoints cannot easily be reconciled with the principle of viewpoint neutrality.<sup>327</sup> This final Section outlines some potential treaty terms between the two warring prin-

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<sup>321</sup> THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 698 (1970); *see also* Norton & Citron, *supra* note 15, at 902 (“[G]overnment expression’s value springs primarily from its capacity to inform the public of its government’s principles and priorities.”).

<sup>322</sup> Greene, *supra* note 112, at 11.

<sup>323</sup> Shiffrin, *supra* note 320, at 604.

<sup>324</sup> *Id.*

<sup>325</sup> Norton, *supra* note 63, at 21 n.75.

<sup>326</sup> *See supra* notes 130–142 and accompanying text.

<sup>327</sup> Post, *supra* note 17, at 165 (observing the inconsistency in the Supreme Court’s analysis of viewpoint prohibition in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)).

ciples. Specifically, it focuses on what might happen were we to surrender—or, more accurately, recognize that we have already surrendered—our supposed commitment to viewpoint neutrality and instead focus on workable rules to govern viewpoint-based speech regulations.

This is not the first effort to bring peace to these belligerent First Amendment principles. Prior efforts have sought to offer something to both viewpoint discrimination and government speech, for example prohibiting the government from engaging in viewpoint discrimination in certain contexts.<sup>328</sup> David Cole would protect “spheres of neutrality” in which government neutrality towards viewpoints is essential to the functioning of a particular institution—the press or educational institutions, for example.<sup>329</sup> Robert Post approaches the problem by calling for a move away from the unhelpful question of what constitutes “speech,” towards increased focus on “relevant processes of social characterization.”<sup>330</sup> And Mary Jean Dolan argues that if the government creates “special public purpose forum[s]” for particular civic, cultural, or aesthetic purposes, it should be allowed to discriminate on the basis of viewpoint within them.<sup>331</sup> It is far beyond the scope of this Article to add (or, hopefully, subtract) from these efforts. I mention them here only as evidence that efforts have been made to separate areas in which the government must remain neutral from those in which it need not.

The alternatives suggested here share something with those of Cole, Post, Dolan and others. Like those scholars’ arguments, these alternatives abandon—or recognize the abandonment of—the commitment to unwavering viewpoint neutrality.<sup>332</sup> Even holding aside the special example of government speech, which this Article has characterized as an exception to the viewpoint neutrality requirement, First

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<sup>328</sup> See sources cited *infra* notes 329–331 and accompanying text.

<sup>329</sup> Cole, *supra* note 17, at 716.

<sup>330</sup> Post, *supra* note 17, at 152. Such processes of social characterization include: (1) defining the domain that the government speech reaches (public discourse or professional speech) and identifying constitutional values that apply to that category of speech, and (2) characterizing the government action as standards for allocating government funding or as internal directives to government officials. *Id.* at 195. The former is subject to more constitutional constraints. *Id.*

<sup>331</sup> Dolan, *supra* note 77, at 113–15.

<sup>332</sup> See Cole, *supra* note 17, at 716 (defending viewpoint neutrality within certain governmental spheres); Dolan, *supra* note 77, at 113–15 (accepting viewpoint discrimination in certain forums); Post, *supra* note 17, at 152 (promoting analysis of government speech to determine the appropriateness of viewpoint neutrality).

Amendment doctrine is littered with viewpoint casualties.<sup>333</sup> In Schauer's words:

As with the other false paths, the path of viewpoint discrimination ultimately leads to the point at which we must acknowledge that some forms of viewpoint discrimination by government enterprises are permissible and some forms are not, with the bare idea of viewpoint discrimination of little assistance in separating the one from the other.<sup>334</sup>

So it simply will not do to try to conceal the expressiveness of speech regulations. Instead of treating viewpoint neutrality as a First Amendment absolute, we should frankly admit, as the doctrine already indicates, that the Constitution permits the government to limit private speech on the basis of viewpoint.<sup>335</sup> And yet one does not have to be a card-carrying member of the ACLU to be somewhat concerned about that sacrifice. So let us add a limiting principle.<sup>336</sup> A few possibilities present themselves, some more promising than others.

First, let us consider and discard one possible solution—separating the “expressiveness” element of a speech prohibition from the rest of it. One could imagine trying to divide a particular speech regulation into constituent elements or purposes—some intended to express a government viewpoint (and which are therefore eligible for favorable treatment as government speech) and some simply intended to limit a particular private activity without “expressing” anything (and which are therefore subject to analysis like any other content-neutral regulation). Governments, after all, presumably pass laws for many reasons, not all of them expressive. And yet discerning the expressive from the unexpressive is deeply problematic. The effort to separate expressive from unexpressive is reminiscent of the now-discredited theory that the “conduct element” of a private action can be separated from the

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<sup>333</sup> *E.g.*, *Rust v. Sullivan*, 500 U.S. 173, 173 (1991) (restricting the speech of doctors who receive government subsidy); see *supra* notes 1–5 and accompanying text (establishing that government speech is exempt from First Amendment scrutiny).

<sup>334</sup> Schauer, *supra* note 52, at 106.

<sup>335</sup> See Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 946 (2010) (“Our commitment to neutrality is in fact a source of serious difficulties, but it doesn’t need to be: we could simply relinquish the commitment (at least in theory).”).

<sup>336</sup> *Cf.* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 200 (1983) (describing “modest viewpoint-based restrictions”).

“speech element.”<sup>337</sup> Perhaps most notably, Thomas Emerson suggested that if the latter “predominated,” then the First Amendment was implicated, and if the conduct element predominated, then there was no free speech issue.<sup>338</sup> But John Hart Ely provided the devastating counterpoint: “[B]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression . . . . Attempts to determine which element ‘predominates’ will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected.”<sup>339</sup> As it is with speech activities, so it is with speech regulations—they are “100%” expressive. If the government’s expressive interests are to be recognized, then those interests are undoubtedly implicated fully in every speech regulation the government passes. That is the root of the problem, not the solution.

Having rejected a false start, we can instead consider three more promising candidates: permitting government speech as a defense only where it leaves sufficient alternatives for private speakers, permitting government speech only where the government has insufficient alternatives, and permitting government speech only where the government *creates* equal alternatives for private speakers.<sup>340</sup> All three of these possibilities rely in one way or another on the concept of “adequate alternatives,” a concept normally employed in time, place, and manner analysis.<sup>341</sup> There is a reason for this. At root, the problem in government speech cases is akin to that in time, place, and manner cases—the need to accommodate two conflicting speech acts (or even viewpoints) in a way that does not impermissibly disable one or the other.<sup>342</sup> This kind

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<sup>337</sup> Tribe, *supra* note 317, at 242 (“How the empty speech-conduct distinction could have survived as long as it did in a world without extrasensory communication remains a mystery to me.”).

<sup>338</sup> See EMERSON, *supra* note 321, at 80.

<sup>339</sup> John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).

<sup>340</sup> See *infra* notes 343–404 and accompanying text.

<sup>341</sup> See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open *ample alternative channels* for communication of the information.

*Id.* (emphasis added).

<sup>342</sup> Compare *Clark*, 268 U.S. at 290–93 (permitting the restriction of protestors from having structures on the National Mall overnight), with *Sumnum*, 129 S. Ct. at 1134–37 (restricting the Sumnum monument but permitting others).

of balancing of incompatibles is precisely what the time, place, and manner test seeks to accomplish, and what the government speech paradox needs.

### 1. Government Speech Must Leave Adequate Alternatives for Private Speakers, or Else Must Have Only a De Minimis Effect on the Private Speaker

Part of the intuitive appeal of characterizing a subsidy denial as something other than a “regulation” is the impression that a subsidy denial leaves the private speaker free to express him- or herself in other ways.<sup>343</sup> At best, then, the interference with the speaker’s speech rights is de minimis; at worst, it preserves adequate (or perhaps even ample) alternative avenues of expression. Although the subsidy/regulation distinction tends to break down for all the reasons set out in Part I.C,<sup>344</sup> the intuition need not be entirely discarded.<sup>345</sup> That is, even if it is accepted that government speech is a viewpoint-based regulation on private speech, such regulation is not unconstitutional because the regulated speaker has sufficient alternative avenues of communication.

The concept of “adequate alternatives” is at the heart of time, place, and manner doctrine.<sup>346</sup> Under the usual time, place, and manner test, the government may pass content-neutral restrictions so long as they are “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication.”<sup>347</sup> The government speech variation on that test would simply omit the content neutrality requirement and permit the government to regulate private speech when that speech interferes with the government’s message *and* where the regulations preserve alternative avenues of communication for private speakers. This would, to be sure, represent a major change in doctrine. The First Amendment’s bar on viewpoint discrimination does not have an ample alternatives exception.<sup>348</sup>

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<sup>343</sup> See *Sumnum*, 129 S. Ct. at 1140–41 (“[N]o one claims that the City prevents Sumnum’s members from engaging in speech in a form more transient than a permanent monument.”); *Rust*, 500 U.S. at 200 (holding that doctors may advise patients regarding abortion outside the scope of the government subsidy); cf. Bezanson, *supra* note 69, at 979 (“[G]overnment’s expressive activities must not displace competing speech from the market, though they may displace competing speech from a part of the market.”).

<sup>344</sup> See *Sumnum*, 129 S. Ct. at 1140–41; *Rust*, 500 U.S. at 200.

<sup>345</sup> See *supra* notes 143–194 and accompanying text.

<sup>346</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *Clark*, 468 U.S. at 293.

<sup>347</sup> *Clark*, 468 U.S. at 293.

<sup>348</sup> See U.S. CONST. amend. I; *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (implying that, regardless of adequate alternatives, government cannot discriminate based on view-

And yet, preserving the adequate alternatives requirement in the context of government speech would help ensure that private speakers can still communicate their viewpoints in *some* way, even if not precisely the way that they would have liked. This represents a disadvantage, of course, but it at least is not a flat-out viewpoint ban.

Another way to evaluate a government regulation through the same basic lens is by looking not simply at whether alternatives are “adequate” or even “ample,” but whether the overall impact on private speakers is so small as to be negligible.<sup>349</sup> The *Summum* may not be able to erect their monument in Pioneer Park, but there are still many other places where they can, so they have not been muzzled so much as slightly inconvenienced. This is an attractive rule precisely because it has such intuitive appeal. If private speakers who have been displaced by the government still have a wide range of forums available in which to express their messages, then any “harm” to them may be so small as to be constitutionally insignificant. Their speech has been “regulated” in some sense, but it has not been stifled. They may express their viewpoints elsewhere just as effectively, or almost as effectively. Meanwhile, the government can express the messages and viewpoints that it must convey in order to govern.

Presumably this approach would preserve a broad range of governmental speech. Consider two brief examples.<sup>350</sup> First, a slight variation on the *Summum* facts: a private group donates a statue of Martin Luther King, Jr. to a public park. It is the first monument in the park, so there is no chance of clutter. The next day, the Ku Klux Klan presents a statue of a hooded figure. Clearly the town does not want to accept the second monument, not because it would clutter the park, but because the town disavows its viewpoint. So long as the impact on the Klan is minimal—so long as it has ample alternatives for expressing its message (as it presumably would)—the government should prevail.

Second, one might consider the digitized forum, as exemplified in the 2008 case *Page v. Lexington County School District*, decided by the U.S. Court of Appeals for the Fourth Circuit.<sup>351</sup> In that case, a public school

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point in a public forum); *see also Rosenberger*, 515 U.S. at 845 (holding that viewpoint discrimination resulted in a denial of free speech).

<sup>349</sup> *Cf. Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2991 (2010) (“But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers.”).

<sup>350</sup> I am grateful to Helen Norton for suggesting these.

<sup>351</sup> 531 F.3d 275 (4th Cir. 2008).

board took a position against school vouchers and permitted communication of that position on its website and in communications to parents.<sup>352</sup> A voucher supporter sought to have pro-voucher materials posted on the district's website as well, but the Fourth Circuit concluded that the website amounted to the district's own speech and thus rejected the claim.<sup>353</sup> This solution, too, makes sense under the government speech variant discussed here, because the voucher opponents presumably had numerous other avenues through which to express their position.

The Supreme Court has in fact implicitly applied elements of this approach in its public forum cases, albeit never explicitly so when viewpoint discrimination was also involved.<sup>354</sup> The Court's 2010 decision in *Christian Legal Society v. Martinez* provides a perfect example.<sup>355</sup> The Court ruled that a public university could require student groups to admit all comers, despite the burden this would place on the groups' rights to free speech and association.<sup>356</sup> In doing so, the Court noted that:

If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers.<sup>357</sup>

The Court noted that the Christian Legal Society still had "access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events."<sup>358</sup> Furthermore, it could take advantage of the "advent of electronic media and social-networking sites."<sup>359</sup>

Despite its evident strengths, this approach to government speech also has substantial shortcomings. For one thing, as Justice Alito indi-

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<sup>352</sup> *Id.* at 278–79.

<sup>353</sup> *Id.* at 284–85.

<sup>354</sup> *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983) (upholding a restriction where, among other things, there were "substantial alternative channels that remain open for communication to take place").

<sup>355</sup> 130 S. Ct. at 2995.

<sup>356</sup> *See id.*

<sup>357</sup> *Id.* at 2991.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

cated in his dissent in *Christian Legal Society*, there is no officially recognized de minimis exception to the First Amendment's bar on viewpoint discrimination.<sup>360</sup> All else being equal, the government cannot, for example, require Republican protestors to stage their protests five feet further away from the Capitol than Democratic protestors. Indeed, as the 1992 U.S. Supreme Court decision in *R.A.V. v. St. Paul, Minnesota* demonstrates, the government may not engage in viewpoint discrimination even if the regulated speech technically falls outside the ambit of the First Amendment, where the burden on protected speech is presumably nonexistent.<sup>361</sup>

Moreover, the adequate alternatives requirement may not be quite enough to ensure that private viewpoints are sufficiently protected.<sup>362</sup> The Court's time, place, and manner cases<sup>363</sup>—not to mention its “erogenous zoning” cases<sup>364</sup>—do not give one much reason to think that the Court will use such a rule to enforce the rights of individual speakers. The Court has said time and time again that alternatives need not be identical, nor even all that similar, to be sufficient.<sup>365</sup> In its 1986 decision in *City of Renton v. Playtime Theatres, Inc.*, the Court determined that a zoning restriction permitted “reasonable alternative avenues of communication” even though “‘practically none’ of the undeveloped land [was] currently for sale or lease, and . . . in general there [were] no ‘commercially viable’ adult theater sites within the 520 acres left open by the Renton ordinance.”<sup>366</sup> In its 1985 decision in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the Court stressed that to be constitutional, speech restrictions (at least in limited public forums) “need not be the most reasonable or the only reasonable limitation.”<sup>367</sup>

The flexibility in what counts as “adequate,” however, can also be something of a strength, in that it permits the test to be tailored in a way that either expands adequacy to mean any reasonably comparable alternative (thus expanding the reach of government speech doctrine) or narrows it to mean only alternatives that are substantially identical

<sup>360</sup> See *id.* at 3006 (Alito, J., dissenting) (“We have never before taken the view that a little viewpoint discrimination is acceptable.”).

<sup>361</sup> See 505 U.S. at 393.

<sup>362</sup> See *infra* notes 363–366 and accompanying text.

<sup>363</sup> *Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

<sup>364</sup> *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

<sup>365</sup> See, e.g., *Playtime Theatres*, 475 U.S. at 54; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

<sup>366</sup> 475 U.S. at 50, 53.

<sup>367</sup> 473 U.S. at 808.



(thus limiting the reach of the doctrine). This elasticity, of course, raises a whole new set of questions that demand more thorough answers that can be provided here. But it suffices to say that, depending on how it is applied, the adequate alternatives analysis proposed here could lead to a broad government speech doctrine or a narrow one. This is also true, albeit in the opposite fashion, for the proposal discussed in the following subsection.

Perhaps a more stringent precondition should apply before the government can invoke the government speech defense. The following subsection considers such a modification.

## 2. The Government May Only Invoke Government Speech Doctrine Where the Government Lacks Adequate Alternatives

This subsection provides two related suggestions. First, when the government has a legitimate message and private speech would conflict with this expression, the government speech doctrine should be available. Principles of distortion prevention and scarcity management help support this suggestion, but these justifications are problematic. Accordingly, the second suggestion proposes that government speech doctrine should apply only when the government has no other way to express its viewpoint aside from suppressing private speech. Although this second test could lead to unsavory results, such results could be avoided through an expansive interpretation of adequate alternatives.

If the government is to be treated as a “speaker,” as government speech doctrine effectively does, then it stands to reason that the adequate alternatives analysis applied to private speakers in time, place, and manner cases can be turned around and applied to the government itself.<sup>368</sup> Thus, instead of permitting the government speech defense where private speakers have adequate alternatives for expressing their viewpoints, it might be permitted only where the *government* has no adequate alternatives available for expressing its viewpoint.<sup>369</sup> In other words, when the government has a legitimate message it needs to

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<sup>368</sup> See *Ward*, 491 U.S. at 791 (applying the time, place, and manner test); *Clark*, 468 U.S. at 293 (same).

<sup>369</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (illustrating that government has no adequate alternatives other than to restrict employee speech to prevent private speech from being attributed to it); *Rust*, 500 U.S. at 173 (holding that the government may restrict doctors’ speech, lest the public attribute abortion counseling to the government, and determining that the government had no adequate alternative means by which to avoid this outcome).

express, and private speech interferes with that message, then the government speech exception may be available.

This test could have a relatively broad application because private speech often does interfere, as a practical matter, with the government's expression of its own message.<sup>370</sup> A government-funded doctor who encouraged his patients to have abortions, for example, would interfere with the anti-abortion viewpoint the government intended to communicate through the law challenged in *Rust*, which denied federal funding to doctors who provided such information to their patients.<sup>371</sup> To protect its message in such cases, the current rationale of government speech doctrine suggests that the government may limit private speakers.

But this is not a problem that is unique to the government, and one of the many mysteries of government speech doctrine is why it provides *only* the government with a remedy for this class of speech harms. Private speakers constantly face situations in which their efforts to speak are drowned out or "distorted" by others. But disagreement and even distortion do not give one private speaker the power to silence another, absent some other legal powers like an employer-employee relationship.<sup>372</sup> For example, if a private individual wanted to speak in Pioneer Park at the same time as representatives of the Summum, but the representatives' message was louder (or simply more appealing) than the individual's, the individual could not on that basis alone exclude the representatives from the park.<sup>373</sup> But that is precisely what Pleasant Grove City was able to do.<sup>374</sup> This is troubling, as there is no particular reason why the government, alone among speakers, should be able to protect its messages from distortion. And yet that is the exact—and apparently sole—rationale behind most government speech cases.<sup>375</sup>

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<sup>370</sup> See, e.g., *Christian Legal Soc'y*, 130 S. Ct. at 2995 (noting that the Christian organization's exclusion of non-Christians interfered with the government's anti-discrimination policy); *Rust*, 500 U.S. at 178–79 (indicating that a doctor's private speech regarding abortion counseling interfered with the government's anti-abortion message).

<sup>371</sup> See *Rust*, 500 U.S. at 178–79.

<sup>372</sup> See *Garcetti*, 547 U.S. at 421–22 (holding that when the government acts as an employer, it can limit private speech of employees); *supra* notes 281–284 and accompanying text.

<sup>373</sup> See *Clark*, 468 U.S. at 300 (Burger, C.J., concurring) ("Respondents' attempt at camping in the park . . . is conduct that interferes with the rights of others to use Lafayette Park . . . Lafayette Park and others like it are for all the people, and their rights are not to be trespassed even by those who have some 'statement' to make.").

<sup>374</sup> See *Summum*, 129 S. Ct. at 1138.

<sup>375</sup> See *supra* notes 73–76 and accompanying text. The fact that Pioneer Park was state owned is no answer, as nearly all public forums are state-owned. See *Summum*, 129 S. Ct. at 1126. The fact that the government, alone among "speakers," is democratically chosen and

If the government were not given unbounded power to protect its viewpoints by discriminating against others, would it thereby lose its ability to effectively communicate? Hardly. As described above, government speech is, if anything, too powerful, not too weak.<sup>376</sup> Even if it is not permitted to muzzle private speakers, the government still has a vast array of powerful tools and platforms by which to make itself heard.<sup>377</sup> But if those tools are not enough to protect the government's speech from distortion by competing speakers, then the appropriate remedies should be those available to private speakers facing the same problem. Indeed, First Amendment doctrine already implicitly recognizes the problems caused by incompatibility of private speech, and provides means for resolving it. The time, place, and manner test, for example, prevents private speakers from monopolizing speech forums to the detriment of other would-be speakers.<sup>378</sup> It protects expression, that is, without countenancing viewpoint-based discrimination. Intellectual property often permits the silencing of private speakers to prevent them from misusing or distorting another's message.<sup>379</sup> Defamation law, too, allows individuals to silence other private speakers whose message represents a harmful distortion of their own.<sup>380</sup>

But unlike government speech, none of these doctrines permit private individuals to silence other private speakers simply because they have expressed a contrary viewpoint. Of course, one might say that cases like *Summum* are somewhat different, in that there are competing *private* interests at stake, and the government must step in to accommodate them all. This seemed to be implicit in the majority's decision, which turned largely on the fact that the monuments in Pioneer Park were permanent, physical, and therefore incompatible with one another:

The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would

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therefore democratically accountable may go further towards addressing the problem. *See id.* But for all the reasons discussed in Part I.B.3, the democratic solution to viewpoint discrimination is not likely to be satisfactory. *See supra* notes 130–142 and accompanying text.

<sup>376</sup> *See supra* notes 66–142 and accompanying text.

<sup>377</sup> *See* YUDOF, *supra* note 24, at 6–10 (describing various ways in which the government can speak).

<sup>378</sup> *See Clark*, 468 U.S. at 293 (utilizing the time, place, and manner test).

<sup>379</sup> *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–60 (1985) (holding that the First Amendment does not shield speech that infringes another's copyright).

<sup>380</sup> *See R.A.V.*, 505 U.S. at 383–84 (noting that defamation “can, consistently with the First Amendment, be regulated . . .”).

have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.<sup>381</sup>

But even assuming these fears to be well founded, it is not the viewpoint neutrality principle that would “lead almost inexorably to the closing of the forum.”<sup>382</sup> Indeed, the majority’s rationale demonstrates, quite convincingly, not the proposition for which it was offered—that the government was expressing a message—but that the government had a compelling viewpoint-neutral reason to regulate the number of monuments. That is, if it allowed every monument in the park, then the forum would effectively dry up—the equivalent of a tragedy of the commons.<sup>383</sup> Thus there may be a perfectly good reason to cap the number of monuments. But if preventing a tragedy of the commons is the reason for rationing the forum, there is no reason why that cap should carry with it the right to exclude based on viewpoint. The space for monuments could just as easily be parceled out according to a lottery, a first-come, first-served basis, or in some other viewpoint-neutral manner. And if that is the case, then *Summum* is not about government speech at all. It is, if anything, a time, place, and manner case.<sup>384</sup>

Thus, it seems that neither the distortion-prevention nor scarcity-management rationales provide a sufficient justification for the government to engage in viewpoint-based regulation.<sup>385</sup> Both rationales identify real harms to the speech marketplace, but they can be addressed in a viewpoint-neutral way. Perhaps the solution can nevertheless be rehabilitated and restated in the following fashion: if the government has no other avenue (or at least no “adequate” avenue) for expressing its viewpoint—which, for all the reasons described in Part III.A, it must do<sup>386</sup>—then it may invoke government speech as a reason for limiting private speech.

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<sup>381</sup> *Summum*, 129 S. Ct. at 1138.

<sup>382</sup> *See id.*

<sup>383</sup> *See id.* at 1137; Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1242, 1244–45 (1968).

<sup>384</sup> It becomes a time, place, and manner case because the government is preventing clutter, rather than expressing a viewpoint. *See Clark*, 468 U.S. at 293 (permitting the government to regulate the time and manner of protests on the National Mall, not to express a viewpoint but to serve a government function).

<sup>385</sup> *See supra* notes 370–384 and accompanying text.

<sup>386</sup> *See supra* notes 315–326 and accompanying text.

This solution, too, has intuitive appeal, because it recognizes the government's interest in speaking but does not permit the government to invoke that interest in a limitless set of scenarios. That is, it balances the government's need to speak against the importance of the viewpoint neutrality requirement. This approach could also help make sense of those difficult cases in which the government seeks to avoid speech-by-attribution.<sup>387</sup> Even if the government does have a strong interest in avoiding improper attribution, it is at least theoretically possible that the government could vindicate that interest through the use of disclaimers or some other means.<sup>388</sup> In other words, it does not necessarily follow that the government should have a right to silence other speakers simply in order to avoid misattribution.

At the very least, then, the rule would help limit the government speech doctrine's potential to erode First Amendment protections by guaranteeing that the government only invokes it as something like a last resort. It might, for example, lead to different results in the Ku Klux Klan and government website examples discussed above.<sup>389</sup> In the former case, the government would not be able to exclude the statue of the hooded figure unless it could show that doing so would be the only way for the government to adequately communicate its position (or, conversely, the only way to adequately avoid communicating a position it did not support). Similarly, the school district would have to show that posting pro-voucher materials on its webpage would prevent the district from expressing its own opposition to the proposal.<sup>390</sup> Such an argument seems unlikely to succeed, as in either case the government could post—in the park or online—disclaimers expressing its position.

These results may be unsavory, or even unpalatable, even though—like permitting Nazis to march in Skokie—they are the natural results of

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<sup>387</sup> See *supra* notes 290–293 and accompanying text.

<sup>388</sup> See, e.g., Bezanson & Buss, *supra* note 17, at 1485; Jacobs, *supra* note 232, at 1398 (indicating that government disclaimer may avoid misattribution of religious speech to the government).

Where the expressive message is pervasive or widespread, disavowal may not be perfectly effective. Nevertheless, because the government's capacity for communicating its position is extensive, it is better to rely on the government's access to the marketplace of ideas than to permit the government to curtail the marketplace. Government's escape from unintended attribution, then, would be limited to disclaimer or disavowal only.

Bezanson & Buss, *supra* note 17, at 1485.

<sup>389</sup> See *supra* notes 350–353 and accompanying text.

<sup>390</sup> See *Page*, 531 F.3d at 284–85.

the viewpoint neutrality principle.<sup>391</sup> It may be possible to avoid them, however, without abandoning this second formulation of the government speech test, which would allow the government to limit private speech when it has no adequate alternatives of expression.<sup>392</sup> As noted above, the Court has made it clear that “adequate” alternatives need not be identical, and in fact may be far inferior.<sup>393</sup> If adequacy were to be given an expansive definition, then it would lead to far *less* protection for government speech. That is, a private speaker could overcome the government speech defense simply by showing that the government had some reasonably comparable alternative avenue available for communication. Of course, this means exploiting the elasticity of the test. But by putting the thrust of the analysis on whether the government is able to convey its message—either in precisely the way it intended or in some adequate alternative method—it limits the reach of government speech doctrine to those cases in which the government truly needs it.

### 3. The Government Must Create Equal Alternatives for Private Speakers When It Invokes Government Speech

As noted above, one of the shortcomings of the adequate alternatives approach is that it has very little bite—courts may find any number of alternatives “adequate” even if they are plainly inferior.<sup>394</sup> To fully protect private speakers and the viewpoint neutrality principle, perhaps the rules should place even more limitations on government speech, permitting it only where it leaves “as much and as good” alternatives for private speakers.<sup>395</sup> The First Amendment would thus permit the government to limit private speech on the basis of viewpoint so long as in doing so it leaves or provides alternatives that are just as plentiful and just as good.

Such bargains, which blend the line between rule and remedy, are not unheard of in constitutional law. The kind of “equal treatment”

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<sup>391</sup> See generally *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977).

<sup>392</sup> See *supra* notes 367–368 and accompanying text.

<sup>393</sup> See *Playtime Theatres*, 475 U.S. at 53–54 (holding that “reasonable alternative avenues of communication” existed for the adult theatre even though none were “commercially viable”); *Cornelius*, 473 U.S. at 809 (“The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker’s message.”).

<sup>394</sup> See *supra* notes 362–367 and accompanying text.

<sup>395</sup> The appropriation of the Lockean Proviso is intentional. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 15 (J.W. Gough ed. 1966) (1690) (“[N]o man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.”).

envisioned by this test is of a piece with the equality guarantees of the Fourteenth Amendment—a kinship that courts and scholars have long recognized.<sup>396</sup> Perhaps even more interestingly, requiring the government to “compensate” private speakers whose viewpoints are displaced by government speech would introduce into government speech doctrine the kind of constitutionally required trade-offs that are the foundation of takings jurisprudence. The Fifth Amendment, of course, states that private property can only be taken for “public purpose,” and that the government must pay “just compensation” for it.<sup>397</sup> And although the text of the First Amendment does not contain such a command,<sup>398</sup> the logic of requiring the government to “pay” for occupying presumptively private space in the marketplace of ideas does have a certain amount of logic to it.

Supporters of government speech might respond that this standard is the functional equivalent of a ban on viewpoint discrimination because it will be impossible to satisfy. Speech regulations, after all, inevitably lessen the avenues available to a private speaker. Presumably the Summum selected Pioneer Park as the site of their monument precisely because they thought it served their purposes better than any other place. It would seem to follow that relegating the monument elsewhere would, almost by definition, be depriving the Summum of their top choice and thereby leaving them with not quite “as much or as good.”<sup>399</sup> Thus there is simply no way to ever satisfy the “as much and as good” requirement, and we might as well retain our commitment to viewpoint neutrality.

There is some force to the objection that the “as much and as good” limitation is impossible to achieve. Consider another intriguing implication of this approach: if the government wants to abandon its commitment to viewpoint neutrality, which is implicit in this approach,

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<sup>396</sup> See *Mosley*, 408 U.S. at 96 (“[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”). See generally Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (promoting the equality principle as the preferred ground for First Amendment analysis).

<sup>397</sup> U.S. CONST. amend. V; see *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (holding that a government taking requires just compensation); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 (1992) (same).

<sup>398</sup> See U.S. CONST. amend. I. As is usually the case for First Amendment problems, textualism does not yield conclusive information—the words of the Amendment may not suggest a just compensation requirement, but neither do they suggest any protection for government speech.

<sup>399</sup> See *Summum*, 129 S. Ct. at 1130; LOCKE, *supra* note 395, at 15.

then in return it may have to affirmatively accommodate the speakers it disadvantages. For example, if Pleasant Grove truly seeks to protect its own message by excluding the Summum monument from Pioneer Park, then the city may have to take affirmative steps to provide a location for the monument that is equally desirable. This could mean constructing a pedestal elsewhere, or giving it some other advantageous location that would not interfere with the government's communication of its own message (which, after all, is supposedly the reason why the monument must be excluded from Pioneer Park).<sup>400</sup>

The "as much and as good" approach, it should be emphasized, is *not* one of viewpoint "neutrality." The Summum, in this hypothetical, are being treated differently because of their viewpoint—they are being excluded from one park, even though they are being provided with another. And yet the government gets to keep what it wants (or at least what government speech doctrine says it wants); a pure, unadulterated message of its own. This may not always be an attractive deal for the government, but legal privileges often involve taking the "bitter with the sweet."<sup>401</sup> If the government wants to discriminate on the basis of viewpoint, it may have to affirmatively accommodate the private rights holders it displaces.

In practice, however, such forced subsidies are unlikely to be very appealing, precisely because they seemingly require the government to support a private viewpoint despite the fact (indeed, because of the fact) that it disagrees with it.<sup>402</sup> In the Ku Klux Klan hypothetical, for example, the government would be permitted to refuse the hooded statue but would thereby have to provide—at taxpayer expense—an adequate alternative venue.<sup>403</sup> Even toying with the concept of "adequacy" (i.e., making it easier for the government to satisfy the test without constructing a new park) is unlikely to prove satisfactory. In other situations, however, the government may be able to affirmatively but easily provide alternatives without appearing quite so involved in reprehensible speech. In the website hypothetical, for example, the government might be able to provide adequate alternatives simply by ena-

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<sup>400</sup> See *Summum*, 129 S. Ct. at 1130.

<sup>401</sup> See *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J., concurring) (observing the difficulty of ensuring and defining a substantive right).

<sup>402</sup> In the *Rust* scenario, for example, the government would have to provide "as much and as good" subsidy for doctors seeking to give advice about abortion. See *supra* note 371 and accompanying text.

<sup>403</sup> See *supra* note 350 and accompanying text.



bling comments on the district's website, or by setting up a separate website at virtually no public cost.<sup>404</sup>

### CONCLUSION

First Amendment doctrine cannot long stand as a house divided. The viewpoint neutrality principle indicates that government cannot restrict speech (nor, as Part I.C demonstrates, favor it)<sup>405</sup> because of the viewpoint it expresses. But this is precisely what government speech doctrine allows and, in fact, requires. As currently stated, that doctrine gives the government a nearly unlimited power not only to flood the market with its own viewpoints, but to limit private speakers on the basis of theirs. The first steps towards rescuing viewpoint neutrality from the rest of the First Amendment lie in recognizing that a strict neutrality requirement is simply incompatible with government speech, and in constructing doctrinally workable rules to limit the reach of the latter.

The solutions proposed here are all premised on doing away with—or, rather, admitting that we have already done away with—an unqualified commitment to viewpoint neutrality, which has long been thought to be the core of the First Amendment. Giving even an inch on this principle may seem like giving up the heart of the First Amendment in order to save its limbs. But the very justification for government speech doctrine—the government's desire to silence a particular private speaker *because of* the message she expresses—is exactly what the First Amendment has long been thought to forbid. The solutions suggested here seek to accommodate these principles without papering over their differences.

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<sup>404</sup> See *supra* notes 352–353 and accompanying text.

<sup>405</sup> See *supra* notes 143–194 and accompanying text.

