

monuments that constituted private expression, municipalities would remain free to refuse all privately proffered displays as a valid restriction on the manner of expression in the forum.<sup>77</sup> Cities could then have as many or as few monuments as they pleased, on any subject — so long as the monuments originated in the first instance with the cities themselves — without running afoul of the Free Speech Clause. Only if some of those monuments constituted private expression would public forum doctrine trigger strict scrutiny of the refusal of other displays. In this case, because the Ten Commandments monument did not originate with the government, it would be considered private speech, and the refusal of the Seven Aphorisms display would thus be subject to strict scrutiny, which it properly failed at the circuit level.<sup>78</sup>

Government speech doctrine's basic rationale — that government needs to be able to speak for itself to govern effectively — is a commonsense principle that has a clear place in First Amendment jurisprudence. However, the doctrine's gradual expansion and lack of a clear test have endangered the principle of viewpoint neutrality, as the courts have applied the doctrine in a greater variety of situations involving speech that is neither purely private nor purely government expression. A bright-line rule requiring all government speech to originate in the first instance with the government would, in combination with a properly applied public forum analysis, vindicate this bedrock principle without impairing the government's necessary ability to favor and express certain points of view.

2. *Government Subsidies of Political Speech.* — In the modern bureaucratic state, the government wears many different hats — employer, protector, patron, and regulator, just to name a few. The Supreme Court has made it clear that the hat the government is wearing is a critical part of assessing the validity of state restrictions on speech.<sup>1</sup> A court might strike down a speech restriction as unconstitutional when the government acts purely as a regulator, but approve the same restriction as an attempt at managerial efficiency when the government acts as an employer.<sup>2</sup> Last Term, in *Ysursa v. Pocatello Education Ass'n*,<sup>3</sup> the Supreme Court held that an Idaho statute prohibiting local government employees from deducting money from their paychecks for union political activities did not violate the First

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<sup>77</sup> Valid, content-neutral manner restrictions in public parks have included a regulation requiring permits for gatherings of more than fifty, *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002), and a regulation requiring a permit for the sale of printed materials, *United States v. Kistner*, 68 F.3d 218, 222 (8th Cir. 1995).

<sup>78</sup> *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1053–55 (10th Cir. 2007).

<sup>1</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>2</sup> See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>3</sup> 129 S. Ct. 1093 (2009).

Amendment.<sup>4</sup> *Ysursa* continues a trend in the Court's free speech jurisprudence in which the Court has focused not on the content of the regulated speech, but rather on whether the government, when restricting speech, was acting as regulator or as speaker, patron, or employer. The *Ysursa* opinion is another signal that the First Amendment's protection of speech may be increasingly at risk as the government's role in daily life expands. As the boundaries between government-as-speaker and government-as-regulator erode, the Court may need to reject categorical analysis in favor of a balancing test, as advocated by Justice Breyer,<sup>5</sup> in order to ensure that historically protected speech remains safe.

In 2003, Idaho enacted the Voluntary Contributions Act<sup>6</sup> (VCA), which, in part, prohibits payroll deductions earmarked for a union's "political activities."<sup>7</sup> The statute defines "political activities" as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure."<sup>8</sup> As originally enacted, the prohibition applied to state, private, and local government employees.<sup>9</sup> Unions representing both private and public employees filed suit against state officials seeking to prevent enforcement of the Act.<sup>10</sup>

The district court partially invalidated the statute.<sup>11</sup> The court quickly dismissed the State's arguments that the prohibition merely represented a decision by the government not to subsidize certain speech. The court noted, first, that the unions had offered to pay for the administrative costs of the deductions, and second, that for private and local employers, the State was not incurring any costs by permitting the deductions to go forward.<sup>12</sup> Next, the court classified the VCA as a content-based restriction because "its criminal sanctions apply only to payroll deductions for political speech."<sup>13</sup> This classification triggered strict scrutiny, thereby requiring the State to provide a

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<sup>4</sup> See *id.* at 1101.

<sup>5</sup> See *id.* at 1103 (Breyer, J., concurring in part and dissenting in part).

<sup>6</sup> IDAHO CODE ANN. § 44-2004(2) (2003 & Supp. 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 44-2602(1)(e) (2003). Any violation of the VCA is punishable by a fine of up to one thousand dollars or imprisonment of up to ninety days. *Id.* § 44-2007.

<sup>9</sup> See *Ysursa*, 129 S. Ct. at 1096.

<sup>10</sup> The plaintiffs seeking to enjoin enforcement of the VCA included local school employees and firefighters, as well as local chapters of the Service Employees International Union and AFL-CIO. See *Pocatello Educ. Ass'n v. Heideman*, No. CV-03-0256-E-BLW, 2005 WL 3241745, at \*1 (D. Idaho Nov. 23, 2005).

<sup>11</sup> See *id.* at \*6.

<sup>12</sup> See *id.* at \*2.

<sup>13</sup> *Id.* at \*3.

compelling interest for the regulation.<sup>14</sup> Idaho argued that a more lenient standard of review should apply by comparing the VCA to a statute upheld by the Supreme Court restricting individuals' political contributions in order to curb corruption; however, the court was not persuaded.<sup>15</sup> Instead, the court agreed with the plaintiff labor organizations that, in contrast to the minimal burden put on the State by permitting the payroll deduction program to continue, the VCA "eliminate[d] the best method for unions to fund political speech" and that any alternative avenues for the speech would be "considerably less effective."<sup>16</sup> Based on this analysis, the court found that the State could ban payroll deduction programs only if it paid for any part of the deductions; thus, the VCA's application to the "employees of local governments . . . and private employers violate[d] the First Amendment."<sup>17</sup>

The defendants appealed the district court's decision, arguing only that the VCA was constitutional as applied to local government employees.<sup>18</sup> The Ninth Circuit affirmed the district court's ruling.<sup>19</sup> Writing for a unanimous panel, Judge Tashima agreed with the district court that the VCA was a content-based restriction on speech for which the State could offer "no compelling justification."<sup>20</sup> Like the district court, the Ninth Circuit first quickly rejected the State's argument that the VCA was exempt from strict scrutiny as a mere denial of a government subsidy, agreeing with the lower court that the subsidy analysis was relevant only to the application of the VCA to state employees.<sup>21</sup> The court then discarded Idaho's contention, neither tested in the lower court nor addressed later by the Supreme Court, that the payroll deduction program was a nonpublic forum in which the government could "exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum."<sup>22</sup> Ultimately, the court

<sup>14</sup> *Id.* at \*5.

<sup>15</sup> *See id.* at \*4. In denying Idaho's request, the court went on to distinguish the VCA from the legislation upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), noting both that the Idaho statute would "reduce the total amount of money potentially available to promote political expression," *Heideman*, 2005 WL 3241745, at \*4 (quoting *Buckley*, 424 U.S. at 22) (internal quotation marks omitted), and that, unlike the statute in *Buckley*, "no such clear link" existed between banning all political contributions and curbing undesirable political corruption or coercion. *Id.*

<sup>16</sup> *Heideman*, 2005 WL 3241745, at \*4.

<sup>17</sup> *Id.* at \*6.

<sup>18</sup> Neither party appealed the district court's finding on the VCA's application to state or private employees. *See Ysursa*, 129 S. Ct. at 1097.

<sup>19</sup> *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1068 (9th Cir. 2007).

<sup>20</sup> *Id.* at 1056.

<sup>21</sup> *See id.* at 1059.

<sup>22</sup> *Id.* at 1060 (quoting *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007)) (internal quotation mark omitted).

held that the State’s “relatively weak interest” in proscribing the core First Amendment activity at issue here would suffice neither as a way to transform the deduction program into a nonpublic forum nor as a compelling justification to satisfy strict scrutiny.<sup>23</sup>

The Supreme Court reversed.<sup>24</sup> Writing for the majority,<sup>25</sup> Chief Justice Roberts made clear from the beginning that, in stark contrast to the analysis offered by both of the lower courts, this was a relatively straightforward case of the government refraining from subsidizing certain speech.<sup>26</sup> Though the Court admitted that the government was forbidden from abridging the ability of groups to engage in political discourse, it held that the State was “not required to assist others in funding the expression of particular ideas, including political ones.”<sup>27</sup> Indeed, the Court viewed the ban on payroll deductions not as any “abridgment of the unions’ speech” at all; rather, the unions “simply are barred from enlisting the State in support of [their] endeavor.”<sup>28</sup>

Having classified the VCA as a refusal to subsidize rather than as an infringement on First Amendment–protected speech, the Court erased the distinction the lower courts had drawn between the VCA’s application to state employees and its encroachment upon local government workers. Implicitly rejecting the lower courts’ suggestion that Idaho was incurring no cost by permitting local governments to continue their own payroll deduction programs, Chief Justice Roberts held that the VCA served “Idaho’s interest in separating the operation of government from partisan politics,” and that this “interest extend[ed] to all public employers at whatever level of government.”<sup>29</sup> Local governments are not merely “subject to the government’s legal authority to regulate [their] conduct” like private corporations but rather are “subordinate unit[s] of government created by the State to carry out delegated governmental functions.”<sup>30</sup> Because local government entities rely on the State for their existence, they do not enjoy full constitutional protections against their creator, the State.<sup>31</sup> The Court concluded that because of this dependence, “it [was] immaterial how the

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<sup>23</sup> *Id.* at 1068.

<sup>24</sup> *See Ysursa*, 129 S. Ct. at 1101.

<sup>25</sup> Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg joined the majority for Parts I and III and concurred in the Court’s judgment.

<sup>26</sup> *See Ysursa*, 129 S. Ct. at 1096.

<sup>27</sup> *Id.* at 1098.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1100.

<sup>30</sup> *Id.* at 1101.

<sup>31</sup> *See id.* (citing *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 185 (1923)).

State allocate[d] funding or management responsibilities between the different levels of government.”<sup>32</sup>

The majority argued that when the State refused to permit local government employees to deduct funds for political activities, Idaho was acting as patron (or, as “anti-patron”) — not as regulator. With the VCA, Idaho was just refusing to “affirmatively assist political speech,”<sup>33</sup> and thus, the State only had to demonstrate a rational basis for the prohibition.<sup>34</sup> Chief Justice Roberts found such a foundation in the “State’s interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics”<sup>35</sup> by more clearly “distinguishing between internal governmental operations and private speech.”<sup>36</sup>

Justices Ginsburg and Breyer both filed opinions suggesting doubts about the majority’s analysis. Justice Ginsburg filed a short opinion concurring in part and concurring in the judgment, agreeing that state and local employees were to be treated similarly but not joining the Court’s speech-as-subsidy analysis.<sup>37</sup> Justice Breyer wrote an opinion concurring in part and dissenting in part.<sup>38</sup> He agreed with the majority’s discussion of the relationship between state and local governments but dissented from the Court’s analysis of the First Amendment question and thus from its ultimate decision.<sup>39</sup> For him, the categorical analysis on which the majority relied was “more metaphysical than practical”; he noted that the difference between labeling the VCA as either a “*promotion*” or an “*abridgment*” of speech was a mere semantic matter of “characterization.”<sup>40</sup> Justice Breyer suggested that a balancing test would be more useful since it would invite the Court to determine “whether the statute impose[d] a burden upon speech that [was] disproportionate in light of the other interests the government [sought] to achieve.”<sup>41</sup> Applying his test to the facts of the case, Justice Breyer concluded that the VCA would be constitutional if it “applied even handedly among similar politically related contributions.”<sup>42</sup> However, “certain features of the provision” indicated to Justice Breyer that the VCA “may affect some politically-related deductions, namely labor-

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 1098.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1099.

<sup>37</sup> *See id.* at 1101–02 (Ginsburg, J., concurring in part and concurring in the judgment).

<sup>38</sup> *Id.* at 1102 (Breyer, J., concurring in part and dissenting in part).

<sup>39</sup> *See id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1103.

<sup>42</sup> *Id.* at 1104.

related deductions, but not others.”<sup>43</sup> Looking beyond the language of the challenged provision, Justice Breyer noted that the VCA was in large part a statute regulating only *union* activities.<sup>44</sup> As such, he found it “unlikely” that the statute would promote “political neutrality” and indeed warned that “the provision could well bring about speech-related harm that is disproportionate to the statute’s tendency to further the government’s ‘neutrality’ objective.”<sup>45</sup>

Justice Stevens dissented.<sup>46</sup> Like Justice Breyer, Justice Stevens looked beyond the facially neutral language of the VCA payroll deduction provision and directly suggested the Act was “intended to make it more difficult for unions to finance political speech.”<sup>47</sup> Justice Stevens noted that, when put into its “statutory context,”<sup>48</sup> the VCA appeared to be more discriminatory toward a particular viewpoint than the language of the particular challenged provision may have at first indicated.<sup>49</sup> For example, the statute did not prohibit deductions for “charitable activities,” which would “often present a similar risk of creating an appearance of political involvement as deductions for . . . political activities.”<sup>50</sup>

Justice Souter wrote a separate dissent.<sup>51</sup> Like Justices Breyer and Stevens, Justice Souter noted that it would be reasonable to “suspect that Idaho’s legislative object was not efficient, clean government, but that unions’ political viewpoints were its target.”<sup>52</sup> Indeed, Justice Souter implicitly chastised the plaintiffs for focusing on the difference between the VCA’s application to state and local employees, rather than challenging the statute as an unconstitutional “effort at viewpoint discrimination.”<sup>53</sup> Because he felt that the case was a “good description of a case that should not [have reached the Supreme] Court as a vehicle to refine First Amendment doctrine,” Justice Souter concluded by saying that he would have dismissed the writ of certiorari as improvidently granted.<sup>54</sup>

The majority opinion in *Ysursa* stands as yet another departure from the approach the twentieth-century Court traditionally took in First Amendment cases: focus on and classify the speech at issue, de-

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

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (Stevens, J., dissenting).

<sup>47</sup> *Id.* at 1105.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at 1105–06.

<sup>50</sup> *Id.* at 1106.

<sup>51</sup> *Id.* at 1108 (Souter, J., dissenting).

<sup>52</sup> *Id.* at 1109.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

termine whether it is worthy of First Amendment protection, and then decide whether the government interest is sufficient to outweigh any restriction of it. Today, the Court decides many of its First Amendment cases by categorizing the government's relationship to the restricted speech, using this doctrinal trick to avoid weighing the speech's value to society, the regulation's burden on the speech, or even the magnitude of the burden (if any) on government. As suggested by Justice Breyer, eschewing First Amendment categorical analysis altogether and embracing a balancing test might be the best way for the Court to ensure that the government's expansion does not threaten First Amendment protections, especially when the government touches more and more of daily life.

Traditionally, the Supreme Court has decided First Amendment cases by classifying the speech at issue as inside or outside the protection of the First Amendment's absolutist language. This content-focused categorical analysis was explicitly embraced by the Court in *Chaplinsky v. New Hampshire*.<sup>55</sup> There, the Court observed that "[t]here are certain well-defined and narrowly limited classes of speech"<sup>56</sup> — such as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"<sup>57</sup> — for which "prevention and punishment . . . have never been thought to raise any Constitutional problem."<sup>58</sup> Thus, depending on the speech's classification, the Court gave "lesser protection to certain content based on its supposed lack of value."<sup>59</sup> The "categorical approach amount[ed] to a kind of prepackaged strict scrutiny, whereby the Court designate[d] some governmental interests as compelling" and thus determined that the speech at issue would not be within the First Amendment's protections.<sup>60</sup>

Toward the end of the twentieth century, however, the Court's First Amendment jurisprudence began to focus less on categorizing the content of the speech at issue and more on categorizing the government's relationship to that speech. One of the earliest and most notable such opinions is the 1991 case *Rust v. Sullivan*.<sup>61</sup> There, the Court upheld a provision of the Public Health Service Act<sup>62</sup> that subsidized family planning clinics, even though the Act stated that no funds would be

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<sup>55</sup> 315 U.S. 568 (1942); *see id.* at 573 (upholding a state statute that banned the use of language "plainly tending to excite the addressee to a breach of the peace").

<sup>56</sup> *Id.* at 571.

<sup>57</sup> *Id.* at 572.

<sup>58</sup> *Id.* at 571–72.

<sup>59</sup> Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 928 (2009).

<sup>60</sup> *Id.* at 919–20.

<sup>61</sup> 500 U.S. 173 (1991).

<sup>62</sup> 42 U.S.C. §§ 201–300jj-38 (2006).

“used in programs where abortion is a method of family planning.”<sup>63</sup> The Court held that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”<sup>64</sup> Thus, because the Court saw the government acting in the role of patron, it allowed the government to restrict the free speech rights of the clinics to talk about abortion.

The Supreme Court continued this government-centric categorical analysis in its 2006 decision in *Garcetti v. Ceballos*.<sup>65</sup> There, a prosecutor’s memorandum undercut an office investigation, the prosecutor’s boss retaliated in response, and the prosecutor filed suit.<sup>66</sup> Even though the attorney alleged that his memo was protected First Amendment speech,<sup>67</sup> the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>68</sup> Thus, the Court again relied on the government’s position as an employer rather than focusing on whether the speech harmed the government or was valuable to society. The Court decided that the government’s role as employer justified less exacting scrutiny, just as the government’s role as subsidizer had done in *Rust*.

The day after *Ysursa* was decided, the Court continued this trend in its opinion in *Pleasant Grove City v. Summum*.<sup>69</sup> In *Summum*, a Utah municipality denied a religious organization a permit to erect a monument in a public park, even though it had permitted the construction of other such structures, notably a monument displaying the Ten Commandments.<sup>70</sup> The organization challenged the constitutionality of the denial, but the Court held that the First Amendment had not been violated.<sup>71</sup> The Court admitted that the park in which the other monuments were placed was a traditional public forum, in which viewpoint discrimination would be prohibited.<sup>72</sup> However, because “[p]ermanent monuments,” unlike temporary public speakers, “typically represent government speech,”<sup>73</sup> the Court held that the installation of monuments was just an innocuous instance of a “govern-

<sup>63</sup> *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6) (internal quotation marks omitted).

<sup>64</sup> *Id.* at 194.

<sup>65</sup> 547 U.S. 410 (2006).

<sup>66</sup> *See id.* at 414–15.

<sup>67</sup> *See id.* at 415.

<sup>68</sup> *Id.* at 421.

<sup>69</sup> 129 S. Ct. 1125 (2009).

<sup>70</sup> *See id.* at 1129–30.

<sup>71</sup> *See id.* at 1134.

<sup>72</sup> *See id.* at 1132.

<sup>73</sup> *Id.*



ment entity [exercising] the right to ‘speak for itself’<sup>74</sup> and “to select the views that it wants to express.”<sup>75</sup> The Court reached this conclusion despite the fact that the monuments were not created by the government, but rather were donated by private individuals or groups.<sup>76</sup> In *Summum*, the Court focused on classifying the relationship of the government to the monument and ultimately relied on the government’s role as speaker to avoid confronting allegations of viewpoint discrimination.

*Ysursa* fits comfortably into this trend. In *Ysursa*, the Court avoided weighing the value of the speech at issue by labeling the deduction program a state subsidy. The Court sidestepped traditional First Amendment categorical analysis and instead focused on categorizing the government’s relationship to the speech at issue. Implicitly invoking *Rust*, the Court held that the VCA was not a restriction on speech, but an example of the State limiting the reach of a subsidized program and merely choosing not to speak.<sup>77</sup> Idaho was not restricting the speech of others but merely remaining silent itself. Like the statute in *Rust*, the deduction program was now within one of the government’s “managerial domains,” in which “[t]he state must be able to regulate speech . . . so as to achieve explicit governmental objectives,”<sup>78</sup> such as administrative efficiency, transparency, or what the *Rust* Court termed the “integrity of [a] federally funded program.”<sup>79</sup> These domains include occasions in which the government acts as educator,<sup>80</sup> as patron,<sup>81</sup> or as employer.<sup>82</sup> “What is at stake” when the Court assigns speech to a domain other than that of the government-as-regulator, as the *Ysursa* Court did, “is whether . . . speech [is consigned to] a social space where ‘the attainment of institutional ends is taken as an unquestioned priority.’”<sup>83</sup> The government function trumps the value of the speech at issue, and the private citizens’ First Amendment rights take a back seat to the government’s own.<sup>84</sup>

<sup>74</sup> *Id.* at 1131 (quoting *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000)).

<sup>75</sup> *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment)).

<sup>76</sup> *See id.* at 1136.

<sup>77</sup> *See Ysursa*, 129 S. Ct. at 1098–99.

<sup>78</sup> Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

<sup>79</sup> *Rust*, 500 U.S. at 198.

<sup>80</sup> *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>81</sup> *See, e.g., Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

<sup>82</sup> *See, e.g., Connick v. Myers*, 461 U.S. 138, 143 (1983) (“[G]overnment offices could not function if every employment decision became a constitutional matter.”).

<sup>83</sup> Post, *supra* note 78, at 171 (quoting Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1789 (1987)).

<sup>84</sup> On the government’s own First Amendment rights, see generally Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

Although *Ysursa* exemplifies the government-centric categorical analysis, it is not just a typical case. In fact, the opinion could be the canary in the First Amendment coal mine for two reasons. First, *Ysursa* involved a restriction on political speech, the category of speech that, as the district court in *Ysursa* itself noted, lies “at the ‘core of our electoral process’ where First Amendment protections are ‘at their zenith.’”<sup>85</sup> Neither *Rust* nor *Garcetti* nor *Summum* involved the government regulating political speech, arguably the speech for which the First Amendment was written and for which its protections should be strongest.<sup>86</sup> Second, unlike the substantial subsidy at issue in *Rust*, the State in *Ysursa* did not demonstrate that it would incur much, if any, cost from allowing the restricted speech. Indeed, the district court noted that the “record [was] devoid of any evidence of the cost of providing [the] deductions.”<sup>87</sup> Although the Court was correct that any costs the local governments incurred were attributable to the State,<sup>88</sup> the district court pointed out that the criminal penalties of the VCA applied even if the “entit[ies] benefitting” from the program, and not the State, had paid for the entire cost of the program.<sup>89</sup>

*Ysursa* suggests that, as government expands its reach, the Court’s government-centric categorical analysis threatens to swallow up core First Amendment speech. To prevent this outcome, the Court’s First Amendment doctrine must recognize that the speech at stake, and the government’s interest in it, are just as important as the government’s role. Dean Robert Post has insisted that the government’s different roles “must be assessed to determine whether particular speakers in particular circumstances ought constitutionally to be regarded as independent participants in the processes of democratic self-governance, and hence whether their speech ought to receive the First Amendment protections extended to public discourse.”<sup>90</sup> The need for this type of individual inquiry indicates that Justice Breyer was correct in *Ysursa* when he suggested that the banner of government speech should not preempt the use of a balancing test questioning “whether the statute imposes a burden upon speech that is disproportionate in light of the

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<sup>85</sup> *Pocatello Educ. Ass’n v. Heideman*, No. CV-03-0256-E-BLW, 2005 WL 3241745, at \*4 (D. Idaho Nov. 23, 2005) (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)).

<sup>86</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), the Court held that Congress could refuse to subsidize lobbying efforts of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. *Id.* at 550–51. While lobbying is close to the core political speech involved in *Ysursa*, the Court has for many decades recognized that lobbying does not enjoy the most robust protection the First Amendment offers. See *United States v. Harriss*, 347 U.S. 612 (1954).

<sup>87</sup> *Heideman*, 2005 WL 3241745, at \*5.

<sup>88</sup> See *Ysursa*, 129 S. Ct. at 1101.

<sup>89</sup> *Heideman*, 2005 WL 3241745, at \*2.

<sup>90</sup> Post, *supra* note 78, at 162.

other interests.”<sup>91</sup> In *Ysursa*, this approach would likely have required the Court to strike down the VCA because the value of political speech, which lies at the core of the First Amendment, would have certainly outweighed both the State’s slight interest in restricting the speech and the deduction program’s minimal cost to Idaho.

Many scholars have recognized that the government requires some flexibility to speak without constitutional restraints.<sup>92</sup> However, policing the barriers of the government speech doctrine is even more important in the modern age where government regulation — and government dollars — touch more and more of daily life. As Professor Mark Yudof recognized three decades ago, “[t]he greatest threat to the system of freedom of expression emanates from the welfare state, not from a multitude of corporate, mass media, union, and other voices.”<sup>93</sup> Because “under contemporary conditions[] instrumental organizations of government presently infiltrate almost all aspects of social life,” the Court will encounter increasing difficulty successfully “draw[ing] a sharp distinction between the [speech of the] state and [that of] its citizens.”<sup>94</sup> The Court’s growing reliance on government-centric categorical analysis is flawed because it refuses to recognize the messy reality of the modern world: the line between private and government speech is growing thinner and thinner. The Court can come to terms with this truth by eschewing categorical analysis altogether and adopting Justice Breyer’s balancing test. In so doing, the Court can prevent the First Amendment’s protections from shrinking as the government grows ever larger.

## II. FEDERAL JURISDICTION AND PROCEDURE

### A. Civil Procedure

*Pleading Standards.* — For fifty years, the standard for a motion to dismiss was governed by *Conley v. Gibson*,<sup>1</sup> which held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in sup-

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<sup>91</sup> *Ysursa*, 129 S. Ct. at 1103 (Breyer, J., concurring in part and dissenting in part). Justice Breyer has suggested a similar approach in other government speech contexts. See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring) (arguing that the Court should ask whether “government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective”).

<sup>92</sup> See, e.g., David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992) (“The citizenry has an interest in knowing the government’s point of view, and the government has an interest in using speech to advance the programs and policies it enacts.”).

<sup>93</sup> Yudof, *supra* note 84, at 873.

<sup>94</sup> Post, *supra* note 78, at 178 (noting also how “institutional boundaries are open and porous”).

<sup>1</sup> 355 U.S. 41 (1957).