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## NOTE

### THREE'S A CROWD — DEFENDING THE BINARY APPROACH TO GOVERNMENT SPEECH

#### INTRODUCTION

With its 2009 decision in *Pleasant Grove City v. Summum*,<sup>1</sup> the Supreme Court held that a Ten Commandments monument placed by a city in a public park was government speech, even though the monument had been designed and submitted by a private group.<sup>2</sup> The decision marked another step in the Court's increasingly confident use of the government speech doctrine, which seems poised to supplant forum analysis in many situations in which both private individuals and the public could be seen to be speaking. A judicial determination that an expressive act is government speech rather than private speech has dramatic consequences for the act's treatment, allowing the state to favor viewpoints in ways otherwise prohibited by the First Amendment. This strict dichotomy has led an increasing number of judges and commentators to suggest that the current framework is insufficient. Instead, they argue that some speech should be treated as a "mixture" or "hybrid" of private and governmental elements.<sup>3</sup> This view is intuitively appealing, seeming to treat difficult questions with suitable nuance. But this Note argues that the hybrid speech approach is both doctrinally and practically unsound, as is the more established "four-factor" approach for analyzing whether speech is governmental or private.<sup>4</sup> Both approaches misleadingly merge what are essentially separate private and governmental expressive acts, allowing private individuals to appropriate the appearance of government approval. Moreover, adding a new category of hybrid speech would derail a doctrine that shows increasing promise. The Supreme Court's recent government speech cases, which focus on whether the state has carefully controlled a method of communication, create manageable and intuitive criteria for distinguishing government speech from that which is entitled to First Amendment protection.

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<sup>1</sup> 129 S. Ct. 1125 (2009).

<sup>2</sup> *Id.* at 1134.

<sup>3</sup> *See, e.g.*, *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 622 (2008); *The Supreme Court, 2008 Term — Leading Cases*, 123 HARV. L. REV. 153, 238 (2009) [hereinafter *2008 Leading Cases*].

<sup>4</sup> *See, e.g.*, *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008).

Part I will summarize the creation and growth of the government speech doctrine. Part II will explore the growing discontent with the government speech doctrine's binary approach to speech and the suggestions for a hybrid speech category. Part III will explain the weaknesses of the hybrid speech approach, on both conceptual and practical levels. Part IV will explain the benefits of retaining a binary approach with a singular focus on the amount of supervision exercised by the government. Part V will address reservations about a vigorous government speech doctrine.

### I. THE DEVELOPMENT OF THE GOVERNMENT SPEECH DOCTRINE

The Supreme Court traces the origin of the government speech doctrine back to 1991,<sup>5</sup> when the Court in *Rust v. Sullivan*<sup>6</sup> scrutinized a regulation promulgated by the Secretary of Health and Human Services interpreting a statute that forbade the use of certain federal funds in "programs where abortion is a method of family planning."<sup>7</sup> The Secretary interpreted the provision broadly, forbidding grantees from referring a pregnant woman to an abortion provider, even upon specific request,<sup>8</sup> and insisting that grantee projects be "physically and financially separate" from any programs that counsel abortion as a method of family planning.<sup>9</sup> The Court rejected a First Amendment challenge to the regulation, reasoning that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."<sup>10</sup> The majority acknowledged that subsidies had been held unconstitutional when they impinged on areas traditionally open to the public for expressive activity.<sup>11</sup> However, it found those cases inapplicable, since the challenged regulations did not require doctors to represent as their own any opinion they did not hold, but allowed them to "make clear that advice regarding abortion is simply beyond the scope of the program."<sup>12</sup>

The *Rust* decision never used the term "government speech," but later Court decisions interpreted the case as holding that the government may discriminate based on content when it enlists private entities

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<sup>5</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

<sup>6</sup> 500 U.S. 173 (1991).

<sup>7</sup> *Id.* at 178 (quoting 42 U.S.C. § 300a-6 (2006)) (internal quotation mark omitted).

<sup>8</sup> *Id.* at 180.

<sup>9</sup> *Id.* (quoting 42 C.F.R. § 59.9 (1989)) (internal quotation marks omitted).

<sup>10</sup> *Id.* at 193.

<sup>11</sup> *Id.* at 200.

<sup>12</sup> *Id.*

to convey state messages.<sup>13</sup> Supreme Court cases decided in the decade after *Rust* tended not to apply its holding. In *Board of Regents of the University of Wisconsin System v. Southworth*,<sup>14</sup> for example, the Court noted that the government speech doctrine was not raised by a state university defending a mandatory student activity fee.<sup>15</sup> Similarly, in *Rosenberger v. Rector & Visitors of University of Virginia*,<sup>16</sup> the Court rejected a government speech defense of a university's expenditure of funds to encourage a diversity of views from private speakers.<sup>17</sup> A decade after *Rust*, the Court even failed to apply the doctrine when faced with a seemingly identical legal question in *Legal Services Corp. v. Velazquez*<sup>18</sup> — whether conditioning the receipt of Legal Services Corporation (LSC) funds on lawyers' declining to take on representations challenging the validity of welfare laws was constitutional.<sup>19</sup> The Court concluded that the provision violated the First Amendment,<sup>20</sup> finding that the government's reliance on *Rust* was misplaced because the program at issue "was designed to facilitate private speech, not to promote a government message."<sup>21</sup> Far from delivering a state message, the Court concluded, LSC-funded attorneys are meant to speak for their clients against the government's denial of welfare benefits.<sup>22</sup> While Justice Scalia called it "embarrassingly simple" that the LSC restriction was identical to the one upheld in *Rust*,<sup>23</sup> the Court passed on yet another opportunity to find government speech.

The government speech doctrine's sleepy childhood preceded a loud adolescence, with two recent cases clarifying its contours and requirements. In *Johanns v. Livestock Marketing Ass'n*,<sup>24</sup> the Court upheld a program that taxed sales and importation of cattle to fund beef promotional campaigns.<sup>25</sup> The campaigns were designed in part by a "Beef Board" and its operating committee, whose members included private beef producers and importers.<sup>26</sup> Despite this private

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<sup>13</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); cf. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

<sup>14</sup> 529 U.S. 217.

<sup>15</sup> *Id.* at 229.

<sup>16</sup> 515 U.S. 819.

<sup>17</sup> *Id.* at 832–35.

<sup>18</sup> 531 U.S. 533.

<sup>19</sup> *Id.* at 536–37.

<sup>20</sup> *Id.* at 537.

<sup>21</sup> *Id.* at 542; see also *id.* at 540–42.

<sup>22</sup> *Id.* at 542.

<sup>23</sup> *Id.* at 558 (Scalia, J., dissenting).

<sup>24</sup> 544 U.S. 550 (2005).

<sup>25</sup> *Id.* at 553, 565–67. The campaigns included the famous slogan, "Beef. It's What's for Dinner." *Id.* at 554.

<sup>26</sup> *Id.* at 553, 560. The Court noted, however, that all the members were removable by the Secretary of the Department of Agriculture. *Id.* at 560.

involvement, the Court concluded that “[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government.”<sup>27</sup> Congress and the Agriculture Secretary had established in broad strokes what the promotional messages would contain, and while the details of the statements were left to the Beef Board, that organization was ultimately answerable to the Secretary.<sup>28</sup> The Secretary exercised final approval authority over the messages, and government officials were intimately involved in the formulation of the campaign’s communications.<sup>29</sup>

Then, in *Summum*, the Court held that a monument donated by a private group and placed in a public park constituted government speech and thus was not subject to scrutiny under the First Amendment’s Free Speech Clause.<sup>30</sup> As a result, Pleasant Grove City’s decision to accept a Ten Commandments monument did not obligate the city to accept a monument featuring the “Seven Aphorisms” of the Summum religion as well.<sup>31</sup> The Court noted that the government must be free to speak for itself and held that “[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.”<sup>32</sup> The Court highlighted the selectivity the city exercised in approving monuments, noting that it had “final approval authority” over their selection.<sup>33</sup> This selectivity is justified, the Court suggested, because city parks “play an important role in defining the identity that a city projects to its own residents and to the outside world.”<sup>34</sup> The Court declined, however, to require the city to formally embrace the message on monuments, finding that its endorsement of the message was obvious from the monument’s placement on municipal land.<sup>35</sup>

Lower courts have not ignored the Supreme Court’s new enthusiasm for the government speech doctrine. They have increasingly applied government speech reasoning instead of the more traditional public forum doctrine, which applies when the government has opened up its property for private expression.<sup>36</sup> Cases involving messages on

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<sup>27</sup> *Id.* at 560–61.

<sup>28</sup> *Id.* at 561.

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

<sup>30</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129–30 (2009).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1131.

<sup>33</sup> *Id.* at 1134 (quoting *Johanns*, 544 U.S. at 561) (internal quotation marks omitted).

<sup>34</sup> *Id.*

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

<sup>36</sup> For a detailed discussion of this shift, see Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113 (2009/2010).

specialty and vanity license plates, for example, have historically analyzed the plates under forum analysis and barred the government from discriminating on the basis of viewpoint.<sup>37</sup> But in the twenty-first century, courts have increasingly given serious consideration to the possibility that such plates might be government speech.<sup>38</sup> In 2006, the Sixth Circuit concluded in *ACLU of Tennessee v. Bredesen*<sup>39</sup> that the Supreme Court's *Johanns* decision compelled the finding that the messages on the license plates at issue were the state's own.<sup>40</sup> Such a shift is significant, since a finding of government speech allows the state to discriminate based on viewpoint, an action generally forbidden in any type of forum.<sup>41</sup>

## II. PUSHBACK AGAINST THE BINARY APPROACH

Perhaps inevitably, an increasingly robust government speech doctrine has prompted concerns that the categorization of speech as either private or governmental is oversimplified. Several commentators have suggested that the "binary" approach fails to appropriately recognize that "much speech is the joint production of both government and private speakers and exists somewhere along a continuum."<sup>42</sup> These commentators have sought recognition of the speech's "mixed"<sup>43</sup> or "hybrid"<sup>44</sup> status.

Caroline Corbin has provided the most thorough critique of the binary approach. In a 2008 article, Corbin suggests that treating mixed speech as either purely private or purely governmental is inadequate. Using the example of specialty license plates, Corbin notes that treating the plates as private creates a nonpublic forum, thereby denying the government the ability to discriminate by viewpoint.<sup>45</sup> This lack

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<sup>37</sup> See Jack Achiezer Guggenheim & Jed M. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 569–73 (2000) (compiling cases).

<sup>38</sup> See *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241 (4th Cir. 2002).

<sup>39</sup> 441 F.3d 370 (6th Cir. 2006).

<sup>40</sup> *Id.* at 375.

<sup>41</sup> For a summary of the Court's forum jurisprudence, see *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

<sup>42</sup> Corbin, *supra* note 3, at 607; see *id.* at 607–08; see also *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc).

<sup>43</sup> Corbin, *supra* note 3, at 608.

<sup>44</sup> 2008 *Leading Cases*, *supra* note 3, at 237 (quoting *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 800 (4th Cir. 2004) (Luttig, J., concurring in the judgment)) (internal quotation mark omitted).

<sup>45</sup> Corbin, *supra* note 3, at 650.

of authority is problematic, Corbin contends, because mixed speech is likely to be linked to the government, and the state is likely to be perceived as approving, or at least tolerating, the messages.<sup>46</sup> In contrast, Corbin claims that treating mixed speech as purely governmental creates the risk that observers will not always realize that the speech is the state's, foiling the usual democratic devices for holding the government accountable for speech.<sup>47</sup>

Instead of either answer offered under the binary approach, Corbin suggests that courts should look to a multifactor test in determining whether mixed speech exists.<sup>48</sup> If the factors point in opposite directions, or if any of the factors is ambiguous, Corbin would declare the expression to be mixed speech.<sup>49</sup> Once mixed speech is found, Corbin argues, the state should be forbidden from enforcing viewpoint discriminatory regulations unless it can overcome a particularly rigorous form of intermediate scrutiny resembling strict scrutiny.<sup>50</sup>

Several judges have also called for an acknowledgement that speech can be mixed. In the 2002 case *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*,<sup>51</sup> Judge Luttig of the Fourth Circuit wrote on the ability of the state to discriminate among organizational messages on specialty license plates. In his opinion respecting the court's denial of rehearing en banc, Judge Luttig acknowledged that the Supreme Court had not recognized a mixed category of speech, but he predicted that "with time, intellectual candor actually will force the Court" to recognize the category.<sup>52</sup> Judge Luttig contended that the messages on specialty license plates were more the private speech of an individual than government speech, since the plates would not exist without organizations requesting them and would never be displayed without individuals purchasing them.<sup>53</sup> The judge asserted that the case was one in which "the government has voluntarily opened up for private expression property

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<sup>46</sup> *Id.* at 654–55.

<sup>47</sup> *Id.* at 663–65.

<sup>48</sup> *Id.* at 610 ("(1) [W]ho is the literal speaker; (2) who controls the message; (3) who pays for the speech; (4) what is the speech goal of the program in which the speech appears; and (5) to whom would a reasonable person attribute the speech.").

<sup>49</sup> *Id.* at 628.

<sup>50</sup> *Id.* at 675 ("I avoid the term 'strict scrutiny' since 'strict in scrutiny' is usually thought to be 'fatal in fact,' and I believe that some viewpoint restrictions can be justified."). Other approaches for dealing with "hybrid speech" have been proposed. See *2008 Leading Cases*, *supra* note 3, at 239 (suggesting government speech should only be found when the expression is affirmatively initiated by the government).

<sup>51</sup> 305 F.3d 241 (4th Cir. 2002).

<sup>52</sup> *Id.* at 245 (Luttig, J., respecting the denial of rehearing en banc); see also *id.* at 244–45 (calling the binary view an "oversimplification," *id.* at 244, and the result of "doctrinal underdevelopment," *id.* at 245).

<sup>53</sup> *Id.* at 246.

that the private individual is actually required by the government to display publicly.”<sup>54</sup> In such cases, he concluded, viewpoint discrimination should be forbidden when the private component of the speech is significant and the government’s interest is less than compelling.<sup>55</sup>

Two years later, in *Planned Parenthood of South Carolina Inc. v. Rose*,<sup>56</sup> the Fourth Circuit again evaluated a specialty license plate program. Using a test borrowed from other circuits, the court looked to the following factors:

- (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>57</sup>

Finding that the factors pointed in opposite directions in the case before it, the majority concluded that the speech was a mixture of private and governmental speech, favorably citing Judge Luttig’s earlier opinion in *Sons of Confederate Veterans* for this proposition.<sup>58</sup> In such cases, the court held that the state could not discriminate on the basis of viewpoint, adding that South Carolina had engaged in such impermissible discrimination by allowing only a “Choose Life” license plate without a pro-choice plate.<sup>59</sup> Concurring in the judgment, Judge Luttig expressed satisfaction that the Fourth Circuit had adopted his view that speech could be hybrid and reiterated his proposed standard that “at least where the private speech component is substantial and the government speech component less than compelling, viewpoint discrimination by the state is prohibited.”<sup>60</sup>

At least one Supreme Court Justice has also taken up the cause. During oral argument in *Summum*, Justice Breyer expressed his misgivings about “applying these subcategories in a very absolute way,” adding, “Why can’t we call this what it is — it’s a mixture of private speech with Government decisionmaking . . . ?”<sup>61</sup> In his concurrence in *Summum*, Justice Breyer urged that “government speech” be consid-

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<sup>54</sup> *Id.* at 247.

<sup>55</sup> *Id.*

<sup>56</sup> 361 F.3d 786 (4th Cir. 2004).

<sup>57</sup> *Id.* at 792–93 (quoting *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)) (internal quotation marks omitted). For other applications of the test, see *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 964–68 (9th Cir. 2008); and *Wells v. City & County of Denver*, 257 F.3d 1132, 1140–42 (10th Cir. 2001).

<sup>58</sup> *Rose*, 361 F.3d at 794 (citing *Sons of Confederate Veterans*, 305 F.3d at 244–45 (Luttig, J., respecting the denial of rehearing en banc)).

<sup>59</sup> *Id.* at 795–99.

<sup>60</sup> *Id.* at 800 (Luttig, J., concurring in the judgment).

<sup>61</sup> Transcript of Oral Argument at 24, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-665.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-665.pdf).

ered a “rule of thumb, not a rigid category,” suggesting that the Court should consider “whether a government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.”<sup>62</sup>

### III. WEAKNESSES OF THE HYBRID APPROACH

The growing calls for a recognition of mixed or hybrid speech are understandable. As a descriptive matter, no one can deny that the expression at issue in cases like *Summum* came into being in part because of the actions of private individuals who possess First Amendment rights. This fact makes dividing the speech into one of two categories seem “oversimplif[ied],”<sup>63</sup> “rigid,”<sup>64</sup> and lacking “nuance[.]”<sup>65</sup> Government speech tests like the common four-factor test enhance this perception: once one applies the test and determines that its prongs point in contrary directions, it seems odd to nonetheless characterize the speech as purely private or purely governmental.<sup>66</sup> But as this Part discusses, the current binary approach need not be seen as promoting a myth that government speech involves no private activity. Instead, it can be seen as asserting that this private involvement is not relevant to the inquiry, since the government in such cases makes the final expressive decision and may therefore select among viewpoints. Indeed, this Part will argue that adopting a hybrid speech category would be a mistake because it would both analytically misstate the nature of the expression and practically complicate the analysis in such cases.

#### A. Conceptual Problems

Proponents of the hybrid approach think of the speech at issue in government speech cases as a pie, whose attribution can be divided up among various governmental or private participants. For some speech, like a White House spokesperson’s statements at a press conference, the whole pie might be governmental.<sup>67</sup> For other expressive activities, like an individual displaying a privately made bumper sticker on his car, the whole pie might be private.<sup>68</sup> For speech with both private and public elements, the reasoning goes, the pie would be divided.

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<sup>62</sup> *Summum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

<sup>63</sup> *Sons of Confederate Veterans*, 305 F.3d at 244 (Luttig, J., respecting the denial of rehearing en banc).

<sup>64</sup> *Summum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

<sup>65</sup> Corbin, *supra* note 3, at 692.

<sup>66</sup> See *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004).

<sup>67</sup> See Corbin, *supra* note 3, at 628.

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



This conception is evident in *Sons of Confederate Veterans*, for example, in which Judge Luttig supported his argument by noting that a license plate's production is requested by a private organization, manufactured and approved by the state, and purchased by a private party for display.<sup>69</sup> The speech, he suggested, was partially the government's, but "more so" that of private contributors.<sup>70</sup> Corbin similarly described mixed speech as being "a combination"<sup>71</sup> and a "joint production"<sup>72</sup> of private individuals and the state. Her article states that sometimes "either the private or the government *component* predominates."<sup>73</sup> Words like "mix" and "hybrid" themselves encourage thinking along these lines, suggesting a combination that produces a single whole.

The outcome of viewing speech in this manner is significant. Since proponents of a hybrid speech approach see both the government and private individuals as contributing to a single speech act, they tend to give both a measure of legal power over the expression. For Judge Luttig, the state might discriminate in such cases if its interest is "compelling."<sup>74</sup> For Justice Breyer, the critical question is whether the state's limit on speech is disproportionate to its legitimate objectives.<sup>75</sup> For Corbin, the government should have the power to engage in viewpoint discrimination of hybrid speech if it can overcome intermediate scrutiny.<sup>76</sup>

The binary approach, however, does not require courts to ignore the role of private speakers. Private involvement need not be seen as taking a slice from the state's pie, because what hybrid speech proponents tend to conflate into a single expressive act is more accurately characterized as multiple acts, each of which can have a distinct speaker. Once "hybrid speech" is split into distinct speech acts, it becomes clear that the state in some such cases does not unconstitutionally limit any private speaker, but merely makes its own expressive choices.

Removing the government from the equation highlights the intuitive nature of this approach. When, for example, an individual wears one of American Apparel's "Legalize LA" t-shirts, it would seem strange to inquire into the proportion of the message that belongs to

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<sup>69</sup> *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

<sup>70</sup> *Id.*

<sup>71</sup> Corbin, *supra* note 3, at 628.

<sup>72</sup> *Id.* at 607.

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> *Sons of Confederate Veterans*, 305 F.3d at 247 (Luttig, J., respecting the denial of rehearing en banc).

<sup>75</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring).

<sup>76</sup> Corbin, *supra* note 3, at 675.

each party or to look for the “literal speaker.” Both parties are undertaking individual expressive acts. As a printer of t-shirts, American Apparel has a First Amendment right to select what slogans it wishes to offer to the public. But if the majority of potential buyers are hostile to the brand’s pro-legalization statements, the company has no right to compel people to wear the shirts, even if the result is that American Apparel struggles to spread its message. Correspondingly, a buyer can decide to purchase the t-shirts and then decide whether to wear them, but he cannot compel American Apparel to print t-shirts with alternative immigration messages, even if that means the buyer struggles to find shirts that adequately convey his feelings. Viewed in this light, what could be seen as a single expressive act is actually two. Neither party has been denied the chance to speak freely, and each has no ability to make the other party join that speech.

This same separation can be applied to government speech cases. In *Summum*, for example, the placement of the Ten Commandments monument actually involved at least two different expressive acts — first, the Fraternal Order of Eagles decided to donate the monument, and second, Pleasant Grove decided to display it. The Eagles were free to select any design they wanted for the submission, whether the Ten Commandments or the Seven Aphorisms of Summum. However, by exercising “final approval authority,”<sup>77</sup> the city made its own expressive choices. It could have refused to accept the monument unless the Eagles changed the design or message. It could have chosen an alternate monument.<sup>78</sup> It was free to place any selected monument anywhere in Pioneer Park it wished, for as long as it wished.<sup>79</sup> While viewing such monuments as hybrid speech suggests that the private submitters are owed some ongoing solicitude, viewing the monument in this light shows that the private groups already received all that the First Amendment promised them — the right to produce and offer their monuments free of state interference. As the Supreme Court appropriately held, the First Amendment’s bar on laws “abridging the freedom of speech”<sup>80</sup> was simply not implicated.<sup>81</sup> Similarly, in *Johanns*, it was irrelevant to the government speech inquiry that messages for the advertising program were proposed by the Beef Board, half of whose members were private beef producers or importers not ap-

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<sup>77</sup> *Summum*, 129 S. Ct. at 1134 (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561 (2005)) (internal quotation marks omitted).

<sup>78</sup> See *id.* at 1129–30.

<sup>79</sup> The Court in *Summum* pointedly noted that “[a]ll rights previously possessed by the monument’s donor have been relinquished.” *Id.* at 1134.

<sup>80</sup> U.S. CONST. amend. I.

<sup>81</sup> *Summum*, 129 S. Ct. at 1138.

pointed by the government.<sup>82</sup> Even if a private individual had first coined the slogan, “Beef. It’s What’s for Dinner,”<sup>83</sup> that private expression was distinct from the expressive act of choosing and spreading that slogan, a decision that rested wholly within the control of the government.<sup>84</sup>

For the same reason, hybrid speech activists are misguided in claiming support from the Supreme Court’s holding in *Wooley v. Maynard*<sup>85</sup> that the compelled display of a license plate bearing a state motto implicated private speech rights.<sup>86</sup> In *Wooley*, the Court ruled that a New Hampshire resident had a First Amendment right not to display the state’s motto, “Live Free or Die,” on his license plate.<sup>87</sup> But the decision granted Maynard only the right to obscure the state motto, creating a plate that displayed only the necessary information for identification. It does not follow that Maynard should have a further right to command the government to print on license plates messages with which it does not want to be aligned.<sup>88</sup> Indeed, the Court in *Wooley* seemed to take for granted that the speech on license plates is state speech and that New Hampshire was, in effect, requiring drivers to “use their private property as a ‘mobile billboard’ for the State’s ideological message.”<sup>89</sup> For this reason, the specialty license plate cases involve multiple speech acts, not one — groups suggest designs for potential plates, the state prints the plates it favors, and motorists choose which of those selected plates to display. While it has been suggested that the license plate’s mandatory nature distinguishes it from other government property,<sup>90</sup> this argument seems to ignore the fact that the motorist may select which of the state’s messages to convey, or may choose to display nothing beyond the license plate number and state name.

<sup>82</sup> *Johanns*, 544 U.S. at 560.

<sup>83</sup> *Id.* at 554.

<sup>84</sup> *Id.* at 561.

<sup>85</sup> 430 U.S. 705 (1977).

<sup>86</sup> See *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); Corbin, *supra* note 3, at 641 n.187.

<sup>87</sup> *Wooley*, 430 U.S. at 715.

<sup>88</sup> See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1015 (9th Cir. 2000) (“Were we to invoke the Constitution to protect Downs’s ability to make his voice a part of the voice of the government entity he served, Downs would be able to do to the government what the government could not do to Downs: compel it to embrace a viewpoint.”).

<sup>89</sup> *Wooley*, 430 U.S. at 715 (emphasis added). Judge Niemeyer raised this point in response to Judge Luttig’s citation to *Wooley* in *Sons of Confederate Veterans*. *Sons of Confederate Veterans*, 305 F.3d at 250–51 (Niemeyer, J., dissenting from the denial of rehearing en banc).

<sup>90</sup> *Sons of Confederate Veterans*, 305 F.3d at 247 (Luttig, J., respecting the denial of rehearing en banc) (including the fact that an individual is required by the government to display a license plate publicly as evidence that the plate should be considered mixed speech).

As a result, it is misleading to suggest, as Corbin does, that the mixed nature of speech has been largely overlooked.<sup>91</sup> The Supreme Court is obviously aware of the role that the private sector played in the messages at issue in its government speech cases, since it has mentioned this role explicitly in those decisions.<sup>92</sup> The Court's failure to balance the private role against the governmental one more plausibly represents an acknowledgement that there is no balancing to be done — when the government is the speaker, no degree of private involvement is sufficient to alter the conclusion that no First Amendment rights are implicated by its decision to discriminate against disfavored views.<sup>93</sup>

### B. Practical Problems

One might be able to look past the conceptual problems with the hybrid speech approach if the inclusion of a “hybrid speech” category in the analysis provided predictable and satisfying results in practice. As this section will show, however, the recognition of hybrid speech would wrongly allow individuals to gain legitimacy through the perception of government approval, while limiting the state's ability to express its own messages.

The practical proposals for identifying government speech vary. Judges in favor of recognition of mixed speech have thus far summarily concluded that speech is mixed whenever a private entity plays a role in what would otherwise be government speech.<sup>94</sup> This category includes a potentially enormous number of the government's speech acts. Indeed, such a category throws into doubt the answer to even Chief Justice Roberts's largely rhetorical question about whether the existence of the Statue of Liberty compels the government to allow a “statue of despotism.”<sup>95</sup> The Statue of Liberty, after all, was paid for using a private donation drive and designed by the French.<sup>96</sup> Those who have provided more specificity in defining the category hardly offer much comfort that such demarcation will lead to intuitive results. Corbin's five factors provide the most detail, asking: “(1) Who is the

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<sup>91</sup> Corbin, *supra* note 3, at 608.

<sup>92</sup> See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009) (mentioning that the Ten Commandments monument was donated by the Fraternal Order of Eagles); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (acknowledging that the messages in the beef campaign were formulated in part by members of the Beef Board not appointed by the government).

<sup>93</sup> Exactly when the government can justifiably claim that it is the speaker, and therefore discriminate against disfavored views, will be explored in Part IV.

<sup>94</sup> See, e.g., Transcript of Oral Argument at 24, *Summum*, 129 S. Ct. 1125 (No. 07-665), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-665.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-665.pdf).

<sup>95</sup> *Id.* at 35.

<sup>96</sup> See *History of the Statue of Liberty*, THE STATUE OF LIBERTY-ELLIS ISLAND FOUNDATION, INC., [http://www.statueofliberty.org/Statue\\_History.html](http://www.statueofliberty.org/Statue_History.html) (last visited Dec. 4, 2010).

literal speaker? (2) Who controls the message? (3) Who pays for the message? (4) What is the context of the speech (particularly the speech goals of the program in which the speech appears)? (5) To whom would a reasonable person attribute the speech?”<sup>97</sup> Unless all of the factors unambiguously indicate government speech or private speech, Corbin would declare the speech mixed.<sup>98</sup> Her concession that “mixed speech” under this framework “cuts a wide swath”<sup>99</sup> seems like an understatement. Even shirts sold in the White House gift shop might be declared mixed speech under this approach, since their patriotic messages could be reasonably attributed to either the White House or any buyer.

The problems with this approach and the similar four-factor test become apparent in cases like *Rose*, in which the Fourth Circuit scrutinized the South Carolina legislature’s vote to approve a “Choose Life” specialty license plate and its refusal to provide for a pro-choice plate.<sup>100</sup> After attempting to discern the literal speaker, the court concluded that the plates represented “mixed speech” and held that the act authorizing the “Choose Life” plate violated the First Amendment.<sup>101</sup> This, despite the facts that the idea for the plate came from the state, the legislature determined what the message would be, and the bill authorizing the specific plate passed both houses and was signed by the Governor.<sup>102</sup> A message whose existence is subject to the whims of elected legislators would seem to be paradigmatic government speech, yet the category of “mixed speech” swallowed it. As explained above,<sup>103</sup> it is unclear why the mandatory nature of license plates should make any difference, since only the identifying information — and not any message — is mandatory.

Once “mixed speech” is found, one would think the state would be given strong tools to make expressive choices, since “mixed speech” purportedly takes seriously the interests of both private and public speakers. Corbin herself argues that, due to the “undeniably strong government component” in mixed speech,<sup>104</sup> the state has legitimate concerns about printing plates featuring, for example, a message from the Aryan Nation.<sup>105</sup> But hybrid speech proponents maintain that the state should not be able to pick viewpoints to favor unless its interests

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<sup>97</sup> Corbin, *supra* note 3, at 627.

<sup>98</sup> *Id.* at 628.

<sup>99</sup> *Id.*

<sup>100</sup> *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 788 (4th Cir. 2004).

<sup>101</sup> *Id.* at 794, 799.

<sup>102</sup> *Id.* at 793.

<sup>103</sup> *See supra* p. 815.

<sup>104</sup> Corbin, *supra* note 3, at 647.

<sup>105</sup> *Id.* at 651.

outweigh, or even greatly outweigh, those of the individual.<sup>106</sup> Rather than acting as a co-speaker, the state would basically be limited to the power that it already possesses regarding purely private speech on government property. Moreover, it is hard to see how one can determine whether the government's interest is sufficiently strong without making a policy judgment about the disputed message.<sup>107</sup> The state's interest in excluding a pro-choice license plate seems much more compelling if one believes that abortion truly is murder. And even if, as Corbin suggests, avoiding racist speech is a substantial interest,<sup>108</sup> deciding whether, say, a Confederate flag falls into this category involves its own policy determinations. Giving judges the power to weigh the significance of the state's interest is common in First Amendment jurisprudence, of course, and is a critical part of forum analysis. But its inclusion here would undermine the entire purpose of the government speech doctrine: to allow the political branches of government to set their own priorities about what messages to express.

#### IV. A BINARY APPROACH WITH A FOCUS ON CONTROL

Critics of a vigorous government speech doctrine have often bolstered their conclusions by arguing that the Supreme Court's explication of the doctrine thus far has failed to create a satisfying standard for identifying government speech.<sup>109</sup> These criticisms understate the clarity that the Supreme Court has provided in recent cases, where majorities focused on the amount of supervision the government exercised over the speech at issue. In *Johanns*, the Court found that the government's effective control of the messages designed by the Beef Board was conclusive evidence that the messages were government speech.<sup>110</sup> The authorizing statute set out in general terms what the promotional campaigns would and would not contain, while the Secretary of Agriculture exercised "final approval authority over every word

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<sup>106</sup> See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 247 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); Corbin, *supra* note 3, at 675–77.

<sup>107</sup> See *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) ("I have generally rejected tests based on such malleable standards as 'proportionality,' because they have a way of turning into vehicles for the implementation of individual judges' policy preferences."); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975) ("[W]here messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing. . .").

<sup>108</sup> Corbin, *supra* note 3, at 685–86.

<sup>109</sup> See *id.* at 626; Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 369–73 (2009).

<sup>110</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–61 (2005).

used in every promotional campaign.”<sup>111</sup> This power included the authority to rewrite or reject proposed messages.<sup>112</sup> The Court concluded on this basis that 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 merely because it solicits assistance from nongovernmental sources in developing specific messages.”<sup>113</sup>

*Summum* echoes the importance of government control in creating government speech. The Court held that “[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a *government-controlled message*.”<sup>114</sup> It noted that the state has historically exercised “selectivity” in allowing monuments on public land.<sup>115</sup> In this case, the Court concluded, “the City has ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.”<sup>116</sup> This “editorial control” is generally exercised “through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals.”<sup>117</sup>

Older cases also illustrate the centrality of the control inquiry. In *Rosenberger*, the Court specifically noted that the University of Virginia had taken pains to disclaim messages contained in university-funded student publications in holding that the school could not discriminate against religious messages.<sup>118</sup> Similarly, in *Lamb’s Chapel v. Center Moriches Union Free School District*,<sup>119</sup> the Supreme Court held that a school district that had opened its rooms as group meeting spaces after school hours could not forbid an evangelical church from showing films on the property.<sup>120</sup> In both cases, the state had ceded control over the messages expressed on its property.

It is telling that the Supreme Court in *Summum* did not analyze the monument under the four-factor test used by a number of circuits

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<sup>111</sup> *Id.* at 561.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 562.

<sup>114</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (emphasis added) (citing *Johanns*, 544 U.S. at 562).

<sup>115</sup> *Id.* at 1133; *see also id.* at 1134.

<sup>116</sup> *Id.* at 1134 (quoting *Johanns*, 544 U.S. at 560–61).

<sup>117</sup> *Id.* at 1133 (quoting Brief of Amicus Curiae International Municipal Lawyers Association at 21, *Summum*, 129 S. Ct. 1125 (No. 07-665), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-665\\_PetitionerAmCuIntlMunicipalLawyersAssoc.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-665_PetitionerAmCuIntlMunicipalLawyersAssoc.pdf)) (internal quotation mark omitted).

<sup>118</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995); *see also id.* at 844 (noting that the university’s procedures allowed it to “avoid[] the duties of supervision”).

<sup>119</sup> 508 U.S. 384 (1993).

<sup>120</sup> *Id.* at 396–97; *see also Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561–62 (1975).

when determining whether a message constitutes government speech, even though judges below had considered the test.<sup>121</sup> *Summum* and *Johanns*, properly understood, implicitly rejected the usefulness of the test and instead relied only on its second prong: how much control the government exercised. The Sixth Circuit in *Bredesen* recognized as much and stated that *Johanns* “sets forth the authoritative test”<sup>122</sup> for determining government speech in holding that “when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.”<sup>123</sup> Using this standard, once the Fourth Circuit in *Rose* concluded that the state exercised “complete editorial control”<sup>124</sup> over its “Choose Life” license plate, the analysis should have been over. The outcome in other license plate cases would then depend on whether the state’s procedures allow it to meaningfully review if the viewpoint expressed on the proposed plate aligned with the state’s goals. But the outcome would not depend on concepts like the “literal speaker,” the meanings of which are unclear and whose applications have been uncertain.<sup>125</sup>

The simplicity to be gained by favoring the approach in *Bredesen* over the one in *Rose* is not the only advantage of a robust government speech doctrine that focuses on control. The approach allows the government to benefit from the input of private parties in the numerous instances in which it must speak without fear that this collaboration will force the state to open its speech to all private parties. It prevents private speakers from appropriating the appearance of government endorsement without actually receiving it. And it is consistent with the role of control in forum doctrine.

A simple test that focuses on the state’s actions gives the state the predictability that it needs to use its property to speak confidently. This ability is especially necessary in an ever more complicated democracy, “where governments’ speech must consist not just of information but also of explanation, persuasion, and justification to a polity tethered to the policies and preferences acted upon by its representatives.”<sup>126</sup> Speech in a vibrant democratic government flows both ways — not only are the First Amendment rights of the public enriched by hearing from the state, but the state also functions best

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<sup>121</sup> See *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1176 n.2 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc).

<sup>122</sup> *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006).

<sup>123</sup> *Id.* at 375 (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–67 (2005)).

<sup>124</sup> *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004).

<sup>125</sup> See *Olee*, *supra* note 109, at 396 (noting that, in license plate cases, “[t]he words ‘literal speaker’ are not self-defining . . . and tend to create more difficulties than they resolve”).

<sup>126</sup> Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001).



when infused with the public's creative spark. Indeed, private individuals have been the originators behind some of the state's most enduring speech acts.<sup>127</sup> Creating a third, amorphous category of speech is unlikely to add to discourse in the private sphere. Instead, it is simply likely to make the government more wary of accepting private input at all when speaking.<sup>128</sup> It is hard to see whose free speech rights would be empowered by such a change.

A focus on government control also correctly recognizes that so-called "mixed speech" is likely to be attributed in part to the government and that private individuals should not be able to co-opt the appearance of the state's backing. Just as forcing unwilling motorists to convey the message "Live Free or Die" incorrectly suggests that the driver supports this message,<sup>129</sup> forcing a state that has carefully controlled its license plate messages to print a particular plate gives the mistaken impression that the plate has governmental support. Critics of the binary approach frequently argue that the doctrine "distorts the marketplace of ideas."<sup>130</sup> But a "Choose Life" license plate authorized by the state legislature appropriately indicates to observers that both the driver and the state, which manufactured the plate, stand behind the message. If a pro-choice license plate cannot similarly win over the state legislature, then it does not distort the marketplace to deny a driver that "official, state-approved sheen."<sup>131</sup> As a *Denver Post* columnist observed, "God invented the bumper sticker for a reason."<sup>132</sup>

As a conceptual matter, scrutinizing solely the degree of control dovetails nicely with the second framework explained in Part III. If one does not view a speech act as a pie, with various portions coming from state and private actors, then one can look solely at the behavior of the state when determining if the speech is government speech.

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<sup>127</sup> The Court in *Summum* noted the private role in the creation of the Statue of Liberty, the Marine Corps War Memorial, and the Vietnam Veterans Memorial. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009).

<sup>128</sup> See *id.* at 1138 ("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 have little choice but to refuse all such donations."); Danny Hakim, *Metro Briefing: Albany: Pataki Vetoes 60 Bills*, N.Y. TIMES, July 28, 2006, at B6 (reporting Governor Pataki's veto of over a dozen bills that would have created new specialty license plates due to "recent lawsuits in other states claiming that if certain groups are allowed to have custom plates, individuals must also be allowed to customize their plates with personal messages"); *License Plates; Room for More*, FLA. TIMES-UNION, Nov. 24, 2008, at B6 (reporting on the Florida legislature's moratorium on specialty plates due to controversial requests).

<sup>129</sup> *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

<sup>130</sup> Corbin, *supra* note 3, at 667. "[T]o the extent that 'Pro-Choice' or 'U.S. Out of Iraq' license plates are absent, speakers are denied the opportunity for self-expression, and readers are denied the opportunity to either hear about these views or know the extent to which other people support them." *Id.*

<sup>131</sup> David Harsanyi, *Free Speech or Just Annoying?*, DENVER POST, Apr. 29, 2009, at 13B.

<sup>132</sup> *Id.*

Once the government has demonstrated through the degree of control it exercises that it means only to propagate messages it supports, it is irrelevant whether a private entity first imagined the message, as in *Summum*,<sup>133</sup> or if private entities will spread the message, as in the license plate cases.

This understanding of speech also aligns the government speech doctrine with the Court's forum jurisprudence, which focuses on the state's behavior, not that of private actors. The forum doctrine creates several categories, all of which hinge on the control the government has historically exerted or presently exerts. "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'"<sup>134</sup> Creating a designated public forum requires the government to willfully cede control:

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.<sup>135</sup>

Finally, the state may create a forum in which access is limited to certain parties or in which only certain topics will be discussed.<sup>136</sup> A finding of government speech is a finding that no forum exists at all, since the state has exercised such intensive control that it has not opened its property even for debate on set issues.

## V. CRITICISM OF A VIGOROUS GOVERNMENT SPEECH DOCTRINE

Defining government speech in the terms that this Note suggests would create a large role for government speech in the Court's free speech jurisprudence, one that critics of the doctrine would undoubtedly find troubling. Even at its current size, some have worried that the government speech doctrine does not require that speech be clearly attributable to the government and that this resulting lack of transparency hinders the usual democratic checks on state behavior.<sup>137</sup> The dissent in *Johanns* argued this point vigorously,<sup>138</sup> while *Summum* soothed government speech skeptics by noting that the monument at

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<sup>133</sup> *Summum*, 129 S. Ct. at 1129.

<sup>134</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (emphasis added) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>135</sup> *Id.* (citation omitted).

<sup>136</sup> See *Summum*, 129 S. Ct. at 1132–33.

<sup>137</sup> See Corbin, *supra* note 3, at 664–65; Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005).

<sup>138</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 577–78 (2005) (Souter, J., dissenting).

issue in that case would be obviously attributable to the city that placed it.<sup>139</sup> Concerns about transparency are legitimate, but it's not clear how they are First Amendment concerns. There is no general First Amendment requirement that the state exercise openness with its citizens.<sup>140</sup> The state is not required to show its hand when purchasing textbooks that favor the majority party's dogma,<sup>141</sup> or when selectively declassifying information for political gain.<sup>142</sup> Even Professor Gia Lee, who has argued persuasively that a government's legitimacy is harmed when it masks the source of government communications, has maintained that "[this] principle does not give rise to a judicially enforceable right."<sup>143</sup> Professor Abner Greene similarly has worried about government "ventriloquism," but concluded that such concerns are rooted more in political theory than in constitutional law.<sup>144</sup> The First Amendment is not a panacea against state misbehavior, and believing that the First Amendment protects a vigorous marketplace of ideas does not mean that any action that might enrich that marketplace is constitutionally mandated.

Other critics contend that the government speech doctrine gives the state too much control over what speech is its own. One commentator worries, "To bring its actions within the government speech doctrine, the government only needs to exercise control over what is said and what is not said."<sup>145</sup> Professor Steven Gey, for example, expresses concern that "the Court might declare the simple assertion of the government's intent to be sufficient to place particular speech into the category of 'government speech.'"<sup>146</sup>

However, it is first worth keeping in mind that only a relatively small amount of speech is at stake. Even under a broad government speech doctrine, the state could not make government speech out of expressions that do not take advantage of government property, such as messages on bumper stickers, t-shirts, newspapers, or websites. The government also could not exercise the control necessary for government speech in traditional public forums, including parks<sup>147</sup> and pub-

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<sup>139</sup> *Sumnum*, 129 S. Ct. at 1133-34.

<sup>140</sup> See *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999).

<sup>141</sup> See Michael Brick, *Texas School Board Set to Vote Textbook Revisions*, N.Y. TIMES, May 21, 2010, at A17.

<sup>142</sup> See Michael A. Fletcher, *Experts: Tactic Would Be Legal but Unusual*, WASH. POST., Apr. 7, 2006, at A8.

<sup>143</sup> Lee, *supra* note 137, at 989.

<sup>144</sup> Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 51 (2000).

<sup>145</sup> Park, *supra* note 36, at 140.

<sup>146</sup> Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1297 (2010).

<sup>147</sup> The Court in *Sumnum* distinguished between speeches and demonstrations in parks, which are by their nature transitory, and monuments, which "interfere permanently with other uses of the public space." *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1137 (2009).

lic sidewalks, since these have been held open historically for private speech.<sup>148</sup> And in all other areas of its property, the state already possesses the power to censor: by closing the forum entirely.<sup>149</sup>

Still, *Rust* lends legitimacy to these concerns, because the case seems to blur the boundary between the state's permissible speech and impermissible censorship. Cases citing *Rust* have suggested that the program at issue in the case was designed to "promote a governmental message,"<sup>150</sup> as if the doctors in *Rust* were acting as government spokesmen.<sup>151</sup> But it is more natural to characterize the *Rust* program — like the one in *Velazquez* — as one designed to increase the public's access to the private advice of professionals, since it is not at all clear what the government's message in *Rust* was.<sup>152</sup> The purpose of the program was "to assist in the establishment and operation of voluntary family planning projects which shall offer a *broad range of acceptable and effective family planning methods and services*."<sup>153</sup> Apart from barring talk concerning abortion, the funding program did not provide affirmative guidelines on what advice doctors should give.<sup>154</sup> Indeed, the *Rust* majority even took comfort in the fact that the program did not "require[] a doctor to represent as his own any opinion that he does not in fact hold."<sup>155</sup>

Of course, one could attempt to infer a message from the program's general goals and its bar on talk of abortion, something like, "We generally advocate methods of family planning, just not abortion." But the government never affirmatively mandated that doctors say *anything* about abortion. Indeed, as Gey observes, the entire purpose of the prohibition on discussing abortion would have been undermined by such a mandate:

It would likely seem to many patients that their own moral decisions were being made for them by the government, a situation that would likely engender disenchantment and even disobedience in many patients. This is

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<sup>148</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

<sup>149</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("[A] state is not required to indefinitely retain the open character of the facility . . .").

<sup>150</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

<sup>151</sup> Other examples of this phenomenon can be found in *Southworth*, where *Rust* was said to stand for the uncontroversial position that the government may spend money "for speech and other expression to advocate and defend its own policies," *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000), and in *Rosenberger*, where the program in *Rust* was cast as one using "private speakers to transmit specific information pertaining to its own program," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

<sup>152</sup> *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) ("If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech.")

<sup>153</sup> 42 U.S.C. § 300(a) (2006) (emphasis added).

<sup>154</sup> See *id.*

<sup>155</sup> *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

undoubtedly why the government chose to accomplish its purpose (reducing the number of abortions in the United States) in a furtive way by denying patients information about the procedure through the silence of healthcare workers.<sup>156</sup>

It seems backwards to say that the government's only "message" is silencing others. And even if the prohibition was itself a speech act, or if the government had affirmatively required participating doctors to state that abortion was not an acceptable method of family planning, this would not change the generally lax control over the program. Prohibiting discussion of a single medical treatment does not come close to the control envisioned for government speech in *Johanns*, where the government approved every word conveyed to the public.<sup>157</sup> In fact, the single restriction on otherwise open, government-funded speech has more in common with *Rosenberger*, where the Court held unconstitutional the University of Virginia's decision to fund a wide variety of student publications while rejecting financial support for one whose purpose was primarily the promotion of religion.<sup>158</sup> Without control over every word, the government conduct is not permissible speech, but rather impermissible censorship.

Because of these problems, commentators have struggled to square *Rust* with the Court's later pronouncements on government speech.<sup>159</sup> Attempting to craft a government speech doctrine that includes *Rust* only arms those who contend that the doctrine suffers from "incoherence and confusion."<sup>160</sup> Instead, the best approach to *Rust* may be the one already seemingly adopted by the Supreme Court — ignoring it. *Johanns* does not even cite the case. The majority in *Sumnum* cited *Rust* only once, for the largely uncontested position that the state may select the views it wishes to express.<sup>161</sup> *Rust* never purported to be a

<sup>156</sup> Gey, *supra* note 146, at 1272–73.

<sup>157</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

<sup>158</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

<sup>159</sup> Professor Andy Olree, for example, argues that the Supreme Court has found government speech in three circumstances, and proposes a corresponding test:

(1) Did the government independently generate the idea of reaching an audience with this particular message in this medium? (2) Was the message expressed in a medium or format effectively owned and controlled by government and clearly reserved for the purpose of expressing only those messages the government regards as its own, never opened to multiple private speakers for the purpose of raising revenue or supporting their speech or welfare? (3) Is there a clear literal speaker who is employed by the government to send messages on this subject in this format?

Olree, *supra* note 109, at 411. The proposed test works better as a descriptive account of what the Supreme Court has done than as a principled proposal for what the Court should do going forward. And it repeats the concepts of literal speaker and independent generation, which, as explained above, are problematic to apply.

<sup>160</sup> Gey, *supra* note 146, at 1290.

<sup>161</sup> *Pleasant Grove City v. Sumnum*, 129 S. Ct 1125, 1131 (2009) (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

government speech case, and limiting the case to its facts allows the doctrine to continue to develop in conformity with the better-reasoned *Johanns* and *Summum*.

While *Rust*'s standards for government speech are undemanding, the control required in *Johanns* and *Summum* is costly because it requires intense supervision that is the functional equivalent of approving every word disseminated by private groups. The state is unlikely to possess the resources, or the interest, to monitor all the speech being produced when it provides funding for college publications<sup>162</sup> or allows after-hours access to a school auditorium<sup>163</sup> or funds a municipal theater.<sup>164</sup> While the focus on control in *Johanns* and *Summum* puts the government in the driver's seat in deciding when government speech can be found, it requires that the state do far more than simply declare that speech is the "Property of the United States." The government must manifest its intent to select among messages, rather than swoop in when it finds speech in an already-opened forum particularly troubling.

#### CONCLUSION

Given the way that commentators have often conceived of the interaction between the government and private actors in government speech cases, the increasing resistance to the Supreme Court's binary approach to dealing with such speech is understandable. But seeking special consideration for "mixed" or "hybrid" speech would only serve to enhance the incorrect perception that private involvement necessarily diminishes the extent to which the state is the speaker. Moreover, it would be problematic to apply, inadequately protecting the state's interest in not being associated with speech it disfavors and giving this speech credibility it has not earned. A better approach acknowledges that a speech act can be exclusively the government's even if it benefits from private inspiration or distribution. More recent government speech cases place the degree of control exercised by the state at center stage, which allows courts to sensibly distinguish between government speech and speech in which the state should not be allowed to viewpoint discriminate. This approach allows for a robust government speech doctrine, but not one that tramples on the rights of individuals to express themselves.

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<sup>162</sup> See *Rosenberger*, 515 U.S. at 822–23.

<sup>163</sup> See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

<sup>164</sup> See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).