

the results of trials may hinder broader goals of justice.⁹⁵ Although the effects of a court's desire for finality are likely smaller than the effects of a prosecutor's desire for conviction, such tendencies might lead a judge to assert the exceptional ability of DNA evidence to establish guilt or innocence at trial in order to confirm the result reached, yet consider such evidence unexceptional in the postconviction setting, again confirming the result reached below.

Regardless of the reason for the conflicting messages about DNA in *Osborne*, the confusion over DNA's uniqueness leaves unclear how lower courts should treat DNA in other contexts, including the determination of whether claims for access to DNA evidence should be brought under § 1983 or in habeas petitions and of how to treat actual innocence defenses. In *Osborne*, the Court declined to discuss whether Osborne's claim was brought validly under § 1983,⁹⁶ despite a circuit split on the issue.⁹⁷ If DNA evidence is viewed as conclusive, requests for access to such evidence may implicate the claims of innocence and requests for release at the core of habeas doctrine. Similarly, DNA's ability to provide sufficiently strong evidence of innocence may bolster appeals based on the yet unacknowledged claim of actual innocence.⁹⁸

The Court's contradictory treatment of DNA calls the decision into question and impairs lower courts' ability to deal with DNA in other contexts. The Court avoided the complicated problems involved in substantive due process analysis by disingenuously rejecting the right as novel. Instead, the Court should have grappled with the issue and avoided leaving future treatment of DNA in doubt.

C. Freedom of Speech and Expression

1. *Government Speech*. — For decades, the Supreme Court has recognized that there must be “room for play in the joints” between the two religion clauses of the First Amendment.¹ Less well explored is the relationship between the Establishment Clause and the Free Speech Clause's government speech doctrine. Under current doctrine,

⁹⁵ See Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 38 (2009) (“[I]nstitutional, professional, and psychological incentives [of prosecutors] are normally aligned with preserving the integrity of the trial result.”).

⁹⁶ *Osborne*, 129 S. Ct. at 2319.

⁹⁷ See generally Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587 (2004).

⁹⁸ See generally Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233 (2002); Eli Paul Mazur, “I’m Innocent”: *Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197 (2003).

¹ *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)).

governmental bodies can — at least sometimes — maintain privately donated religious displays on public land without offending the Establishment Clause.² A question unresolved until recently, however, was whether in doing so those bodies are engaging in government speech, which the First Amendment does not regulate, or providing a forum for private expression, wherein restrictions on private speech are subject to strict scrutiny.³ Last Term, in *Pleasant Grove City v. Summum*,⁴ the Supreme Court held that a privately donated Ten Commandments display on public land — and all other such monuments — was categorically government speech, rendering public forum analysis inapplicable. This ruling expanded government speech doctrine beyond its justifications. Where the government facilitates only some private speech instead of initiating its own expression, traditional First Amendment concerns regarding viewpoint discrimination are stronger and the core rationale for government speech doctrine is weaker. Further, where the speech in question is religious in nature, the Establishment Clause's bar on favoring certain religious speakers over others is implicated. Accordingly, the Court should have adopted a rule under which, to qualify as government speech, expression must be affirmatively initiated by the government. Such a rule would have classified the Ten Commandments monument at issue as private speech, which, under a properly applied forum analysis, could not be displayed without accepting similar monuments from other private speakers.

Pioneer Park is a public park in Pleasant Grove City, Utah, containing fifteen permanent displays, including a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.⁵ In 2003, the city received a request from Summum, a Utah-based religious organization, to erect in the park a similarly sized stone monument to the Seven Aphorisms of Summum.⁶ The city refused, citing an unwritten policy of accepting only displays related to the city's history, or those donated by groups “with longstanding ties to the Pleas-

² See *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding placement of a privately donated Ten Commandments monument on the grounds of the Texas state capitol).

³ Compare *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (“[T]he Government's own speech . . . is exempt from First Amendment scrutiny.”), with *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (“[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”).

⁴ 129 S. Ct. 1125 (2009).

⁵ *Id.* at 1129.

⁶ *Id.* at 1129–30. Summum doctrine holds that before Moses received the Ten Commandments at Mount Sinai, he first received a set of tablets containing the Seven Aphorisms, but destroyed them. See *The Aphorisms of Summum and the Ten Commandments*, <http://www.summum.us/philosophy/tenccommandments.shtml> (last visited Oct. 3, 2009).

ant Grove community.”⁷ After another request went unanswered in 2005, Summum filed suit against Pleasant Grove, alleging, *inter alia*, that the city had violated the First Amendment by accepting the Ten Commandments monument but not the Seven Aphorisms display.⁸

In an oral ruling, the District Court for the District of Utah denied Summum’s request for a preliminary injunction requiring the city to accept the monument.⁹ The court observed that Summum would likely not succeed on the merits if the city were found to have a reasonable, viewpoint-neutral policy for evaluating proposed monuments. Although the court found that the facts regarding the city’s policy were in dispute, the court nonetheless ruled that “Summum had not established a substantial likelihood of success on the merits.”¹⁰ Summum appealed.

The Tenth Circuit reversed.¹¹ Writing for the panel, Chief Judge Tacha observed that public parks were “quintessential public forums,”¹² and that restrictions on speech therein were thus subject to strict scrutiny, which the district court had not applied.¹³ Accordingly, the Tenth Circuit found that, as the city had failed to present a compelling interest sufficient to justify a content-based restriction on speech, Summum had carried its burden in establishing likely success on the merits, and therefore a preliminary injunction requiring the display of the monument was warranted.¹⁴

The city petitioned the Tenth Circuit for a rehearing en banc, which the court denied by an evenly divided vote.¹⁵ Judges Lucero and McConnell each dissented from the denial of rehearing en banc.¹⁶

The Supreme Court reversed. Writing for the Court, Justice Alito¹⁷ first noted the sharp disagreement between the parties regarding the governing line of precedent: the city urged that government speech

⁷ *Summum*, 129 S. Ct. at 1130. The following year, the city passed a resolution codifying the policy. *Id.*

⁸ *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1047 (10th Cir. 2007).

⁹ *Id.* at 1048.

¹⁰ *Id.* at 1049.

¹¹ *Id.* at 1047.

¹² *Id.* at 1050 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

¹³ *Id.* at 1050–51.

¹⁴ *Id.* at 1053, 1057.

¹⁵ *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1171 (10th Cir. 2007) (denial of rehearing en banc).

¹⁶ *Id.* at 1171, 1173 (Lucero, J., dissenting from denial of rehearing en banc) (arguing that, for forum analysis purposes, it was necessary “to distinguish between transitory and permanent speech,” *id.* at 1171); *id.* at 1175 (McConnell, J., dissenting from denial of rehearing en banc) (arguing that “any messages conveyed by the monuments [the city has] chosen to display are ‘government speech’”).

¹⁷ Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer joined Justice Alito’s opinion.

doctrine was the appropriate lens through which to view the case, whereas *Sumnum* argued that the Court, like the Tenth Circuit, should conduct a public forum analysis.¹⁸ If the city were engaging in its own expression by displaying the monument, “then the Free Speech Clause has no application. . . . [I]t does not regulate government speech.”¹⁹ This is no less true, the Court explained, “when [government] receives assistance from private sources for the purpose of delivering a government-controlled message.”²⁰ If, however, the Ten Commandments monument was private speech, the city’s ability to reject the *Sumnum* monument was sharply restricted by public forum doctrine, which protects speech rights in public spaces that “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” — of which parks are a quintessential example.²¹ The Court explained that in a public forum, “restrictions based on viewpoint are prohibited.”²²

Turning to the case at hand, the Court found the ownership of the land and the monument to be enlightening: “[P]ersons who observe donated monuments routinely — and reasonably — interpret them as conveying some message on the property owner’s behalf.”²³ This association is particularly strong, the Court stated, in public parks, which “are often closely identified in the public mind with the government.”²⁴ The Court explained that this conclusion was bolstered by the historical practice of “selective receptivity” to donated monuments on the part of American governmental bodies.²⁵ Governments have traditionally exercised “editorial control” through “design input, requested modifications, written criteria, and legislative approvals of specific content proposals.”²⁶ Thus, the Court reasoned, “[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message.”²⁷ Turning specifically to Pioneer Park, the Court stated that the city maintained “final approval authority” over the displays there, selecting only those monuments that “present[ed] the image of the City that it wishe[d] to project.”²⁸

¹⁸ *Sumnum*, 129 S. Ct. at 1131.

¹⁹ *Id.* (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005)).

²⁰ *Id.* The Court did note that government speech is not without limits — it must, for example, “comport with the Establishment Clause.” *Id.* at 1131–32.

²¹ *Id.* at 1132 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)) (internal quotation marks omitted).

²² *Id.*

²³ *Id.* at 1133.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (quoting Brief of Amicus Curiae Int’l Mun. Lawyers Ass’n in Support of Petitioners at 21, *Sumnum*, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 WL 2550618).

²⁷ *Id.* at 1134.

²⁸ *Id.*

The Court acknowledged that *Summum* had raised the “legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint,” but rejected the group’s suggestion that the concern be addressed by “requir[ing] a government entity accepting a privately donated monument to go through a formal process of . . . publicly embracing ‘the message’ that the monument conveys.”²⁹ First, the Court asserted that taking ownership of a monument constituted a more “dramatic” form of adoption than any formal endorsement.³⁰ Second, the Court noted the difficulty in determining precisely what message a particular monument conveyed or was intended to convey, pointing to the “mosaic of the word ‘Imagine’ that was donated to New York City’s Central Park in memory of John Lennon” as an example of a monument without a clear, adoptable message.³¹

The Court also held that the facts of the case rendered public forum doctrine inapposite. Noting that parks have been considered quintessential public fora “for purposes of assembly,” the Court pointed out that the same was not true when it came to allowing the permanent installation of monuments.³² The Court dismissed *Summum*’s argument that concerns about increasing, permanent clutter could be dealt with through the “content-neutral time, place and manner restrictions” that govern public fora, concluding that *Summum*’s position would force government bodies to choose between “‘brac[ing] themselves for an influx of clutter’ or fac[ing] the pressure to remove longstanding and cherished monuments,” lest the restrictions be found to constitute content or viewpoint discrimination.³³

The opinion generated four concurrences. Justice Stevens, joined by Justice Ginsburg, expressed his continuing skepticism regarding government speech doctrine as a whole and asserted that treating the government like a private property owner and thus approaching the display as “an implicit endorsement of the donor’s message” would yield the same result without resorting to government speech doctrine.³⁴ Justice Scalia, joined by Justice Thomas, wrote separately to assure the city that it “ought not fear that today’s victory has propelled

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1135. The Court also included twenty-six lines of Lennon’s song *Imagine* in a footnote, *id.* at 1135 n.2, suggesting that Chief Justice Roberts’s citation of Bob Dylan’s *Like A Rolling Stone* in *Sprint Communications Co. v. APCC Services, Inc.*, 128 S. Ct. 2531, 2550 (2008), may have paved the way for other Justices to cite to their favorite rock lyrics.

³² *Summum*, 129 S. Ct. at 1137 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

³³ *Id.* at 1137–38 (quoting *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc)).

³⁴ *Id.* at 1139 (Stevens, J., concurring).

it from the Free Speech Clause frying pan into the Establishment Clause fire,”³⁵ because the Court’s decision in *Van Orden v. Perry*³⁶ would protect the city in future litigation over the monument. Justice Breyer wrote separately to urge that categories like “government speech” and “public forum” be applied “with an eye towards their purposes — lest we turn ‘free speech’ doctrine into a jurisprudence of labels.”³⁷ Accordingly, Breyer argued that the Court should consider whether, regardless of initial classification, “government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.”³⁸ Lastly, Justice Souter agreed that the Ten Commandments monument was government speech, but expressed concern about the Court’s acceptance of the “position that public monuments are government speech categorically.”³⁹ Instead, he suggested an approach employed in the Court’s Establishment Clause jurisprudence: asking whether a reasonable observer “would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.”⁴⁰

In holding that privately donated monuments are categorically government speech, the *Summum* Court imperiled fundamental free speech values by further expanding the government speech doctrine into a gray area in which government decisionmaking or endorsement is combined with private expression.⁴¹ In such cases, the risks of viewpoint discrimination in characterizing the “hybrid speech”⁴² in question as government speech outweigh the government’s need to communicate, which underpins the doctrine’s rationale. Accordingly, the Court should have adopted a rule under which, to qualify as government speech, expression must have been affirmatively initiated by the government. Thus, the Court should have held that public forum doctrine applied, but only because the government facilitated a private display. Such a rule would prevent viewpoint discrimination without leading to the clutter feared by the *Summum* majority.

³⁵ *Id.* (Scalia, J., concurring).

³⁶ 545 U.S. 677 (2005) (upholding against an Establishment Clause challenge the display of a nearly identical Ten Commandments monument, also donated by the Fraternal Order of Eagles, on the grounds of the Texas state capitol).

³⁷ *Summum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

³⁸ *Id.* Such an inquiry in this case would, Breyer wrote, reveal that the city’s action did not “disproportionately restrict *Summum*’s freedom of expression.” *Id.* at 1140–41.

³⁹ *Id.* at 1141 (Souter, J., concurring in the judgment).

⁴⁰ *Id.* at 1142 (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 635–36 (1989) (O’Connor, J., concurring in part and concurring in the judgment)).

⁴¹ The Court has been gradually expanding the government speech doctrine since its inception. For a more extensive discussion of this trend, see *infra* section I.C.2, pp. 242–52.

⁴² *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 800 (4th Cir. 2004) (Luttig, J., concurring in the judgment) (arguing that “speech can indeed be hybrid in character”).

Government speech doctrine is justified at its core by the idea that, in order to function, government must have the ability to express certain points of view,⁴³ and it would be unable to do so effectively if, for example, the Constitution required a government pro-democracy campaign to be accompanied by a pro-fascism campaign.⁴⁴ Standing alone, this common sense proposition is relatively uncontroversial. However, the doctrine has generated extensive criticism because of the difficulty in answering the precise question presented in *Summum* — when is the government speaking for itself, and when is it facilitating private speech?⁴⁵ In turn, that difficulty stems from the fact that the question presents a false dichotomy: like *Summum*, government speech cases frequently involve a mixture of private expression and government endorsement or decisionmaking.⁴⁶ The lower courts have begun to refer expressly to mixed speech,⁴⁷ but the Supreme Court has applied government speech doctrine in a variety of areas⁴⁸ without ever doing so.⁴⁹

As the doctrine has expanded beyond those situations contemplated by its core rationale, the strength of that rationale has waned and the risks to free speech have increased. Where the government clearly speaks for itself, the risk of official viewpoints dominating the public discourse is minimal, kept in check by the power of the electorate to replace government actors whose speech is problematic.⁵⁰ This is no

⁴³ See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) (“It is the very business of government to favor and disfavor points of view . . .”); 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.”).

⁴⁴ See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

⁴⁵ See generally Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587 (2008); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. (forthcoming 2009) (manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393414).

⁴⁶ See Transcript of Oral Argument at 24, *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf (Justice Breyer: “Why can’t we call this what it is — it’s a mixture of private speech with Government decision-making . . .”). See generally Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

⁴⁷ Corbin, *supra* note 46, at 608 (noting that while “few lower courts have addressed [mixed speech],” some have done so in specialty license plate cases).

⁴⁸ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (employment); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (advertising); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (education).

⁴⁹ Corbin, *supra* note 46, at 608 (“The Supreme Court has never explicitly acknowledged the existence of mixed speech . . .”).

⁵⁰ See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”).

less true when the government “enlists private entities to convey its own message,”⁵¹ so long as the identity of the speaker remains clear.⁵² However, it is less clear that the government must be allowed to endorse only some private speech in order to govern effectively, even though some government expression is involved in deciding which speech to facilitate.⁵³ The form of certain private speech might strike a government decisionmaker as the ideal mode for that particular message, but precluding the government from using private expression as the starting point for government speech will not hamper its capacity to put forth independently any message it considers important. By requiring the government to “independently generate” all expression that can be classified as government speech, even if it later recruits private actors to help disseminate that speech, such a rule would ensure that when government speaks, it truly speaks for itself.⁵⁴ For the purposes of such a requirement, speech would be independently generated if, without any external prompting by private actors, a government actor or body put forward “the idea of reaching an audience with this particular message in this medium.”⁵⁵

By precluding the government from promulgating favored private expression in the guise of government speech,⁵⁶ such a rule would serve the bedrock First Amendment principle that the government may not discriminate among speakers based on the content of their speech.⁵⁷ Further, while such a rule would constitute a contraction of government speech doctrine, it would not represent a radical departure

⁵¹ *Rosenberger*, 515 U.S. at 833.

⁵² *See Corbin*, *supra* note 46, at 666 (arguing that government speech not identifiable as such “shatters the bargain where the government may promote certain positions to the exclusion of others but only on the condition that the electorate can hold [it] accountable for its advocacy”).

⁵³ *Cf. Olree*, *supra* note 45 (manuscript at 3) (“[P]rivate speech does not become government speech simply because the government allows the speaker to use governmental resources to get the message out.”).

⁵⁴ This rule would prevent the government speech label from applying to any speech proposed to the government by private actors, even where the government would have generated that speech if left to its own devices. In this sense, the rule is consciously overinclusive; however, with the rule in place, private actors would likely refrain from proposing speech to the government, as to do so would prevent the government from propagating it.

⁵⁵ *Olree*, *supra* note 45 (manuscript at 45). Obviously, in a democratic society in which government actors quite properly interact with private citizens in a multitude of situations, choosing the precise point at which to draw this line would require great care. For the moment, it suffices to say that any express request, like a citizen petition, a letter, or either of the two monuments in *Summum*, would not qualify as independently generated by the government.

⁵⁶ Identifying hybrid speech as government speech risks distorting the marketplace of ideas by allowing the government to favor certain speakers without facing First Amendment scrutiny. *See Corbin*, *supra* note 46, at 662–71 (discussing the harms of classifying mixed speech as government speech).

⁵⁷ *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”).

from the doctrine's principles as articulated by the Court. The idea that government speech doctrine allows the government "to promote a particular policy *of its own*"⁵⁸ has been central to the Court's development of the doctrine, and, in cases where it has found that government funding was not being used to "advance a particular message,"⁵⁹ it has declined to apply the doctrine.⁶⁰

The appeal of such a rule is heightened by the fact that it also deals with *Summum's* elephant in the room — the Establishment Clause. Throughout, *Summum* was "litigated in the shadow of the . . . Establishment Clause."⁶¹ At oral argument, Chief Justice Roberts immediately interrupted Pleasant Grove City's counsel to observe, "the more you say that the monument is Government speech to get out of . . . the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."⁶² In its opinion, however, the *Summum* majority deftly avoided addressing any Establishment Clause concerns.⁶³ While it remains unclear whether the *Summum* Decalogue would itself run afoul of the Establishment Clause,⁶⁴ when mixed speech is religious in nature, it becomes doubly important that government truly speak for itself; just as the Free Speech Clause is implicated when government selects among private viewpoints, the Establishment Clause is implicated when the government chooses among religious groups.⁶⁵ The proposed rule thus respects both the Free Speech Clause's prohibition on viewpoint discrimination and the Establishment Clause's proscription against religious favoritism.

⁵⁸ *Id.* at 833 (emphasis added).

⁵⁹ Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

⁶⁰ See Olree, *supra* note 45 (manuscript at 46–47) (citing *Rosenberger* and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), as cases in which "the fact that the government did not 'set the overall message' was an important factor in the Court's determination that the message constituted private speech").

⁶¹ *Summum*, 129 S. Ct. at 1139 (Scalia, J., concurring) (emphasis omitted).

⁶² Transcript of Oral Argument, *supra* note 46, at 4. Justice Kennedy expressed a similar concern. *Id.* at 5 ("[Y]ou're going to say it's Government speech and you [will thus] have an Establishment Clause problem.").

⁶³ The Court noted only that government speech must "comport with the Establishment Clause." *Summum*, 129 S. Ct. at 1132.

⁶⁴ Compare *id.* at 1139–40 (Scalia, J., concurring) (arguing that *Van Orden v. Perry*, 545 U.S. 677 (2005), would protect the city in an Establishment challenge to the Decalogue, notwithstanding that "all the Justices [in *Van Orden*] agreed that government speech was at issue," *id.* at 1140), with *id.* at 1141 (Souter, J., concurring) (suggesting that after *Summum*, religious monuments that are government speech will raise "the specter of violating the Establishment Clause").

⁶⁵ See *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

A further advantage of this proposal is that, although it may sweep in some legitimate government expression,⁶⁶ it offers a bright-line rule to a doctrine currently lacking in clarity.⁶⁷ The Supreme Court itself has not consistently applied the government speech doctrine. In first creating the doctrine in *Rust v. Sullivan*,⁶⁸ the Court held that regulations that conditioned the receipt of federal Public Health Service Act funding on refraining from engaging in abortion counseling, referral, or advocacy did not violate the free speech rights of the funding recipients.⁶⁹ A decade later, however, in *Legal Services Corp. v. Velazquez*,⁷⁰ the Court struck down regulations that conditioned the receipt of federal funding via the Legal Services Corporation on submitting to certain advocacy restrictions, including a bar on challenging existing laws.⁷¹ Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, dissented, arguing that the scheme in question was “in all relevant respects indistinguishable” from the program in *Rust*, and that the two holdings therefore contradicted each other.⁷² Likewise, in tackling various mixed-speech cases, the lower courts have failed to develop a uniform test for government speech.⁷³ A clear test would allow the courts to avoid “mak[ing] up a percentage” of government involvement sufficient to transform expression into government speech.⁷⁴

Finally, the Court’s holding that, beyond “limited circumstances,” public forum doctrine did not apply to permanent displays⁷⁵ was unnecessary. Under the test outlined above, public forum doctrine can operate to prevent viewpoint discrimination without bringing about the parade of horrors envisioned by the *Summum* majority. The Court was concerned that applying forum doctrine would force municipalities either to accept all privately donated monuments or to maintain no monuments whatsoever.⁷⁶ However, in the absence of

⁶⁶ That is, speech that truly represents the government’s own opinion, but also happens to have been presented to the government by a private actor. See *supra* note 54.

⁶⁷ Cf. Transcript of Oral Argument, *supra* note 46, at 41–42 (Justice Scalia: “[W]e need a clear rule here. . . . [W]e can’t expect the courts . . . to investigate in every case what the degree of the Government’s involvement in the [speech is] . . . [T]hat’s not the way threshold constitutional questions ought to be resolved or resolvable.”).

⁶⁸ 500 U.S. 173 (1991).

⁶⁹ *Id.* at 192–200. To the Court, the rules simply prevented funding recipients from undermining the program under which they were funded. *Id.* at 196.

⁷⁰ 531 U.S. 533 (2001).

⁷¹ *Id.* at 538.

⁷² *Id.* at 553 (Scalia, J., dissenting). But see *id.* at 548 (majority opinion) (arguing that, in *Velazquez*, “there [was] no programmatic message of the kind recognized in *Rust*”).

⁷³ See, e.g., *Olree*, *supra* note 45 (manuscript at 3) (citing the varying approaches used in specialty license plate cases as evidence of the failure of the lower courts to develop a uniform test).

⁷⁴ Transcript of Oral Argument, *supra* note 46, at 41.

⁷⁵ *Summum*, 129 S. Ct. at 1138.

⁷⁶ *Id.*

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.⁷⁷ 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.⁷⁸

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.¹ 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.² Last Term, in *Ysursa v. Pocatello Education Ass'n*,³ 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

⁷⁷ 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).

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

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

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

³ 129 S. Ct. 1093 (2009).