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## Article

### Identifying Government Speech

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*The U.S. Supreme Court has interpreted the Speech Clause of the First Amendment to mean that when the government distributes money or other resources to private speakers, it generally may not discriminate among speakers based on viewpoint. The government is, however, allowed to express its own viewpoint, even if it enlists the aid of private parties to get the message out, as long as the communication does not violate some separate legal restriction, such as the Establishment Clause. Together, these understandings form the core of what has become known as the “government speech doctrine.” This doctrine signals that distinguishing between government speech and private speech will become crucial in many cases involving either the Speech Clause or the Establishment Clause. While the Court has announced the distinction in general terms and has decided cases based on it—including a notable case this term involving Ten Commandments monuments—the Court has yet to announce a standard by which judges can reliably identify government speech across a range of cases. After examining several attempts by others to formulate such a standard, this Article suggests that the Court has now identified three basic types of government speech. Accordingly, the Article proposes a three-factor test for identifying government speech, demonstrating how the test could function as a unifying explanation of precedent, and a uniform method of resolving future cases.*

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# Identifying Government Speech

ANDY G. OLREE\*

## I. INTRODUCTION

One of the most familiar axioms in all of First Amendment law is the general rule that the government is not allowed to restrict private expression based on viewpoint.<sup>1</sup> The axiom applies even when speakers use governmental resources to get their message out. From time to time, the government actually facilitates expression by private persons—for example, by subsidizing a variety of speakers, by offering public land or other property as a forum for those who wish to speak, or by providing people some means of accessing a variety of private information sources and opinions. In these and other similar contexts, government is not allowed to deny access to public property or support on the basis of the speaker’s viewpoint.<sup>2</sup> The government may grant access to its aid selectively, but the access criteria must be viewpoint-neutral.

However, government itself sometimes wishes to express its own particular viewpoint, and it is generally allowed to do so. Governments often attempt to influence behavior and thought, not only by coercively penalizing certain behaviors or expressions, but by expressing viewpoints designed to affect the social milieu or to persuade people to think and act

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<sup>1</sup> See *Rosenberger v. Rector & Visitors of 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.” (citing *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972))).

<sup>2</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (finding that government cannot restrict speech on the basis of viewpoint and that any restriction must be reasonable); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001) (finding that a viewpoint-based funding restriction was unconstitutional); *Rosenberger*, 515 U.S. at 829–31, 834 (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–94 (1993) (finding that the government may control access to a nonpublic forum “so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870–71 (1982) (plurality opinion) (finding that the Board of Education has discretion in determining the content in school libraries, but the “discretion may not be exercised in a narrowly partisan or political manner” such that certain ideas would be suppressed); see also *United States v. Am. Library Ass’n*, 539 U.S. 194, 236 (2003) (Souter, J., dissenting) (“[I]n extreme cases [one could] expect particular [book acquisition] choices [by public libraries] to reveal impermissible reasons (reasons even the plurality would consider to be illegitimate), like excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (“[E]ven in the provision of subsidies, the Government may not ‘ai[m] at the suppression of dangerous ideas.” (second alteration in original) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983))); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (noting that when governmental property functions as any kind of expression forum, whether public or nonpublic, the government may not “suppress expression [in the forum] merely because public officials oppose the speaker’s view”).

differently.<sup>3</sup> Government then becomes one of a host of speakers competing in the marketplace of ideas. Our notion of freedom of speech has not demanded that the government abstain from such a role, nor have we required government to endorse all viewpoints equally as it sends its messages.<sup>4</sup> In other words, most citizens would likely agree with the courts that the government may send the message “Say no to drugs” without offending the First Amendment and without having to send the alternative message “Say yes to drugs.”<sup>5</sup> Viewpoint neutrality is not usually required of the government when it is sending its own messages.<sup>6</sup>

Hence, when courts examine viewpoint-based restrictions involving governmental property or resources, one distinction makes all the difference—if the speech is the government’s own speech, the viewpoint restrictions are permissible, but if the speech is private speech facilitated by government resources, viewpoint restrictions are generally impermissible. Classifying the speech as either government speech or private speech becomes a crucial question—often *the* crucial question—in deciding these speech cases.

When claims involve the Establishment Clause rather than the Speech Clause, identifying government speech is often just as crucial, although the effects of the identification are reversed. In this sort of claim, someone has alleged that the government’s message constitutes governmental support of, or opposition to, religion, in violation of the Establishment Clause. Although private parties may send their own messages approving or disapproving of religion, the Supreme Court sometimes interprets the Establishment Clause to forbid the government from doing so.<sup>7</sup> So if the

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<sup>3</sup> See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 5–10, 13–15 (1983) (discussing the “government’s increasing influence on and involvement in communications networks”); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380–81, 1384–87 (2001) (identifying the capacities in which government speaks); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983–84, 986–87, 992 (2005) (arguing for greater transparency when government is promoting a particular message).

<sup>4</sup> See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553, 559–61 (2005) (holding that a federal program that finances advertising to promote an agricultural product is government speech); *Velazquez*, 531 U.S. at 541 (“[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . .”); *Rosenberger*, 515 U.S. at 833 (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (noting that the government did not “discriminate[] on the basis of viewpoint when it [chose] to fund a program dedicated to advanc[ing] certain [] goals”).

<sup>5</sup> See *DKT Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 477 F.3d 758, 761 (D.C. Cir. 2007) (“In sponsoring Nancy Reagan’s ‘Just Say No’ anti-drug campaign, the First Amendment did not require the government to sponsor simultaneously a ‘Just Say Yes’ campaign.”).

<sup>6</sup> Governmental messages regarding religion may be an exception to this rule, at least sometimes. See *infra* note 7 and accompanying text.

<sup>7</sup> See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (“By showing a purpose to favor religion, the government ‘sends [an impermissible] message to . . . nonadherents’” (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000))); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 (“[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and

message constitutes government speech rather than private speech, the government may be violating the Establishment Clause.

Identifying government speech becomes more difficult as governments become more and more involved in facilitating private speech, on the one hand, and in sending their own messages, on the other. When a private speaker uses governmental property or support as she sends her message, who is really speaking? How can we tell? The higher the level of governmental support and involvement, the more the speech looks like the government's own speech, particularly because governments now send so many messages of their own, and because this government may have made some affirmative decision to permit this particular speaker to use governmental resources, a decision similar in many respects to the decision to speak. But private speech does not become government speech simply because the government allows the speaker to use governmental resources to get the message out.<sup>8</sup> Judges must distinguish the government's own messages from those of others, particularly in the contexts of Speech Clause claims, in which a finding of government speech is a point in the government's favor, and Establishment Clause claims, in which a finding of government speech is a strike against the government.

A uniform test for identifying government speech in these various contexts seems desirable, but lower courts are struggling mightily to come up with one. A salient example is the set of cases dealing with specialty license plate programs,<sup>9</sup> in which, for an additional fee, a state allows motorists obtaining license plates to choose from a menu of unique designs in lieu of the state's standard plate design.<sup>10</sup> Typically, private

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Exercise Clauses protect.” (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)); *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989) (holding that the Establishment Clause prohibited a county's display of a crèche because by permitting the display under the circumstances, “the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message”).

<sup>8</sup> See *supra* note 2 and accompanying text for examples of courts not allowing the government to deny access to public property or support on the basis of the speaker's viewpoint.

<sup>9</sup> See *Roach v. Stouffer*, 560 F.3d 860, 862, 869–70 (8th Cir. 2009) (holding that Missouri's specialty license plate program violated the First Amendment); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (holding that messages on specialty license plates do not constitute government speech); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965–66 (9th Cir. 2008) (holding that messages conveyed through specialty license plates primarily represent private speech), *cert. denied*, 129 S. Ct. 56 (2008); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376–77 (6th Cir. 2006) (holding that specialty license plates represent government speech for the purposes of the Free Speech Clause); *Henderson v. Stalder*, 407 F.3d 351, 352 (5th Cir. 2005) (finding that the court did not have jurisdiction over a suit over a specialty license plate program that diverted excess charges to organizations endorsed by the legislature); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) (holding that specialty license plates were neither purely government speech nor purely private speech); *Women's Emergency Network v. Bush*, 323 F.3d 937, 943–45 (11th Cir. 2003) (holding that individual residents did not have taxpayer standing to challenge Florida's specialty license plate program under the Establishment Clause).

<sup>10</sup> For a discussion of various states' specialty license plate programs, their general features, and some differences between them, see Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424–41 (2001); Amy Riley

organizations must apply in advance to the state for permission to add their own design to the menu of options. Many states have approved a lengthy menu of choices, but occasionally a state will deny a particular application because of the viewpoint represented by the applicant group or its proposed plate design.<sup>11</sup> If the approved specialty plate designs are viewed as government speech, a viewpoint-based denial can be upheld as a governmental decision not to speak; but if the designs are viewed as private speech using government property, any viewpoint-based denial is presumptively unconstitutional, even though the plates are owned and issued by the government. These cases have been giving federal courts fits over the past decade. Two circuits have refused to decide such cases on the constitutional merits,<sup>12</sup> but the circuits that have addressed the First Amendment arguments have employed widely varying analyses. One circuit has viewed specialty plates as purely government speech,<sup>13</sup> at least two have viewed the plates as private speech,<sup>14</sup> one has viewed the plates

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Lucas, Comment, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971, 2007–09, 2011–13, 2017 (2008).

<sup>11</sup> There is some dispute in some of these cases as to whether the state's denial was driven by an intent to exclude a particular viewpoint or an entire subject matter. If (as the Seventh Circuit has recently concluded with respect to Illinois's specialty plate program) the state's denial is truly the product of a reasonable desire to exclude from specialty plates all points of view related to a particular subject matter, the denial might be construed as viewpoint-neutral and is somewhat more defensible, even if the plates are not deemed to be government speech. *Compare Choose Life*, 547 F.3d at 865–67 (concluding that Illinois's denial of an application for a "Choose Life" license plate was founded in a viewpoint-neutral state policy of refusing to issue plates for all groups expressing opinions on the subject matter of abortion), with *Arizona Life Coal.*, 515 F.3d at 971–72 (concluding that Arizona's denial of an application for a "Choose Life" license plate was founded in a state policy of refusing to issue plates for groups weighing in on the issue of abortion because it was so controversial, but that this fact demonstrated the state's viewpoint discrimination, since the state's statutes did not exclude controversial messages in general or the subject of abortion in particular, and the denial was based on the divisiveness of the proffered viewpoint). This Article, however, focuses on situations in which viewpoint discrimination is present or assumed. See, e.g., *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 623–26 (4th Cir. 2002) (finding viewpoint discrimination where the state disapproved an organization's proposed specialty plate design containing a Confederate flag because of the viewpoint represented by the flag). In such cases, the crucial judicial task usually will be to distinguish government speech from private speech. In other words, courts must determine whether the viewpoint discrimination represents the government's attempt to control its own message or instead to disadvantage a disfavored private viewpoint.

<sup>12</sup> The Eleventh Circuit has dismissed a specialty plate complaint for lack of standing. See *Women's Emergency Network*, 323 F.3d at 940. And the Fifth Circuit has held that the specialty plate fee is a tax and that therefore the federal Tax Injunction Act forbids federal court jurisdiction over specialty plate complaints. See *Henderson*, 407 F.3d at 352.

<sup>13</sup> See *Bredesen*, 441 F.3d at 375–76 (Sixth Circuit) (holding that a "Choose Life" specialty license plate was government speech because the state had "final approval authority over every word used").

<sup>14</sup> See *Roach*, 560 F.3d at 868 (Eighth Circuit) (finding that "under all the circumstances a reasonable and fully informed observer would recognize the message on the 'Choose Life' specialty plate as the message of a private party, not the state"); *Arizona Life Coal.*, 515 F.3d at 968 (Ninth Circuit) (finding that specialty plates are private speech because the state did not "bear[] ultimate responsibility for the content of the speech"); see also *Sons of Confederate Veterans*, 288 F.3d at 621–22 (Fourth Circuit) (finding, in a case decided two years before *Rose*, that specialty plates constituted private speech); *infra* note 17 and accompanying text (noting that the Seventh Circuit has rejected the

as a hybrid of both governmental and private speech, requiring the court to impose a sort of intermediate scrutiny in evaluating viewpoint-based denials of specialty plate applications;<sup>15</sup> and one, claiming that “private-speech rights are implicated” by the plates and denying that the plates are government speech,<sup>16</sup> has applied conventional forum analysis to the plates—as if they are private speech—without saying whether they constitute private speech or some form of hybrid speech.<sup>17</sup> A clarification of the government speech doctrine would surely aid in the uniform resolution of such cases.

On the Establishment Clause side, the identification of government speech can prove just as troublesome. For example, the circuit courts have often been asked to identify government speech in cases involving inanimate displays in city parks. One familiar bone of contention is the nativity scene or crèche erected on public property during the Christmas season.<sup>18</sup> If a nativity scene is displayed on public property under circumstances suggesting that the government itself was “send[ing] an unmistakable message” endorsing Christianity, the display is forbidden by the Establishment Clause.<sup>19</sup> But if such displays are donated or loaned to the government by private organizations, could they be viewed as private speech and thus immunized from Establishment Clause challenges?<sup>20</sup>

Ten Commandments monuments, often donated to state or local government by a private religious or charitable group, represent another familiar type of inanimate display. Some circuit courts have struck down such displays as violations of the Establishment Clause.<sup>21</sup> The U.S.

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contention that specialty plates were government speech and analyzed them using conventional forum analysis as if they constituted private speech, but refused to say whether they constituted private speech or hybrid speech).

<sup>15</sup> At least two of the judges on the Fourth Circuit’s three-judge panel in *Rose* reached this conclusion in separate opinions, although there was no opinion for the court. See *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794–95 (4th Cir. 2004); *id.* at 800 (Luttig, J., concurring in judgment); see also *id.* at 801 (Gregory, J., concurring in judgment) (suggesting that specialty plate programs “have elements of both private *and* government speech”).

<sup>16</sup> *Choose Life*, 547 F.3d at 864 (Seventh Circuit).

<sup>17</sup> *Id.* at 864–67.

<sup>18</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

<sup>19</sup> See *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989); *cf. id.* at 601 (“[B]y prohibiting government endorsement of religion, the Establishment Clause prohibits . . . the government’s lending its support to the communication of a religious organization’s religious message.”).

<sup>20</sup> One circuit has suggested that donated permanent displays in city parks constitute private speech in a public forum. See *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1047 n.2, 1050–52 (10th Cir. 2007), *rev’d*, 129 S. Ct. 1125, 1132–34 (2009) (holding that the placement of a permanent monument in a public park is a form of government speech); *Summum v. City of Ogden*, 297 F.3d 995, 1002, 1004–06 (10th Cir. 2002) (holding that permanent monuments were a nonpublic forum because property was “not by tradition or designation a forum for public communication” (quotations omitted)).

<sup>21</sup> See, e.g., *Adland v. Russ*, 307 F.3d 471, 481–82, 490 (6th Cir. 2002) (holding that the Commonwealth, by displaying a Ten Commandments monument, “emphasize[d] a single religious influence to the exclusion of all other religious and secular influences” in violation of the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 307–08 (7th Cir. 2000) (holding that a Ten Commandments monument on city property improperly advanced or endorsed religion in violation of

Supreme Court and some other circuits have held that governmental display of such monuments is sometimes permissible, but the opinions were not grounded in any assumption that the monuments constituted private speech rather than government speech.<sup>22</sup> Yet the Tenth Circuit held in 2002 that donated monuments of this sort do constitute private speech.<sup>23</sup> Reasoning from that precedent, a competing religious group later convinced the circuit that a city displaying a donated Ten Commandments monument in the city's park is operating a traditional public forum for private speech and must therefore also accept and display the group's own unique donation to the city: a monument to the Seven Aphorisms of Summum.<sup>24</sup> Recently, the U.S. Supreme Court reversed the Tenth Circuit's decision, unanimously holding that donated Ten Commandments monuments constitute government speech.<sup>25</sup> While clarifying the law with respect to certain monuments, however, the Court did not venture a method for identifying government speech in other circumstances.<sup>26</sup>

Lower courts are increasingly required to identify government speech in a wide variety of free speech and religious establishment cases, and the circuits are reaching a wide variety of conclusions about how this ought to be done. The confusion has led some commentators to suggest that the two-category approach itself is the problem. Following the lead of the Fourth Circuit in its most recent specialty plates case, commentators are increasingly calling for an end to the rigidly binary government speech/private speech distinction, claiming that much speech falls somewhere in between and arguing for the creation of a third category of

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the Establishment Clause); *see also* *Staley v. Harris County*, 461 F.3d 504, 514–15 (5th Cir. 2006) (holding that a county monument commemorating a local citizen and located on courthouse grounds violated the Establishment Clause because it contained an open Bible and had been recently refurbished for the purpose of calling attention to the Bible), *vacated en banc as moot and unripe*, 485 F.3d 305 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 647 (2007); *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (holding that the Establishment Clause was violated when the chief justice of the state supreme court erected a Ten Commandments monument, built with private funds, in a state judicial building).

<sup>22</sup> *See* *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (ruling that the display of a Ten Commandments monument on the grounds of the state capitol did not violate the Establishment Clause); *Card v. City of Everett*, 520 F.3d 1009, 1020–21 (9th Cir. 2008) (holding that a city's display of a Ten Commandments monument was permissible because, *inter alia*, "nothing apart from the monument's text suggests a religious motive on the City's part"); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776–78 (8th Cir. 2005) (holding that the city's display of a Ten Commandments monument did not violate the Establishment Clause because the monument made passive use of the Commandments "to acknowledge the role of religion in our Nation's heritage").

<sup>23</sup> *City of Ogden*, 297 F.3d at 1004–06.

<sup>24</sup> *Pleasant Grove City*, 483 F.3d at 1047, 1050–55.

<sup>25</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009); *id.* at 1141 (Souter, J., concurring in judgment). *See infra* notes 299–306 and accompanying text for further discussion of *Pleasant Grove* and the Supreme Court's holding that the government speaks when it accepts, embraces, and communicates a donated message.

<sup>26</sup> *See Pleasant Grove City*, 129 S. Ct. at 1132 ("There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation.").

“hybrid” or “mixed” speech, restrictions on which would qualify for some medium degree of scrutiny or an ad hoc balancing of the competing interests involved.<sup>27</sup>

The hybrid approach is alluring, but in this Article, I will argue that it leads to inconsistent results and that it may insufficiently protect free speech rights; furthermore, I will argue, the hybrid approach is in tension with the whole notion of government speech as developed by the Supreme Court. I will also argue that, while the traditional binary approach is preferable, the tests developed by some circuits to categorize speech within that binary framework are flawed and likewise misstate the law. I believe Supreme Court precedents can be distilled into the notion that government speech arises in one of three basic ways. I will propose this three-factor test as a preferable method of consistently identifying government speech in both expression cases and establishment cases. I do not argue that the Court has formally or intentionally embraced this test—only that the test provides a useful way of understanding what the Court has done and predicting what it will do. My purpose is thus to explain the results in a variety of the Court’s speech and establishment cases, and also, secondarily, to provide a few reasons why the Court’s approach, understood in this way, might be preferable to alternatives.<sup>28</sup>

Part II briefly describes the development of the government speech doctrine by the Supreme Court. Part III discusses one approach used by the Sixth Circuit to identify government speech, an approach that in effect considers a single factor to be determinative. Part IV analyzes a four-pronged test for identifying government speech which has been more commonly used by various circuits. Part V discusses the proposal by a few judges and recent commentators that courts should recognize a third “hybrid” or “mixed” category of speech. Part VI suggests an alternative approach which I believe explains and reconciles the key Supreme Court precedents while also providing a more complete and consistent protection of private speech. Finally, Part VII suggests ways in which this approach might be used in understanding Supreme Court precedents and resolving some current legal controversies in both free speech and establishment contexts.

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<sup>27</sup> For the most extended recent discussion, see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 675–77 (2008). Other recent commentators have also suggested or assumed this approach, albeit without extended consideration of alternatives. See, e.g., Lucas, *supra* note 10, at 2013, 2022; Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 620–21 (2008).

<sup>28</sup> My primary purpose is descriptive. While I do provide a very limited defense of the Court’s approach—partly in the form of a critique of existing alternatives—a fuller normative evaluation must await another article. I likewise save for another day the development of a unifying theory that might explain why the Court sees government speech in each of these three particular situations and not others.

## II. THE ORIGINS OF THE GOVERNMENT SPEECH DOCTRINE

According to accepted wisdom, the government speech doctrine, as articulated by the U.S. Supreme Court, had its genesis in *Rust v. Sullivan*.<sup>29</sup> In *Rust*, federal law prohibited the distribution of certain federal “family planning project[.]” funds to entities that provided abortion counseling or referrals, or which otherwise encouraged abortion.<sup>30</sup> The Court rejected the claim that the government had selectively withheld funds from a handful of private speakers due to its disfavor of their viewpoint; instead, the Court upheld the program as a permissible decision by the federal government about how it would design its own programs and spend its own money.<sup>31</sup> “[A] legislature’s decision not to subsidize the exercise of a fundamental right,” said the Court, “does not infringe the right.”<sup>32</sup> The Court saw the funding limitation as a decision about how to use limited subsidy resources—not as discrimination against a disfavored viewpoint, but as the inevitable result of defining the scope and limits of a governmental spending program.<sup>33</sup>

The Court itself seems to have accepted the common view that the government speech doctrine originated in its opinion in *Rust*. Ten years after *Rust*, the Court described the case’s implications as follows:

The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors . . . amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or instances, like *Rust*, in which the government “used private speakers to transmit specific information pertaining to its own program.”<sup>34</sup>

Lower courts have widely adopted this understanding of *Rust* as a leading case on the government speech doctrine—or at least have noted that the Court has done so.<sup>35</sup>

According to this accepted wisdom, the government prevailed in *Rust* because the funded speech at issue, although conveyed by private parties,

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<sup>29</sup> 500 U.S. 173 (1991).

<sup>30</sup> *Id.* at 178–80.

<sup>31</sup> *Id.* at 193–94.

<sup>32</sup> *Id.* at 193 (quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983)).

<sup>33</sup> *Id.* at 194–95.

<sup>34</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

<sup>35</sup> *E.g.*, *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 617–18 (4th Cir. 2002); *Wells v. City & County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001); *see also* *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006) (referring to the Supreme Court’s holding in *Rust* as authority when deciding a government speech doctrine case).

was government speech rather than private speech. The funding rules were part of a larger governmental program to encourage or discourage some private activity—in *Rust*, a program to discourage abortion and to encourage family planning using alternative methods. The funds were allocated so as to ensure that private speakers would “transmit specific information”—the government’s message—in support of the governmental program.<sup>36</sup> The “family planning without abortion” message was the government’s own message, crafted in advance by the government, and the funds at issue were part of a program designed to promote that kind of family planning rather than speech in general;<sup>37</sup> therefore, the government was not required to fund messages by private speakers expressing other viewpoints, conveying other information, or offering other services. The viewpoint restriction could stand.

The government speech doctrine clearly continues in full strength. In a pair of subsequent cases alleging compelled speech by means of a forced subsidy,<sup>38</sup> the Court signaled that the presence of government speech would be determinative.<sup>39</sup> These cases involved the claim that the government had compelled the claimants to pay fees or taxes which were used in part to fund messages with which the claimants disagreed.

In one of the cases, public university students were forced to pay a student activity fee, a portion of which was later distributed to student groups conveying messages that certain students found objectionable.<sup>40</sup> The objecting students claimed they were being compelled to speak, in violation of their First Amendment rights.<sup>41</sup> Although the messages were deemed private speech, the Court upheld the program to the extent that the government’s criteria for distribution were viewpoint-neutral;<sup>42</sup> the Court noted in dicta, however, that if the objectionable messages had constituted government speech, viewpoint neutrality in the distribution might not be required because the government is allowed to tax even dissenting parties to pay for its own speech.<sup>43</sup>

In the other case, decided only four years ago, the Court turned this dictum into law, upholding the disputed tax precisely because the Court

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<sup>36</sup> *Rosenberger*, 515 U.S. at 833.

<sup>37</sup> *See Rust*, 500 U.S. at 178–79 (stating that Congress passed Title X to ensure that funds would only be used for preventive family planning and not for abortion).

<sup>38</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 555–56 (2005); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

<sup>39</sup> A line of compelled speech precedents holds that the First Amendment Speech Clause forbids the government under some circumstances to force private parties to pay a subsidy to support the speech of other private parties with whom the payer disagrees. *E.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233–35 (1977).

<sup>40</sup> *Southworth*, 529 U.S. at 222–27.

<sup>41</sup> *Id.* at 226–27.

<sup>42</sup> *Id.* at 233–34.

<sup>43</sup> *Id.* at 229.

found the funded messages, conveyed by private parties, to be government speech.<sup>44</sup> The federal government had taxed sales and imports of cattle to fund “beef-related projects” such as “promotion and research.”<sup>45</sup> A substantial amount of the money was used to fund beef advertising, including ads containing the familiar slogan “Beef. It’s What’s for Dinner.”<sup>46</sup> Some beef producers did not like the ads and complained that the tax effectively compelled them to speak against their will, in violation of the First Amendment.<sup>47</sup> The Court upheld the tax, however, on the ground that the ads at issue constituted government speech.<sup>48</sup> The Court was able to reach this conclusion because:

The message set out in the beef promotions is from beginning to end the message established by the Federal Government. . . . Congress and the Secretary [of Agriculture] have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary . . . .

Moreover . . . the Secretary exercises final approval authority over every word used in every promotional campaign.<sup>49</sup>

Importantly, the Court said that the finding of government speech would be the same even if a reasonable viewer would not attribute the message to the government.<sup>50</sup>

Meanwhile, in other cases where the government used viewpoint as a criterion for allocating funds, the Court struck down the funding program when it found that the funded messages constituted private speech rather than government speech. In *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>51</sup> a public university required the payment of a student activity fee which was collected in a fund and distributed to student groups conveying various messages.<sup>52</sup> The Court struck down the program upon finding that the government’s criteria for distributing the funds were not viewpoint-neutral and that the messages themselves constituted private speech.<sup>53</sup> The Court distinguished *Rust*—which had also involved criteria that were not viewpoint-neutral—by noting that in *Rust*, the funded

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<sup>44</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553, 560–64 (2005).

<sup>45</sup> *Id.* at 554.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 555–56.

<sup>48</sup> *Id.* at 553, 560–64.

<sup>49</sup> *Id.* at 560–61.

<sup>50</sup> *Id.* at 564 n.7.

<sup>51</sup> 515 U.S. 819 (1995).

<sup>52</sup> *Id.* at 823–25.

<sup>53</sup> *Id.* at 833–35.

messages constituted government speech because “the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program.”<sup>54</sup>

A few years later the Court extended this reasoning in a case involving federal funding for legal services.<sup>55</sup> Federal laws authorized funding for private organizations providing free legal assistance to indigent clients in certain kinds of cases, but denied such funding if the organization made “an effort to amend or otherwise challenge existing welfare law.”<sup>56</sup> The Court struck down the funding limitation, finding that this restriction operated as a denial of funding based on the expressed viewpoint of would-be recipients.<sup>57</sup> The government argued that its funding program was a program of government speech indistinguishable from the one upheld in *Rust*, but the Court found that the program had more in common with the funding program struck down in *Rosenberger*:

[T]he salient point is that, like the program in *Rosenberger*, [this] program was designed to facilitate private speech, not to promote a governmental message. . . . The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.<sup>58</sup>

The Court refused to find that the legal services funding program had created any kind of forum for private expression,<sup>59</sup> but this did not change the outcome. The funding restriction was not a governmental decision about what message it wanted to pay others to send on its behalf, but rather a decision to suppress a disfavored message originating with private speakers:

[I]n the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives. This serves to distinguish [the statute here] from any of the Title X program restrictions upheld in *Rust* . . . .<sup>60</sup>

Thus, the Court in this line of Speech Clause cases has provided some

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<sup>54</sup> *Id.* at 833.

<sup>55</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547–48 (2001).

<sup>56</sup> *Id.* at 536–37.

<sup>57</sup> *Id.* at 547–49.

<sup>58</sup> *Id.* at 542–43.

<sup>59</sup> *See id.* at 544 (“As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense . . . .”); *id.* at 542 (“[T]he LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to ‘encourage a diversity of views’ . . . .” (quoting *Rosenberger*, 515 U.S. at 834)).

<sup>60</sup> *Id.* at 548.

guidance about how to identify government speech. But the guidance has not often been explicitly applied in other contexts, such as Establishment Clause claims, in which the Court needed to distinguish between government speech and private speech. When members of the local clergy deliver prayers at public school graduation exercises,<sup>61</sup> when a private nonprofit group donates a Ten Commandments monument to a state which then displays the monument on the grounds of the state capitol,<sup>62</sup> when a student delivers prayers over a loudspeaker to begin each home game of a public high school's football season<sup>63</sup>—in these and other scenarios evoking Establishment Clause claims, the Court has been called to decide whether a particular religious message is government speech or private speech. For the most part, the Court has not set forth unique rules for identifying government speech in all Establishment Clause cases, nor has it often referenced the government speech doctrine emanating from *Rust* and the other Speech Clause cases. Instead, the approach has been less unified and intentional. The Court has addressed the issue using fluctuating descriptors as it evaluated the unique circumstances of each case: from time to time the Court has expressed concern over the “degree of school [or governmental] involvement” in the message,<sup>64</sup> the degree of governmental “endorsement” of the message,<sup>65</sup> the degree of governmental “entanglement” in the message,<sup>66</sup> the degree to which the government is “lending its support to the communication of a religious organization’s religious message,”<sup>67</sup> and/or the degree to which a “reasonable observer” would attribute the message to the government.<sup>68</sup>

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<sup>61</sup> *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

<sup>62</sup> *Van Orden v. Perry*, 545 U.S. 677, 682 (2005).

<sup>63</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

<sup>64</sup> *Id.* at 305 (quoting *Lee*, 505 U.S. at 590).

<sup>65</sup> See *Santa Fe*, 530 U.S. at 305, 307–08, 315–16 (analyzing the specific facts of the case and holding that the school district’s policy involves both perceived and actual endorsement of student prayer); *County of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989) (citing cases involving governmental “endorsement” of religion and how the Establishment Clause prohibits government from appearing to take a position on religious issues).

<sup>66</sup> See *Santa Fe*, 530 U.S. at 305–06 (noting that petitioner school district “attempted to disentangle itself from the religious messages by developing the two-step student election process”); *Agostini v. Felton*, 521 U.S. 203, 232–34 (1997) (examining whether New York City’s Title I program resulted in an excessive entanglement between church and state).

<sup>67</sup> *County of Allegheny*, 492 U.S. at 601.

<sup>68</sup> See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment); *Santa Fe*, 530 U.S. at 315 (noting that “reasonable observers have reasonable memories” which will cause observers to note the context in which the policy arose); *id.* at 308 (finding that a pregame prayer would “unquestionably” be perceived as “stamped with [the] school’s seal of approval”); see also *County of Allegheny*, 492 U.S. at 593–94 (O’Connor, J., concurring) (“The Establishment Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief . . . .” (emphasis added) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1983))). But see *Pinette*, 515 U.S. at 765–68 (rejecting the contention that the Establishment Clause is violated whenever a reasonable observer might mistake private religious speech for the government’s own speech).

Nevertheless, in freedom of speech cases, lower courts have accepted the *Rust*-inspired government speech doctrine and seem to be aware that when the government has a message to send, such a message need not be viewpoint-neutral, and other messages need not receive governmental support. The difficulty has come in recognizing when the message is the government's message. Accepting (and sometimes expanding) the limited guidance of the Supreme Court regarding the government speech doctrine, lower courts and commentators have advocated varying approaches for identifying government speech.

Some of these approaches, which this Article labels "binary approaches," more closely track the teaching of the Supreme Court's Speech Clause cases by assuming that any particular message must be either government speech or private speech; they then proceed to classify it as one or the other. Other approaches, however, find this binary classification system unnecessarily restrictive and unrealistic; they allow for a third category of "hybrid" or "mixed" speech—unrecognized thus far by the Supreme Court—which carries its own unique implications for judging the powers and duties of government. The binary approaches, in turn, differ from one another on the question of which factors to consider in classifying a message as governmental speech.

### III. THE BINARY APPROACH USING A SINGLE-FACTOR TEST

Like most federal appellate courts that have addressed the issue, the Sixth Circuit has adopted a binary approach to classifying speech: a message may constitute either government speech or private speech, but not both.<sup>69</sup> In one recent case, however, the Sixth Circuit parted ways with most of these other courts when it held that a message constitutes government speech whenever "the government determines an overarching message and retains power to approve every word disseminated at its behest."<sup>70</sup> While this standard might at first appear to encompass two distinct factors—whether "the government determines an overarching message" and whether the government "retains power to approve every word disseminated at its behest"<sup>71</sup>—the Sixth Circuit largely ignored the first of those factors, effectively reducing the test for government speech to

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<sup>69</sup> When invited to recognize a third category of "mixed speech" in a specialty license plate case, as the Fourth Circuit had previously done, the Sixth Circuit refused to do so. See *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376, 380 (6th Cir. 2006).

<sup>70</sup> *Id.* at 375 (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559–67 (2005)). It is currently somewhat unclear whether the Sixth Circuit views this test as controlling in every case. See *Grosjean v. Bommarito*, 302 F. App'x 430, 436 (6th Cir. 2008) (favorably citing *Bredesen's* test, but noting that "the two factors identified in [the Supreme Court case upon which *Bredesen* relied] were not . . . held to be exhaustive," and suggesting in dicta that another relevant factor might be "whether the speech is attributed to a particular private actor").

<sup>71</sup> *Bredesen*, 441 F.3d at 375 (citing *Johanns*, 544 U.S. at 559–67).

a question of how much power the government had to approve or veto the wording and design of the message before it was disseminated.

The case before the court, *ACLU of Tennessee v. Bredesen*,<sup>72</sup> involved specialty license plates.<sup>73</sup> The state of Tennessee had authorized its Department of Safety to issue specialty plates to motorists willing to pay a surcharge, and the menu of available plates was continually expanding; the general rules were that the Department could make a new specialty plate available whenever (1) the legislature authorized the particular plate by name;<sup>74</sup> (2) the state commissioner of revenue approved a design for that plate submitted by a private sponsor;<sup>75</sup> and (3) the state received at least one thousand advance orders for that plate.<sup>76</sup> In routine practice, apparently, when a private organization desired a specialty plate of its own, the organization lobbied the state legislature to introduce and pass a bill authorizing the plate.<sup>77</sup> By the time of the litigation, the state legislature had authorized over one hundred different specialty plates, including a “Choose Life” plate,<sup>78</sup> but had rejected a bill, for which Planned Parenthood lobbied, that would have authorized a “Pro-Choice” plate.<sup>79</sup>

Recognizing that the key question in the case was whether the “Choose Life” message constituted government speech, the Sixth Circuit held that the recent Supreme Court opinion in *Johanns*<sup>80</sup> had established a new standard for identifying government speech, and that this standard was controlling. “*Johanns* stands for the proposition,” said the court, “that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must

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<sup>72</sup> 441 F.3d 370 (6th Cir. 2006).

<sup>73</sup> For a brief description of specialty license plates and the legal issues involved, see *supra* notes 9–17 and accompanying text.

<sup>74</sup> In general, each plate was required to be explicitly listed in a state statute, which of course required that the legislature approve each particular plate; however, the legislature was only approving them in concept (such as “Choose Life plates,” “NASCAR plates,” “Mothers Against Methamphetamine (MAMA) plates,” etc.), usually leaving the particular design to be worked out between the private sponsoring organization and the state commissioner of revenue, who was granted veto power over the design. See TENN. CODE ANN. § 55-4-201 (2009) (outlining requirements of cultural, specialty earmarked, and new specialty earmarked license plates); *id.* § 55-4-202 (providing examples of specialty earmarked license plates); *id.* § 55-4-210 (“The department is authorized to administratively issue personalized plates to qualified applicants.”); *id.* §§ 55-4-305 to 307 (providing legislative authority for “Choose Life plates,” “NASCAR plates,” and “Mothers Against Methamphetamine (MAMA) plates”); *Bredesen*, 441 F.3d at 372 (noting that Tennessee law allows special logotypes on license plates and that the Tennessee legislature authorized the “Choose Life” logotype); *Bredesen*, 354 F. Supp. 2d at 772 (discussing Tennessee law to issue specialty plates).

<sup>75</sup> TENN. CODE ANN. § 55-4-201(b)(4) (2009); *Bredesen*, 354 F. Supp. 2d at 772.

<sup>76</sup> TENN. CODE ANN. § 55-4-201(h)(1) (2009); *Bredesen*, 441 F.3d at 372.

<sup>77</sup> See *Bredesen*, 354 F. Supp. 2d at 773 n.4 (“[P]articipants in the license plate scheme . . . must find legislators willing to sponsor a bill.” (quoting *Henderson v. Stalder*, 265 F. Supp. 2d 699, 717 (E.D. La. 2003))); *Bredesen*, 441 F.3d at 372 (noting that Planned Parenthood unsuccessfully “lobbied for an amendment authorizing a ‘Pro-Choice’ specialty license plate”).

<sup>78</sup> *Bredesen*, 441 F.3d at 372, 376.

<sup>79</sup> *Id.* at 372; *Bredesen*, 354 F. Supp. 2d at 772.

<sup>80</sup> See *supra* notes 44–50 and accompanying text.

be attributed to the government for First Amendment purposes.”<sup>81</sup> After a rather conclusory observation that Tennessee had chosen an “overarching message” in this case because the legislature “spelled out in the statute that these plates would bear the words ‘Choose Life,’”<sup>82</sup> the court spent most of its time on the latter portion of the *Johanns* formulation, arguing that the commissioner’s veto power over plate design meant that the state “retain[ed] power to approve every word disseminated at its behest.”<sup>83</sup> While admitting that motorists’ “voluntary dissemination [of the ‘Choose Life’ message] itself qualifies as expressive conduct,”<sup>84</sup> the court found that the plates themselves contained only government speech and did not constitute any sort of government-created forum for private speech.<sup>85</sup> The court offered the following support for this finding: (1) the Supreme Court once characterized the New Hampshire state motto “‘Live Free or Die’ as ‘the State’s ideological message’” when that motto was embossed on all New Hampshire license plates;<sup>86</sup> (2) *Johanns* and *Rust* show that the government does not necessarily create a speech forum every time it uses private volunteers (or hired hands) to disseminate a governmental message;<sup>87</sup> and (3) finding a forum in cases like this would “render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate,” such as government-produced “Register and Vote” pins worn by private citizens, or postage stamps that say “Win the War.”<sup>88</sup>

The court’s reasons for refusing to find a forum seem weak. In *Wooley v. Maynard*,<sup>89</sup> the New Hampshire “Live Free or Die” case, “Live Free or Die” was the *state motto*, and it was embossed on *all standard-issue* plates. No motorists paid extra for them or selected that message over others; in fact, the state *required* all noncommercial vehicles to bear that message on their license plates.<sup>90</sup> This message was not one of over one hundred state-allowed options for motorists, as in *Bredesen*;<sup>91</sup> rather, it was not optional at all. Under such circumstances, it is easy to conclude that the message “Live Free or Die,” which was, after all, the state motto, was government speech rather than private speech, and that no speech forum had been

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<sup>81</sup> *Bredesen*, 441 F.3d at 375 (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559–67 (2005)).

<sup>82</sup> *Id.* at 376.

<sup>83</sup> *Id.* at 375.

<sup>84</sup> *Id.* at 377.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 377–78 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)); see *Wooley*, 430 U.S. at 717 (holding that New Hampshire could not constitutionally prosecute car owners for obscuring the motto “Live Free or Die” on their license plates).

<sup>87</sup> *Bredesen*, 441 F.3d at 378.

<sup>88</sup> *Id.* at 378–79.

<sup>89</sup> 430 U.S. 705 (1977).

<sup>90</sup> *Id.* at 707.

<sup>91</sup> See *Bredesen*, 441 F.3d at 376.

created simply by embossing all standard-issue license plates with this message. But that says very little about whether a message represented in one design appearing on a long menu of various specialty plate designs—a message that will never be communicated at all unless a motorist chooses to pay for it—constitutes private speech, or whether such a specialty plate program creates a forum of some kind for private speakers. *Wooley* is simply inapposite. Moreover, while *Johanns* and *Rust* may indeed suggest that the government *can* use private parties—even volunteers—to disseminate a message without creating a forum, *Johanns* and *Rust* do *not* show that the government’s use of private volunteers *precludes* a finding that the government program is a forum—only that the use of volunteers by itself does not *make* it so. In other words, and perhaps unsurprisingly, the volunteer element is not alone determinative of whether a forum has been created, although every forum will include volunteers conveying messages. But of course, there are several other elements common to specialty plate programs, elements not present in the governmental programs at issue in *Johanns*, *Rust*, or *Wooley*, which might indicate the presence of a speech forum.<sup>92</sup>

These considerations suggest serious logical flaws in each of the court’s first two reasons for refusing to find a forum. One suspects, then, that the driving force behind the Sixth Circuit’s rejection of forum analysis may have been its third reason: the fear of a slippery slope. This fear alone, however, is a rather unsatisfying basis for denying that the government had established a forum. Moreover, the court’s concerns seem overblown, since government pins, stamps, and the like do not present many indicators of a speech forum and could be readily distinguished from specialty plates on that basis.<sup>93</sup>

Of course, the Sixth Circuit had to dispose of the forum argument in order to stand by its prior conclusion that the message “Choose Life” constituted purely government speech.<sup>94</sup> In reaching that prior conclusion, the court assumed *Johanns* had changed the law, or at least clarified it,

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<sup>92</sup> These elements might include, *inter alia*, the fact that the government widely invites (explicitly or implicitly) private parties endorsing various unknown messages to apply for governmental permission to use governmental property in sending those messages, the fact that the government does not tax anyone or spend its own money to promote any particular message, the fact that the impulse to communicate each message originates outside the halls of government, and the fact that the messages actually sent under the program are numerous, varied, and sometimes (at least somewhat) contradictory. *Id.* at 381–85 (Martin, J., concurring in part and dissenting in part) (reasoning that the program allows for a variety of views and is designed to promote private speech rather than to convey a government message).

<sup>93</sup> For example, it seems likely that messages appearing on government pins and stamps—messages such as “Win the War” and “Register and Vote”—originated with the government, not private applicants. One also suspects that it was not the government’s historic practice to allow dozens (or hundreds) of private organizations to emblazon their own unique advertising on the government’s pins and stamps.

<sup>94</sup> See *supra* notes 80–88 and accompanying text.

with respect to all sorts of speech.<sup>95</sup> As understood by the Sixth Circuit, the *Johanns* test for government speech, regardless of the content or context of the message, required a simple determination of whether the government had (1) “determine[d] an overarching message” and (2) “retain[ed] power to approve every word disseminated at its behest.”<sup>96</sup> But the Sixth Circuit never seriously applied the first prong. The court found, without further elaboration, that the first prong was satisfied because “Tennessee set the overall message and the specific message when it spelled out in the statute that these plates would bear the words ‘Choose Life.’”<sup>97</sup> Aside from the paucity of the court’s discussion, there are at least two problems with this analysis under the first prong, suggesting that the first prong was effectively meaningless as applied.

First, the court inexplicably refused to consider the purpose or message of the specialty plate program as a whole; instead, it considered only the message reflected in the short statutory provision authorizing “Choose Life” plates.<sup>98</sup> The “Choose Life” message, reflected in this single statute, was only one of many messages disseminated by the state’s specialty plate program.<sup>99</sup> In *Johanns*, the Supreme Court found that the government had “determine[d] an overarching message”<sup>100</sup> only after the Court had considered the program of which the message was a part—and there was no indication in those cases that the larger government program involved numerous messages on varied topics. In *Rust*, the relevant program was considered to be “the Title X program,” which was designed “to encourage family planning” without encouraging abortions,<sup>101</sup> the Title X program funded services and messages consistent with this unitary purpose.<sup>102</sup> In *Johanns*, the relevant program was a tax-and-spend scheme designed to “promot[e] the marketing and consumption of ‘beef and beef products,’”<sup>103</sup> and some program funds were spent on sending messages consistent with

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<sup>95</sup> See *Bredesen*, 441 F.3d at 380 (rejecting the Fourth Circuit’s approach to specialty plates because, inter alia, “the Fourth Circuit opinions . . . are in tension with the intervening case of *Johanns*. *Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes. [The Fourth Circuit] relied instead on a pre-*Johanns* four-factor test . . .”).

<sup>96</sup> See *supra* note 70 and accompanying text.

<sup>97</sup> *Bredesen*, 441 F.3d at 376.

<sup>98</sup> See *id.* at 375–77 (analyzing the questions about government speech and the existence of a forum by reference only to the portion of the Tennessee Code authorizing “Choose Life” license plates, not other statutes authorizing other specialty license plates).

<sup>99</sup> See *supra* notes 74–79 and accompanying text (discussing the numerous types of specialty plates and how the number of specialty plates was continually expanding).

<sup>100</sup> See *Bredesen*, 441 F.3d at 375 (discussing the Supreme Court’s holding in *Johanns*).

<sup>101</sup> *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

<sup>102</sup> *Id.* at 179–80, 192–93.

<sup>103</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (quoting The Beef Promotion and Research Act of 1985, Pub. L. No. 99–198, § 2, 99 Stat. 1597, 1598 (1985) (codified as amended at 7 U.S.C. § 2901(b))).

this purpose.<sup>104</sup> In *Bredesen*, however, the “Choose Life” message was not sent as part of some state program designed to encourage adoptions or discourage abortions; rather, it was sent as part of a specialty license plate program—and over one hundred different messages, on various topics, were sent under the auspices of that program.<sup>105</sup> Yet the Sixth Circuit refused to take account of that program in deciding whether the government had crafted an “overarching message,” or in defining the message itself.<sup>106</sup> Judging the government’s purpose or message by reference to the “Choose Life” statute, in isolation, ignores the governmental program of which that message was a part: it ignores the governmental actions and operational context which made such statutes and messages possible.

Second, in finding that the government had “determine[d] an overarching message” by authorizing “Choose Life” plates, the Sixth Circuit ignored the true origins of the message, instead resting its finding of governmental “determin[ation]” on the mere evidence that the state legislature had passed a statute approving dissemination of a message by private parties willing to pay.<sup>107</sup> This obscures the reality that the message “Choose Life” originated, not with the state legislature, but with one or more private sector organizations that lobbied for this particular message and stood to benefit directly from its dissemination.<sup>108</sup> This certainly was not the case in *Rust*. And in *Johanns*, while some associations of beef producers may have lobbied for the establishment of a pro-beef program in general terms, the messages themselves were crafted only after the government had established the program, and those producers’ ties to those messages were quite indirect.<sup>109</sup> Unlike the federal government in *Rust* and

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<sup>104</sup> *Id.* at 553–55.

<sup>105</sup> See *supra* notes 74–79 and accompanying text (explicating the conditions under which Tennessee could authorize a new specialty plate).

<sup>106</sup> See *supra* note 98 and accompanying text.

<sup>107</sup> *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006).

<sup>108</sup> In Tennessee, the “principal direct financial beneficiary of the ‘Choose Life’ license plate plan” was a nonprofit organization called New Life Resources, Inc., which filed a successful motion to intervene in the *Bredesen* case. *ACLU of Tenn. v. Bredesen*, 354 F. Supp. 2d 770, 772 (M.D. Tenn. 2004). As of late 2009, twenty-one states offered “Choose Life” specialty plates, and all but one of these states directed funds from the specialty plate purchase to private organizations; in the remaining state, purchasers of the “Choose Life” plate were allowed an opportunity to contribute to such organizations at the time of purchase. Guttmacher Institute, *State Policies in Brief: “Choose Life” License Plates* (Dec. 1, 2009), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_CLLP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_CLLP.pdf); see also *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 614 (4th Cir. 2002) (finding that, in a Virginia specialty plate program in which “plates must be specifically authorized by statute,” the ordinary practice was that “a group or organization that would like to have a special license plate made available to its members contacts a member of the General Assembly to request that a bill be introduced which, if enacted, would authorize the issuance of a special plate”).

<sup>109</sup> Most importantly, producers did not receive a monetary payment every time the ads ran, or every time a consumer chose to display the message “Beef. It’s What’s for Dinner.” Moreover, only a select few producers—some of whom were chosen by the government—participated in designing the

in *Johanns*, the Tennessee government “determine[d] an overarching message” of “Choose Life” (among many others) only *after* that *exact* message had already been “determine[d]” and proposed to the government by one or more private organizations, who hoped to gain the government’s approval of their fundraising plan.<sup>110</sup> Thus, Tennessee’s involvement could reasonably be characterized as the mere perfunctory approval of a message presented to the state from the private sector. Arguably, this is not what the Supreme Court had in mind in *Johanns* when it characterized government speech by noting that “from beginning to end [it is] the message established by the Federal Government.”<sup>111</sup>

These problems with the Sixth Circuit’s approach suggest that the court largely ignored the governmental determination of the message, and allowed the second prong of its *Johanns* formulation, regarding governmental veto power over the final wording, to dictate the classification of this speech as government speech. Thus, the Sixth Circuit’s method of identifying government speech in *Bredesen* represents a binary approach, using what is in essence a single-factor test. The court determined that there were two possibilities here—the message was either government speech, or private speech—and then the court considered only one factor in making the classification: did the government retain power to approve the final wording of the message?

Indeed, this determinative prong—whether the government “retain[ed] power to approve every word disseminated at its behest”—did, in isolation, point in the direction of government speech. Like the federal government in *Johanns*, the Tennessee government (or its agents) held veto power to approve or disapprove the final wording and design of the “Choose Life” message in advance of dissemination.<sup>112</sup> And this factor, in those cases where it is combined with the sort of pervasive governmental involvement present in *Johanns*,<sup>113</sup> makes the message look like government speech. Without that pervasive governmental involvement, however—involvement which was not present in *Bredesen*—governmental veto power over the final wording of a message could simply be evidence of prior restraint or

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message; indeed, some producers and producer associations did not like the ads. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553–56 (2005). And while many of the ads did say “Funded by America’s Beef Producers,” no preexisting private entity was explicitly named in the ads, as they are on many specialty plates. *Id.* at 555. See, e.g., TENN. CODE ANN. § 55-4-307 (2008) (Mothers Against Methamphetamine plates); *id.* § 55-4-311 (Tennessee Performing Arts Center plates).

<sup>110</sup> *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006); see *supra* 74–79 and accompanying text (noting that by the time of the litigation, the legislature already authorized over 100 specialty plates, one of which was “Choose Life”).

<sup>111</sup> *Johanns*, 544 U.S. at 560–61.

<sup>112</sup> See *ACLU of Tenn. v. Bredesen*, 354 F. Supp. 2d 770, 772 (M.D. Tenn. 2004) (“The plate is effectively designed by its private sponsor, New Life Resources, Inc., and approved by the State.”).

<sup>113</sup> See *supra* notes 44–50, 103–104, 109, and accompanying text (detailing the extent to which the government was involved in the messaging of the program).

ensorship in violation of the Speech Clause.<sup>114</sup>

This is the central problem with identifying government speech solely by reference to whether the government exercised veto power over the message. In contexts where the government did *not* come up with the idea of reaching an audience with this particular message, and instead merely came up with the idea of granting licenses for the private originators of approved messages to express those messages on government property, any such “approved” message looks most unlike the government speech present in *Rust* and *Johanns*. In fact, the message looks like private speech, and the licensing scheme like a government-created forum for speech. Under such circumstances, the additional fact that the government held veto power over the message’s final wording seems to indicate censorship of private speech, not editorial control of the government’s own speech. Surely, evidence that the government exercised editorial control over a private speaker’s message in advance of dissemination should not, by itself, convert otherwise private speech into government speech and convince judges that a forum never existed. This is especially easy to see if we imagine the Sixth Circuit applying its approach in other speech contexts, such as speech in city parks or other traditional public forums.

#### IV. THE BINARY APPROACH USING THE FOUR-PRONGED TEST

Like the Sixth Circuit, most of the other circuits addressing government speech issues have used a binary approach—that is, they have assumed that any given message must be either government speech or private speech—but they do not adopt the Sixth Circuit’s single-pronged classification test that prioritizes government approval of the final wording. Instead, most of them have identified government speech by using some version of a four-pronged test, originally enunciated as such by the Tenth Circuit.<sup>115</sup>

##### A. *The Tenth Circuit Formulates the Four-Pronged Test*

According to the Tenth Circuit’s formulation, when classifying a message as either government speech or private speech, the four factors to be considered are (1) whether the central purpose of the governmental program facilitating the message is to promote private views; (2) who exercises editorial control over the content of the message; (3) who is the

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<sup>114</sup> At least one federal court has reached a similar conclusion. See *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 512 F. Supp. 2d 424, 436 (S.D.W. Va. 2007) (finding that an inquiry into the degree of a state’s editorial control “confuses rather than clarifies the analysis” in cases where the central purpose of the government program at issue was not to disseminate a governmental message).

<sup>115</sup> See *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001) (outlining the four prongs of the test).

literal speaker of the message; and (4) who bears ultimate responsibility for the content of the message.<sup>116</sup> The Tenth Circuit claimed to draw the four-pronged test from principles articulated in an Eighth Circuit opinion involving donor recognitions aired on National Public Radio and, to a lesser extent, from principles in a Ninth Circuit opinion involving a public school teacher's postings on a school bulletin board.<sup>117</sup> The court noted that the Eighth Circuit had alluded to such considerations in finding that donor acknowledgements, read on the air by employees of a local public radio station during the station's broadcast of National Public Radio's "All Things Considered" program, constituted government speech, and that therefore the station could exclude particular would-be donors and their messages based on viewpoint.<sup>118</sup> And the Ninth Circuit had used somewhat similar considerations to conclude that where a public school had created a bulletin board for the purpose of supporting Gay and Lesbian Awareness Month, postings on that board by faculty or staff members constituted government speech and need not be viewpoint-neutral or represent a variety of views on the subject.<sup>119</sup>

The Tenth Circuit used the four-pronged test to evaluate a city's holiday display. In *Wells v. City and County of Denver*, the city and county governments erected on the steps of a government building a display including "a creche, tin soldiers, Christmas trees, . . . an array of lights, . . . a shed containing Santa Claus and his elves," and other decorations,<sup>120</sup> all of which were owned and maintained by the government.<sup>121</sup> Importantly, the city had built a large sign, which it erected as a part of the display, containing the message "Happy Holidays from the Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building,"<sup>122</sup> and then listing six corporate sponsors.<sup>123</sup> A private organization, the Freedom from Religion Foundation, asked permission to have its own "Winter Solstice" sign erected within the display, but the government would not agree.<sup>124</sup> The Foundation claimed that the "plain language of the [city's] sign" indicated that the display as a whole was speech by the Keep the Lights Foundation and the other private sponsors, rather than government speech, and that the Freedom from Religion Foundation should have the right to have its

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<sup>116</sup> *Id.*

<sup>117</sup> See *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011–12 (9th Cir. 2000); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000); see also *Wells*, 257 F.3d at 1141 (citing *Downs*, 228 F.3d at 1011–12).

<sup>118</sup> *Knights*, 203 F.3d at 1087–93.

<sup>119</sup> *Downs*, 228 F.3d at 1005–07, 1011–12.

<sup>120</sup> *Wells*, 257 F.3d at 1137.

<sup>121</sup> *Id.* at 1139.

<sup>122</sup> *Id.* at 1137.

<sup>123</sup> *Id.* at 1140 n.4.

<sup>124</sup> *Id.* at 1137–38.

message included.<sup>125</sup> The court, however, applied the four-pronged test and found that the display, including the sign, constituted government speech.<sup>126</sup>

In applying the first prong—asking whether the central purpose of the governmental program facilitating the message is to promote private views—the court inexplicably focused on the “purpose of the sign” rather than the purpose of any possible governmental program, such as the current year’s display or the “program” of erecting holiday displays.<sup>127</sup> In this case, however, the variation probably did not affect the court’s conclusion; the court found that the sign’s purpose had nothing to do with promoting private views, and the display “program” as a whole seems even less connected to private messages than the sign alone.<sup>128</sup> In determining that the sign was not intended to promote private views or messages, the court pointed to “the City’s complete control over the sign’s construction, message, and placement,” along with a government official’s testimony (which the lower court had credited, despite the sign’s actual wording) that the sign’s purpose was to express the government’s thanks to the sponsors.<sup>129</sup> As to the second and third prongs, the court found that the government exercised editorial control over the content of the message and also was the literal speaker because “the City built, paid for, and erected the sign.”<sup>130</sup> Finally, applying the fourth prong of the test, the court found that the government bore ultimate responsibility for the content of the display as well as the sign, since the government had provided security and a fence for the display and was in fact defending the display in this litigation.<sup>131</sup> The court refused to add to the test a fifth factor suggested by the dissent—“who the listener believes to be the speaker”—but argued that even if this were one relevant factor, an informed and reasonable observer would conclude under all the circumstances that the display was government speech.<sup>132</sup>

Since *Wells* was decided, other circuits have adopted its four-pronged test in deciding whether to classify a message as government speech. Several of these cases have involved specialty license plates.

#### B. *The Fourth Circuit Adopts the Four-Pronged Test*

The earliest of these specialty license plate cases was a Fourth Circuit case in which Virginia had approved a specialty plate for the Sons of

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<sup>125</sup> *Id.* at 1140.

<sup>126</sup> *Id.* at 1142–43.

<sup>127</sup> *See id.* at 1141–42 (discussing the purpose of the sign).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1142.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1142–43.

Confederate Veterans (“SCV”) organization but refused to emboss the plates with the organization’s logo, which included the Confederate flag.<sup>133</sup> Although the state routinely approved logos for other organizations’ plates, it was apparently unwilling to allow the Confederate flag to appear on license plates because of the message the flag conveys.<sup>134</sup> SCV objected, claiming viewpoint discrimination in violation of the First Amendment’s Speech Clause.<sup>135</sup> The Fourth Circuit panel unanimously held that the messages on Virginia’s specialty plates constituted private speech, not government speech.<sup>136</sup> While noting that the four-pronged test might not “constitute an exhaustive or always-applicable list,” the court applied the test anyway and found that all four prongs indicated private speech rather than government speech.<sup>137</sup> Under the first prong the court examined the “‘purpose’ of the special plate program” and found that the purpose was to generate revenue for the state while allowing “the private expression of various views.”<sup>138</sup> The court found under the second prong that editorial control over the content of specialty plate messages rested, as a practical matter, with the private organizations associated with each plate; whatever legal power the state had to design or control content was rarely if ever exercised until this case.<sup>139</sup> The court discussed the third and fourth prongs together in a relatively truncated analysis of who is literally speaking on a specialty plate and who bears ultimate responsibility for those messages. After confessing that neither prong suggested a clear outcome in the context of specialty plates,<sup>140</sup> the court progressed to the rather unremarkable observations that while the government owned the plates at all times, the plates were mounted on private vehicles, and the Supreme Court had suggested in *Wooley v. Maynard* that “license plates . . . implicate private speech interests”; from these observations, the court concluded that the third and fourth prongs, like the first and second,

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<sup>133</sup> *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 613 (4th Cir. 2002).

<sup>134</sup> *See id.* at 623 (“Although the logo restriction itself makes no reference to the Confederate flag . . . it was the inclusion of the Confederate flag in the SCV’s logo that led to the prohibition against the use of the logo on the SCV’s special license plate.”); *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 946 (W.D. Va. 2001) (“[T]he motivation behind the Commonwealth’s ban of logos or emblems was to avoid controversy by preventing Plaintiffs from designing a plate that displays the Confederate battle flag. Out of hundreds of specialty plates in existence, only that bearing the Sons’ logo is targeted.”); Corbin, *supra* note 27, at 621 (“[T]he Virginia legislature probably did not want the divisive image of the Confederate flag linked to the State.”).

<sup>135</sup> *Sons of Confederate Veterans*, 288 F.3d at 622.

<sup>136</sup> *Id.* at 621.

<sup>137</sup> *Id.* at 619–21.

<sup>138</sup> *Id.* at 619.

<sup>139</sup> *Id.* at 621.

<sup>140</sup> *Id.* (“The ‘literal’ speaker here might be said to be the license plate itself . . . and who bears ‘ultimate responsibility’ for the speech is unclear.”).

indicated private speech rather than government speech.<sup>141</sup>

Although the Supreme Court has never adopted the four-pronged test for identifying government speech, former Justice Sandra Day O'Connor has very recently applied it in a unanimous opinion she wrote while sitting by designation on a Fourth Circuit panel, thus demonstrating the Fourth Circuit's application of the four-pronged test outside the specialty plate context.<sup>142</sup> Importantly, the court did not recognize the existence of any third category of "mixed" or "hybrid" speech, but once again assumed a binary classification scheme, under which speech was either government speech or private speech.<sup>143</sup> In this case, a city council, which traditionally had begun each of its meetings with an opening prayer offered by a council member, implemented a policy requiring all such prayers to be "nondenominational."<sup>144</sup> One of the council members claimed that the new policy violated several of his First Amendment rights, including freedom of speech.<sup>145</sup> The court rejected this claim, however, on the ground that the prayers constituted government speech rather than private speech. Applying the four-pronged test, the court was first required to determine the purpose of the program in which the speech occurred. The relevant "program," according to the court, was not one particular prayer or one speaker's prayers, but rather the policy of having council members offer prayers at council meetings.<sup>146</sup> As to that program, the court readily concluded that the purpose was governmental because the meetings themselves served a governmental purpose and the prayers were listed on the agenda as an "official part" of every meeting; moreover, the content of the prayers usually included calls for the council to be granted wisdom and guidance as they performed their official duties.<sup>147</sup> The court analyzed the second and third prongs together, concluding that the new policy itself evidenced that the government exercised "substantial editorial control" over the prayers and concluding that the government was the literal

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<sup>141</sup> *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). *Wooley*, of course, did not involve specialty plates; the case involved a motorist's claim that a state motto, embossed on all standard-issue plates, was a form of compelled speech as to those motorists who were required to purchase and display the plates. See *supra* notes 89–91 and accompanying text (discussing the Court's decision in *Wooley*).

<sup>142</sup> *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 354 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 909 (2009).

<sup>143</sup> *Id.* at 354–55. Justice O'Connor's opinion for the court cited *Sons of Confederate Veterans* but ignored *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004). *Rose* was an intervening specialty plate case in which a Fourth Circuit panel had applied the four-pronged test but had suggested, in at least two of the three separate opinions, that the test showed that messages on specialty plates constitute neither purely government speech nor purely private speech, and thus fit into a putative third category called "hybrid" speech. *Planned Parenthood of S.C.*, 361 F.3d at 792–93, 800–01. For a discussion of *Rose*, see *infra* notes 215–216, 228–248, and accompanying text.

<sup>144</sup> *Turner*, 534 F.3d at 353–54.

<sup>145</sup> *Id.* at 354.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

speaker because anyone offering such a prayer was only allowed to speak “by virtue of his role as a Council member.”<sup>148</sup> The most difficult question to answer, said the court, was the fourth prong question of who bears ultimate responsibility for the content of the message.<sup>149</sup> The court noted that the council members who offered prayers did “take some personal responsibility for their [council] prayers.”<sup>150</sup> But without pursuing this analysis further or reaching an explicit conclusion under the fourth prong, the court concluded that on the whole, “given the focus of the prayers on government business . . . we agree with the District Court that the prayers at issue are government speech.”<sup>151</sup>

### C. *The Ninth Circuit Adopts the Four-Pronged Test*

Quite recently, the Ninth Circuit was called to distinguish government speech from private speech in the specialty plate context, and it too assumed a binary approach and applied the four-pronged test.<sup>152</sup> As in the *Bredesen* case,<sup>153</sup> “Choose Life” plates were at issue here; but in this case, rather than disallowing pro-choice plates, the state of Arizona disallowed “Choose Life” plates.<sup>154</sup> Arizona had not authorized any kind of pro-choice plates, either, although no evidence showed that any group had requested them.<sup>155</sup> The state government contended that it denied the application for “Choose Life” plates because it wished to keep all messages about abortion and abortion rights off of specialty plates.<sup>156</sup> The government further contended that such a restriction was permissible because any messages on specialty plates (or any other license plates) were government speech and, in the alternative, that the restriction was a reasonable, viewpoint-neutral limitation on the use of the specialty plate forum.<sup>157</sup> Applying the four-pronged test, the Ninth Circuit panel unanimously found that messages on specialty plates constituted private

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<sup>148</sup> *Id.* at 354–55.

<sup>149</sup> *Id.* at 355.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* The court provided additional support for this conclusion by citing *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 279, 288 (4th Cir. 2005) (holding that similar prayers at county board meetings, when offered by members of the local clergy selected by the board, constituted government speech). Curiously, the *Simpson* case did not mention or apply the four-pronged test adopted earlier in *Sons of Confederate Veterans*, nor did it acknowledge the existence of a third, “hybrid” category of speech, as had been suggested by various opinions in *Rose*. See *supra* note 143 (demonstrating that two of the three separate opinions suggested that the four-pronged test showed that speech on specialty plates was neither purely private nor purely governmental).

<sup>152</sup> *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965–68 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008).

<sup>153</sup> See *supra* notes 69–88 and accompanying text (discussing the *Bredesen* case, in which the court found “Choose Life” specialty plates to contain purely government speech).

<sup>154</sup> *Ariz. Life Coal.*, 515 F.3d at 960–62.

<sup>155</sup> *Id.* at 961, 971.

<sup>156</sup> *Id.* at 972.

<sup>157</sup> *Id.* at 965, 971.

speech,<sup>158</sup> and then went on to conclude that the state's exclusion of all viewpoints about abortion and abortion rights was not a viewpoint-neutral restriction.<sup>159</sup>

In applying the first prong of the government speech test, the court analyzed neither the purpose of all license plates nor the purpose of a single specialty plate design, but the purpose of the "specialty license plate program as a whole."<sup>160</sup> The court found the purpose of that program to be "revenue raising"<sup>161</sup> and also "providing a forum in which philanthropic organizations . . . can exercise their First Amendment rights in the hopes of raising money to support their cause."<sup>162</sup> On the second prong's question of editorial control, the court again found for the private organization, noting that "the idea of a 'Choose Life' license plate originated with Life Coalition," who also "determined the substantive content of their message," despite the state's authority to set "guidelines for gaining access to the license plate forum."<sup>163</sup> Regarding the third prong, the court found that the evidence, while somewhat conflicting, predominately favored classifying private parties as the literal speakers, despite the government's ownership of the plates; the court drew on *Wooley* for its primary support.<sup>164</sup> And the court concluded under the fourth prong that private organizations bore ultimate responsibility for the message, since their organization's motto and name would appear on the plates and the program placed the "burden . . . on the nonprofit organization" to "take the affirmative step of submitting an application" before any message would be authorized or communicated.<sup>165</sup> Thus each of the prongs, according to the court, supported a finding of private speech.

#### D. *The Seventh Circuit Joins In—Or Does It?*

The Seventh Circuit claimed to have employed the four-pronged test—albeit in a truncated formulation—in a similar specialty plate case decided at the end of 2008, in which the state of Illinois disallowed a private organization's application for "Choose Life" plates.<sup>166</sup> Considering and then rejecting the Sixth Circuit's approach in *Bredesen*,<sup>167</sup> the Seventh Circuit found:

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<sup>158</sup> *Id.* at 965–68.

<sup>159</sup> *Id.* at 972.

<sup>160</sup> *Id.* at 965 (emphasis omitted).

<sup>161</sup> *Id.* at 966.

<sup>162</sup> *Id.* at 965.

<sup>163</sup> *Id.* at 966.

<sup>164</sup> *Id.* at 967.

<sup>165</sup> *Id.* at 967–68.

<sup>166</sup> *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 855–56 (7th Cir. 2008).

<sup>167</sup> *Id.* at 862–63. For a discussion of *Bredesen*, see *supra* Part III (discussing how the Sixth Circuit held that a message constitutes government speech whenever the government retains the power to approve every word of the message).

[T]he approach of the Fourth and Ninth Circuits [is] more persuasive. Their multi-factor test can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party? Factors bearing on this analysis include, but are not limited to, the degree to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message.<sup>168</sup>

In using this test, the court does not seem to have applied the above factors one by one, so much as generally kept them in mind as it listed a number of characteristics of the specialty plate program, some of which indicated government speech and some private speech.<sup>169</sup> In the end, the court determined only that “there are enough elements of private speech here to rule out the government-speech doctrine.”<sup>170</sup>

In fact, the very language of the Seventh Circuit’s “test” conceals more than it reveals. The “approach of the Fourth and Ninth Circuits,” which the Seventh Circuit purported to adopt, was the four-pronged test; yet the Seventh Circuit refused explicitly to endorse that test.<sup>171</sup> Even more confusingly, after applying its own formulation—a somewhat open-ended “reasonable person” attribution test—the Seventh Circuit framed its conclusion negatively: “[T]here are enough elements of private speech here to rule out the government-speech doctrine; the messages on Illinois specialty license plates are not government speech.”<sup>172</sup> But what *are* they? The court held that “private-speech rights are implicated” by the specialty plate program, but stopped short of saying whether the messages on specialty plates constituted private speech, hybrid speech, or something else entirely.<sup>173</sup> Nevertheless, the court went on to employ forum analysis as if the messages constituted private speech, ultimately deciding that specialty plates were a nonpublic forum<sup>174</sup> and yet upholding the state’s restriction in this case as a reasonable, viewpoint-neutral subject matter limitation within that forum.<sup>175</sup>

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<sup>168</sup> *Choose Life*, 547 F.3d at 863.

<sup>169</sup> *Id.* at 863–64.

<sup>170</sup> *Id.* at 864.

<sup>171</sup> *Id.* at 863.

<sup>172</sup> *Id.* at 863–64.

<sup>173</sup> *Id.* at 864.

<sup>174</sup> *Id.* at 864–65.

<sup>175</sup> *Id.* at 867.

E. *The Eighth Circuit Applies the Four-Pronged Test to Answer “One Key Question”*

Most recently the Eighth Circuit, which the Tenth Circuit credited with originating the four-pronged test, has applied the test in deciding its own specialty plate case involving a state’s refusal to issue “Choose Life” plates.<sup>176</sup> In doing so, however, the court followed the lead of the Seventh Circuit in characterizing its analysis as a mere inquiry into attribution:

Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party. Notwithstanding the Sixth Circuit’s conclusion to the contrary, we now join the Fourth, Seventh and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker [of the message appearing on a specialty plate] to be the organization that sponsors and the vehicle owner who displays the specialty license plate.<sup>177</sup>

But unlike the Seventh Circuit, the Eighth Circuit answered the “one key question” of attribution by applying, explicitly and in order, the elements of the four-pronged test.<sup>178</sup> Beginning with the first prong, the court determined that “[t]he primary purpose of Missouri’s specialty plate program is to allow private organizations to promote their messages and raise money and to allow private individuals to support those organizations and their messages.”<sup>179</sup> Next, the court applied the second prong in pointing out that “[u]nder the Missouri statute, both the state and the sponsoring organization exercise some degree of editorial control over the messages on specialty plates.”<sup>180</sup> Finally, the court applied the third and fourth prongs: after noting that private organizations submitted “a general description of the plate” for approval or rejection by a state legislative committee, and that the plates thus approved were designed by the organization and produced without further input from the state regarding content, the court concluded that “the organizations that sponsor the specialty plates and the vehicle owners who choose to purchase and display them are the literal speakers who bear the ultimate responsibility for the message.”<sup>181</sup>

Then, going beyond the four-pronged test, the court went on to point

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<sup>176</sup> *Roach v. Stouffer*, 560 F.3d 860, 871 (8th Cir. 2009); *see also* *Sumnum v. City of Ogden*, 297 F.3d 995, 1004–05 (10th Cir. 2002) (discussing how the Eighth Circuit developed the test in *Knights*).

<sup>177</sup> *Roach*, 560 F.3d at 867.

<sup>178</sup> *Id.* at 867–68.

<sup>179</sup> *Id.* at 867.

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

<sup>181</sup> *Id.* at 867–68.

out two other factors that would likewise lead a reasonable observer to attribute specialty plate messages to private speakers. The first of these was the sheer number and types of different specialty plates issued by the state: “With more than 200 specialty plates available to Missouri vehicle owners, a reasonable observer could not think that the State of Missouri communicates all of those messages.”<sup>182</sup> The second additional factor was the absence of state compulsion:

While Missouri requires a vehicle to display a license plate, the State does not compel anyone to purchase a specialty plate. . . . The sponsoring organization must apply for the specialty plate, and the vehicle owner must choose to purchase it. Because the “Choose Life” plate is different from the standard Missouri license plate, a reasonable observer would understand that the vehicle owner took the initiative to purchase the specialty plate and is voluntarily communicating his or her own message, not the message of the state.<sup>183</sup>

In the end, based on the four-factor test and the two additional factors, the court was convinced that specialty plate messages constituted private speech. Again departing from the Seventh Circuit’s example, the Eighth Circuit made this conclusion explicit and unequivocal by stating that “the messages communicated on specialty plates are private speech, not government speech.”<sup>184</sup> Without determining what type of speech forum the plates constituted, the court found that Missouri’s specialty plate program was facially unconstitutional because it allowed state officials to exercise viewpoint discrimination, which is forbidden in every type of forum, as they approved or disapproved applications for specialty plates.<sup>185</sup>

#### F. *Difficulties with the Four-Pronged Test*

As the foregoing history demonstrates, recent applications of the four-pronged test raise a few nagging concerns about it, in either its original or modified formulations. First, some of the prongs seem to be unclear, or at least susceptible to varying definitions. The first prong of the test—the central purpose of the program giving rise to the message—provides an example. Although it did not apply the four-pronged test, the Sixth Circuit in *Bredesen* had to consider a factor similar to the first prong as it applied *Johanns*, and held that the relevant “program” was the particular statute

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<sup>182</sup> *Id.* at 868.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 868–70 & n.4.

authorizing “Choose Life” plates;<sup>186</sup> in contrast, the Fourth, Eighth, and Ninth Circuits, applying the first prong of the four-pronged test, considered the relevant “program” to be the specialty license plate program;<sup>187</sup> and the state has sometimes urged that the relevant “program” is the set of all policies regarding license plates.<sup>188</sup> The four-pronged test apparently does not specify which program is the relevant one. Another example of ambiguity can be found in the third prong of the test, requiring courts to determine who is the “literal speaker.”<sup>189</sup> In some speech contexts the term “literal speaker” will no doubt have a clear meaning, but in many of the more troublesome cases, one suspects, it will not. Specialty license plates provide a perfect illustration of the difficulty. Who is the “literal speaker” of the message on a specialty plate: the motorist, who installed the plates and drives the car on which they are displayed; the state, who owns and prints the plates, who regulates their format, and whose name is emblazoned across the top; or the nonprofit organization, who likely designed the plate’s background and whose name, logo, and message are displayed there? Or is the “literal speaker,” as the Fourth Circuit once suggested with a hint of frustration, the “license plate itself”?<sup>190</sup> The words “literal speaker” are not self-defining in such contexts and tend to create more difficulties than they resolve.

A second concern, related to the first, is that some prongs of the four-pronged test seem often to point in multiple directions. The “literal speaker” prong, as noted above, is flawed in this way. As another example, consider the fourth prong: the determination of who bears ultimate responsibility for the content of the message. A number of facts might reasonably bear on that question of “ultimate responsibility,” facts which may often point in different directions. If “ultimate responsibility” is simply a question about attribution by a reasonable or average viewer/listener, we will want to assign “responsibility” to the entity whose name is affixed to the message (if any, and only one, is so affixed);<sup>191</sup> if,

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<sup>186</sup> *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375–77 (6th Cir. 2006); *see also supra* notes 98–106 and accompanying text (discussing the Sixth Circuit’s refusal to conclude that the specialty plate program was the relevant program).

<sup>187</sup> *See Roach*, 560 F.3d at 867; *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 619 (4th Cir. 2002); *supra* notes 138, 160, 179, and accompanying text (discussing the cases that held that the relevant program was the specialty plate program).

<sup>188</sup> *See, e.g., Ariz. Life Coal.*, 515 F.3d at 965.

<sup>189</sup> *Sons of Confederate Veterans*, 288 F.3d at 621.

<sup>190</sup> *Id.*

<sup>191</sup> *See Ariz. Life Coal.*, 515 F.3d at 967 (finding that Life Coalition bore ultimate responsibility for the message, “Life Coalition submitted its motto to be placed on a specialty license plate that would also identify the organization by name”); *see also Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (noting that the entire four-pronged test “can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”).

however, this is also a question about who stands to lose financially if the message falls on deaf ears, that might suggest another entity altogether;<sup>192</sup> if it is also a question of who is liable if the message constitutes a tort or other actionable wrong, that may suggest a third entity;<sup>193</sup> if it is also a question of who paid for the message or provides protection of the message, that might suggest yet other groups.<sup>194</sup>

In light of such ambiguities, it is perhaps unsurprising that reasonable judges can and do disagree on outcomes under the four-pronged test. The Tenth Circuit, for example, which originated the test in its four-part formulation,<sup>195</sup> has recently divided over how to apply the test in the context of a Ten Commandments monument donated to a city by a private nonprofit group and now owned and displayed by the city in a city park. Shortly after the Tenth Circuit announced the four-pronged test in *Wells*,<sup>196</sup> the court applied the test to such a donated monument and concluded that the monument constituted private speech.<sup>197</sup> This determination was adopted by the court, without discussion or application of the four-pronged test, in another case involving a similar monument five years later;<sup>198</sup> Judge McConnell, however, joined by Judge Gorsuch, dissented from a denial of rehearing en banc in that case, arguing that the *Wells* four-factor test showed that such monuments constitute government speech.<sup>199</sup>

The court's decision in that case has now been reversed by the Supreme Court (without any discussion or application of the four-pronged test),<sup>200</sup> but the disagreement among the judges of the Tenth Circuit illustrates some of the ambiguities inherent in the elements of the four-pronged test. Judge McConnell believed that the second and fourth prongs indicated government speech because the government "exercised total 'control' over the monuments . . . [and] bore 'ultimate responsibility' for

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<sup>192</sup> For example, given the facts of *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, 203 F.3d 1085, 1089–90 (8th Cir. 2000), one could argue that NPR's donors bear "ultimate responsibility" for the donor acknowledgements that NPR broadcasts, precisely because it is the donor who stands to win or lose financially based on how favorably the message is received by NPR's listeners.

<sup>193</sup> See *Wells v. City & County of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001) (stating that "this litigation [in which the City is a named defendant] is itself an indication that the City bears the ultimate responsibility for the content of the display").

<sup>194</sup> See *id.* (finding that the City bore "ultimate responsibility" for the message because, inter alia, it provided "security for the display, including a fence to guard against theft and protect citizens from possible electrical hazards, . . . video cameras, . . . motion detectors, . . . and a security guard").

<sup>195</sup> See *supra* notes 115–132 and accompanying text (discussing the four-pronged test).

<sup>196</sup> See *id.*

<sup>197</sup> *Summum v. City of Ogden*, 297 F.3d 995, 1004–06 (10th Cir. 2002).

<sup>198</sup> *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1047 n.2 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009).

<sup>199</sup> *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175–77 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc).

<sup>200</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

the monuments' contents and upkeep."<sup>201</sup> The court had disagreed, holding that the second prong indicated private speech because "the [private donor organization] exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product."<sup>202</sup> And the court thought that while the government might have had "ultimate responsibility" for the content of the monument after it was donated, the other three prongs of the test indicated private speech and outweighed the fourth prong conclusion.<sup>203</sup> In particular, the court thought that the first prong indicated private speech because "the central purpose of the Ten Commandments monument is to advance the views of the [private donor organization] rather than those of the City of Ogden."<sup>204</sup> Judge McConnell did not apply the first prong explicitly, but considering the language of that prong as quoted in *Wells* itself,<sup>205</sup> one could surely object to the court's decision to examine the purpose of the monument rather than the purpose of the "program"—perhaps the city's policy about all the monuments displayed in its parks—which gave rise to the message.<sup>206</sup>

Finally, Judge McConnell seems to have thought "ownership" of the "speech"—a factor not expressly listed in the four-pronged test—should be a determinative factor by itself in cases, like that of the donated monument, where ownership is not in dispute.<sup>207</sup> This approach, however, raises its own questions. First, is "ownership of the speech" demonstrated merely by ownership of the medium through which the speech is expressed (here, the monument and perhaps the park)? If not, what counts as "ownership of the speech," such that we can be certain the city owned the speech here? On the other hand, if ownership of the medium is enough, then *Knights*, the Eighth Circuit case that Judge McConnell said represented a more questionable case of ownership, should have been another easy case of government ownership of the message (and thus government speech), because the government owned the radio station used to communicate the message (and probably the paper upon which the message was written). And specialty license plates would represent another easy case of

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<sup>201</sup> *Pleasant Grove City*, 499 F.3d at 1177 (McConnell, J., dissenting from denial of rehearing en banc).

<sup>202</sup> *City of Ogden*, 297 F.3d at 1004.

<sup>203</sup> *Id.* at 1005–06.

<sup>204</sup> *Id.* at 1004.

<sup>205</sup> See *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001) ("[T]he Eighth Circuit relied on a number of factors: (1) that 'the central purpose of the enhanced underwriting program is not to promote the views of the donors' . . ." (emphasis added) (quoting *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000))).

<sup>206</sup> See, e.g., *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008) (stating that "we must address [the] specialty license plate program as a whole"); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 619 (4th Cir. 2002) (considering entire specialty plate program under first prong analysis).

<sup>207</sup> *Sumnum v. Pleasant Grove City*, 499 F.3d 1170, 1176 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc).

government speech, simply because the government clearly owns the plates. These results seem too easy. Second, and more fundamentally, why should government ownership of the medium, by itself, convert otherwise private speech into government speech? If a city makes microphones available for any speakers who wish to speak in the city park, one would not typically assume that the speech is government speech, although the government clearly owns the media of communication.<sup>208</sup>

Even if each of the four prongs were unambiguous by itself, the disagreement among the Tenth Circuit judges also reminds us that the test as a whole still leaves room for judicial doubt in the case of a “prong split.” How many of the factors must point in the same direction before we can reach a conclusion? Conveniently, and perhaps not entirely by accident, courts most often seem to find that the prongs all point in the same direction,<sup>209</sup> but if the result under one prong is an outlier, do the other three always outweigh it?<sup>210</sup> What if two prongs indicate government speech and two indicate private speech—how are we to break the tie?<sup>211</sup>

These problems with the four-pronged test are largely practical problems of implementation. But a more fundamental flaw might lie in what the test actually measures. Indeed, it is not at all clear that the four-pronged test would lead to a finding of government speech even on the facts of *Rust* itself,<sup>212</sup> which suggests that the test functions rather poorly as

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<sup>208</sup> See also *id.* at 1179 (Tacha, J., responding to dissent from denial of rehearing en banc) (“No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text.”).

<sup>209</sup> See, e.g., *Ariz. Life Coal.*, 515 F.3d at 965–68; *Sons of Confederate Veterans*, 288 F.3d at 619–21; *Wells*, 257 F.3d at 1141–42; *Knights*, 203 F.3d at 1093–94.

<sup>210</sup> See, e.g., *Sumnum v. City of Ogden*, 297 F.3d 995, 1005 (10th Cir. 2002) (explaining that when three of the four prongs indicated private speech, the court resolved “[a]ny doubt” by taking account of “the after-the-fact nature of the [government’s] effort to claim adoption of that speech”); *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 355 (4th Cir. 2008) (finding that a message constituted government speech when three prongs indicated government speech and evidence under fourth prong was equivocal).

<sup>211</sup> Compare *Pleasant Grove City*, 499 F.3d at 1176–77 (McConnell, J., dissenting from denial of rehearing en banc) (arguing that the second and fourth prongs, indicating government speech, would be dispositive by themselves, regardless of the outcome under the first and third prongs), with *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793–94 (4th Cir. 2004) (arguing that when the first and second prongs indicate government speech and third and fourth prongs indicate private speech, a message constitutes “mixed speech” under four-pronged test).

<sup>212</sup> In *Rust*, federal law prohibited the distribution of certain federal “family planning project[ ]” funds to entities that provided abortion counseling or referrals, or which otherwise encouraged abortion. *Rust v. Sullivan*, 500 U.S. 173, 178–80 (1991). Under the second prong, the government surely did not exercise much “editorial control” over any given statement by a doctor or employee of the recipient clinics; private persons were deciding all the details about what to say, except that they were not to speak about abortion. Under the third prong, the “literal speaker” was clearly the private physician or clinic staffer. Under the fourth prong, “ultimate responsibility” for whatever was said about family planning—in the eyes of the law or in the mind of an average listener—arguably rested with the clinic rather than the federal government. The majority of the four prongs thus indicate private speech, not government speech. And the first prong, assessing the “central purpose of the program in which the speech occurred,” might indicate either governmental or private speech, depending on

an estimation of government speech law.

In a way, the shortcomings of the four-pronged test are not surprising. In announcing and applying these factors originally, the Eighth Circuit was focused on evidence that seemed relevant to decide the case before it; the court does not seem to have considered or intended that these factors would be used to identify government speech across a range of cases.<sup>213</sup> But the Supreme Court has never given a very clear test for identifying government speech, so when other circuits were subsequently forced to differentiate government speech from private speech, they latched onto the Eighth Circuit's factors, formulated them into a four-pronged test, and applied that test in a variety of contexts.<sup>214</sup> The move is somewhat understandable; courts obviously prefer to have clear law to apply. But close inspection of the test shows that it is neither "clear" nor the "law" as so far announced by the Supreme Court.

#### V. THE "HYBRID" OR "MIXED" SPEECH APPROACH

Separate from, and perhaps prior to, the question of whether to employ the four-pronged test is the question of whether to adopt a binary approach to classifying speech. Most circuits have embraced such an approach, assuming any given speech is either government speech or private speech. At least one circuit case, however, suggests that speech might be more complex, so that in some situations both governmental and private elements are present and the speech cannot be classified as one or the other.<sup>215</sup> The proposed solution is the recognition of a new category of blended, "hybrid," or "mixed" speech, denoting speech that is simultaneously governmental and private.<sup>216</sup> A few commentators, too, have recently embraced this third category of speech.<sup>217</sup> While some who have adopted this approach favor the four-pronged test for classifying

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whether the "program" is defined as the federal grant program or a particular clinic's program of family planning services. See *supra* note 116 and accompanying text (stating the four prongs of the test).

<sup>213</sup> See *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000); *supra* note 118 and accompanying text; see also *Wells*, 257 F.3d at 1155 (Briscoe, J., dissenting) ("[I]t is not clear whether the court in *Knights of KKK* was creating a test to be applied in all government speech cases, or whether it was identifying the factors that evidenced government speech in that case.").

<sup>214</sup> See *supra* Parts IV.A.–D. (discussing the formulation of the four-pronged test).

<sup>215</sup> See *Rose*, 361 F.3d at 794.

<sup>216</sup> See *id.* at 794 (Michael, J.) (finding specialty license plates to be "mixed speech" which is "neither purely government speech nor purely private speech"); *id.* at 800 (Luttig, J., concurring in judgment) (finding that "speech can indeed be hybrid in character" because "some speech acts constitute both private and government speech"); see also *id.* at 801 (Gregory, J., concurring in judgment) (finding that "license plate programs . . . 'really have elements of both private and government speech'" and that "government speech interests . . . are implicated in the vanity license plate forum" (quoting *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc))).

<sup>217</sup> See *supra* note 27.

speech into one of the three categories,<sup>218</sup> others advocate considering a somewhat different set of factors.<sup>219</sup>

#### A. *Judges Who Have Advocated the “Hybrid” or “Mixed” Speech Approach*

Among federal judges, perhaps the earliest to suggest something like a hybrid speech category was Judge Mary Beck Briscoe of the Tenth Circuit, who asserted as she dissented in *Wells* that “the holiday display is not solely government speech, but contains private speech . . . .”<sup>220</sup> If she had in mind a distinct third category of speech, however, Judge Briscoe did not elaborate on it.

The leader of the judicial charge to recognize explicitly a hybrid speech category has been Michael Luttig, who was at the time sitting on the Fourth Circuit. As early as 2002, in considering a request for rehearing in the *Sons of Confederate Veterans* case dealing with specialty license plates,<sup>221</sup> Judge Luttig wrote separately to assert that while “to this point, the Supreme Court has always held that speech is either private or governmental,” this binary approach was the result of “doctrinal underdevelopment.”<sup>222</sup> Judge Luttig continued:

[A]lthough the doctrine may not have previously recognized such, speech in fact can be, at once, that of a private individual and the government . . . . I believe that, with time, intellectual candor actually will force the Court . . . . to fully recognize this fact doctrinally . . . .

I am [also] convinced that our court in turn will, upon reflection, conclude that at least the particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both. Indeed, as I have thought about the matter, I believe that the speech that appears on the so-called “special” or “vanity” license plate could prove to be the quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable . . . .<sup>223</sup>

Two years later, in the *Rose* case involving specialty plates, Judge Luttig

<sup>218</sup> See, e.g., *Rose*, 361 F.3d at 792–94.

<sup>219</sup> See, e.g., Corbin, *supra* note 27, at 627 (discussing the possibility of a five-prong test).

<sup>220</sup> *Wells v. City & County of Denver*, 257 F.3d 1132, 1154 (10th Cir. 2001) (Briscoe, J., dissenting).

<sup>221</sup> See *supra* notes 133–39 and accompanying text (discussing *Sons of Confederate Veterans*).

<sup>222</sup> *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting denial of rehearing en banc).

<sup>223</sup> *Id.*

continued to defend his conception of hybrid speech—this time bringing one or two other Fourth Circuit judges along with him—but did not further explain the contours or implications of the hybrid speech category.<sup>224</sup>

The significance of recognizing a hybrid speech category depends on how such a category will be used. What legal standards apply to hybrid speech? In *Sons of Confederate Veterans*, Judge Luttig disclaimed any intent “to foretell those limitations here,”<sup>225</sup> but nevertheless opined that viewpoint discrimination by the government should be forbidden as to hybrid speech if three factors were present: (1) “the government has voluntarily opened up for private expression property that the private individual is actually required by the government to display publicly”; (2) the private speech component of the hybrid speech is “significant”; and (3) the government interest is “less than compelling.”<sup>226</sup> Believing all three factors to be present with respect to specialty license plate programs, Judge Luttig agreed that it was unconstitutional for the state to deny, on the basis of viewpoint, an organization’s request to include the Confederate flag in its specialty plate design.<sup>227</sup> Subsequently in *Rose*, Judge Luttig did not take any further steps in developing a standard to apply to hybrid speech, instead simply citing his earlier position in *Sons of Confederate Veterans* that viewpoint discrimination should be forbidden with respect to the particular form of hybrid speech appearing on specialty license plates.<sup>228</sup>

His colleague on the *Rose* panel, Judge Blane Michael, provided a fuller discussion. In his own separate opinion, Judge Michael applied the four-pronged test from *Sons of Confederate Veterans*, found that the first two prongs pointed toward government speech and the last two prongs pointed toward private speech, and concluded from this that the specialty plate speech was “mixed speech” which was “neither purely government speech nor purely private speech.”<sup>229</sup> Without specifying a test that could be applied to all such mixed speech, Judge Michael pointed to three factors, quite different from Judge Luttig’s, which led him to conclude similarly that viewpoint discrimination would be impermissible with regard to this particular form of mixed speech: (1) the specialty plates constituted a limited forum for expression which the state had created; (2) the government had favored itself as a speaker within that forum; and (3) the state’s one-sided advocacy might not be apparent to average viewers of

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<sup>224</sup> See *supra* note 216.

<sup>225</sup> *Sons of Confederate Veterans*, 305 F.3d at 247 (Luttig, J., respecting denial of rehearing en banc).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 800–01 (4th Cir. 2004) (Luttig, J., concurring in judgment).

<sup>229</sup> *Id.* at 793–94 (Michael, J.).

the plates.<sup>230</sup>

Judge Michael's opinion raises some troubling questions. First, while proceeding on the assumption that the four-pronged test is legally binding, Judge Michael used the test to reach a "mixed speech" conclusion that was never recognized as a possibility in the precedents which had created the test.<sup>231</sup> Along the same lines, the opinion gives no indication of what showing is necessary under the four-pronged test to qualify particular speech as "mixed." In this case, two prongs were said to point in one direction and two in the other,<sup>232</sup> but is this necessary, or sufficient, for a finding of "mixed speech"? Was the decisive factor *which* particular prongs pointed in a single direction, or the fact that two did, or the fact that not all did? The opinion leaves all of this unclear.

More important, perhaps, are the particular standards Judge Michael applied to mixed speech in concluding that viewpoint discrimination was forbidden. First, there is the finding of a forum: he noted that the government's restriction of this mixed speech was suspicious because the government, in creating a specialty plate program, had created a limited forum for expression.<sup>233</sup> But by definition, one might assume, a speech forum is a place that contains some purely private speech.<sup>234</sup> If the only messages in the "forum" are mixed speech containing some governmental component, that in itself might well be proof that no forum exists—at least not of the sort known to precedent. Judge Michael's finding of a forum was based primarily, if not exclusively, on the fact that those carrying the mixed speech on their cars were volunteers who were not "enlist[ed]" by the state, as were the doctors in *Rust*.<sup>235</sup> But then why was their speech in the specialty plate "forum" not purely private speech? Putting aside the question whether the actual message-bearers in *Rust* (the doctors)<sup>236</sup> or in *Johanns* (the media outlets)<sup>237</sup> were any less "volunteers" than the motorists in *Rose*, one wonders how the finding that the motorists were volunteers can be held to indicate that the government intentionally created a forum for speech, but not to indicate the presence of any purely private speech. Can there be such a thing as a "mixed speech forum," a forum

<sup>230</sup> *Id.* at 795–96 (Michael, J.).

<sup>231</sup> These precedents are *Knights of Ku Klux Klan v. Curators of University of Missouri*, 203 F.3d 1085 (8th Cir. 2000), *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001), and *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). See *supra* notes 117–43 and accompanying text.

<sup>232</sup> *Rose*, 361 F.3d at 793–94.

<sup>233</sup> See *supra* note 230 and accompanying text.

<sup>234</sup> See, e.g., *U.S. v. Am. Library Ass'n*, 539 U.S. 194, 204–06 (2003) (plurality opinion); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–83 (1992); *Comelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802–06 (1985) (noting the presence of purely private speech in a variety of speech forums).

<sup>235</sup> *Rose*, 361 F.3d at 798 (Michael, J.).

<sup>236</sup> *Rust v. Sullivan*, 500 U.S. 173, 179–81 (1991).

<sup>237</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 554–55 (2005).

containing *only* mixtures of governmental and private speech? If all the speech includes some governmental component, in what sense is there a public forum—or a forum of any kind?<sup>238</sup>

Second, there is the focus on attribution: Judge Michael claimed that in a mixed speech context, when a state has “favored itself”<sup>239</sup> as a “privileged speaker” within a limited forum (in this case, by authorizing a plate that promotes the government’s view and refusing to authorize a plate promoting a competing view)<sup>240</sup> and average viewers do not readily attribute the one-sided message to the state, viewpoint discrimination is forbidden.<sup>241</sup> Since viewpoint discrimination would presumably be inherent in the governmental component of any mixed speech, this boils down to the assertion that a government crafting messages for mixed speech in a forum must clearly identify itself as a speaker. This command, however, seems contrary to Supreme Court precedent, as it would elevate attribution to the status of a determinative factor in certain situations.

The Supreme Court, by contrast, has not focused on attribution as a key factor in identifying government speech or in determining whether viewpoint discrimination is permissible—in fact, quite the opposite. No doubt viewpoint discrimination would be less likely if the average listener would be readily able to link the speech to the government; but the Supreme Court has pointedly allowed viewpoint discrimination even where the public does not attribute the message to the government, noting that “the correct focus is not on whether the ads’ audience realizes the government is speaking, but on the [government program’s] purported interference with respondents’ First Amendment rights.”<sup>242</sup> True, the Court in that case had found the presence of pure government speech.<sup>243</sup> But under Judge Michael’s analysis, the speech there might well have qualified as mixed speech instead: the government had funded pro-beef ads that were designed by a combination of governmental and private actors; the ads were conveyed through private media outlets as literal speakers; and the ads often carried a statement announcing that they were “Funded by America’s Beef Producers,” making no mention of governmental involvement.<sup>244</sup> On any reasonable understanding, the government was speaking covertly and the ads were not viewpoint-neutral; yet the Court upheld the arrangement as government speech, rather than striking it down

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<sup>238</sup> *Cf. Am. Library Ass’n*, 539 U.S. at 206 (finding that neither a public library nor the internet terminals it provided constituted a public forum because such a library “provides Internet access, not to ‘encourage a diversity of views from private speakers,’” but for other reasons (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995))).

<sup>239</sup> *Rose*, 361 F.3d at 795.

<sup>240</sup> *Id.* at 798.

<sup>241</sup> *Id.* at 795–96, 799.

<sup>242</sup> *Johanns*, 544 U.S. at 564 n.7.

<sup>243</sup> *Id.* at 563–64.

<sup>244</sup> *Id.* at 553–55, 560–61.

as forbidden viewpoint discrimination regarding mixed speech.<sup>245</sup>

Judge Luttig's approach is also problematic, though for different reasons. His proposal for limiting government control of "hybrid" speech was tailored to situations in which "the government has voluntarily opened up for private expression property that the private individual is actually required by the government to display publicly."<sup>246</sup> In such situations—assuming the private speech component of the hybrid speech was "significant"—he would only allow viewpoint discrimination if the government had a "compelling" interest.<sup>247</sup> It is difficult to imagine what speech would be governed by this rule aside from specialty or vanity license plates.<sup>248</sup> What other government property is legally required to be displayed by private citizens and also serves as a government-designated forum for their speech? In fact, one might well argue that even vanity and specialty plates do not constitute property that any private individual is required to display publicly; although vehicle owners are required to display a license plate of some kind, no owner is required to display a vanity or specialty plate, containing some element of her own speech.<sup>249</sup> At best, then, Judge Luttig's prescription seems to provide guidance for how to treat hybrid speech only in the narrow context of specialty plates, and hinges the permissibility of viewpoint discrimination on the somewhat arbitrary standard of a compelling governmental interest; at worst, it provides no guidance even in the context of specialty plates.

#### B. Professor Corbin's "Mixed Speech" Approach

Some commentators have likewise embraced the hybrid or mixed category for speech.<sup>250</sup> Providing the most extended defense of this approach, Caroline Mala Corbin has recently proposed the recognition of a "mixed speech" category, setting forth a five-factor test for classifying speech as governmental, private, or mixed: "(1) Who is the 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>251</sup> As Professor Corbin conceives this test, there is

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<sup>245</sup> *Id.* at 560–67.

<sup>246</sup> *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 denial of rehearing en banc); see *supra* note 226 and accompanying text.

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

<sup>248</sup> Indeed, Judge Luttig disclaimed any intention of fashioning a broad rule for all hybrid speech. See *Sons of Confederate Veterans*, 305 F.3d at 246–47.

<sup>249</sup> See *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009) ("[W]e note that the messages communicated through specialty plates are voluntary, not compulsory. While Missouri requires a vehicle to display a license plate, the State does not compel anyone to purchase a specialty plate.").

<sup>250</sup> See *supra* note 27.

<sup>251</sup> Corbin, *supra* note 27, at 627.

no worry regarding indeterminate factors or a division of conclusions among factors, for “unless all factors point exclusively to private speech or exclusively to government speech, the speech is mixed.”<sup>252</sup> Applying this test to specialty license plates, Professor Corbin (perhaps unsurprisingly) finds the plates to be mixed speech, “fall[ing] squarely in the middle of the private/government speech spectrum.”<sup>253</sup> The literal speaker, she finds, is “both the government and the private car owner”;<sup>254</sup> control over the message is exercised to a “substantial degree[.]” by “both the government and the individual car owner”;<sup>255</sup> funding for the speech rests primarily with private speakers, “though the government plays a funding role as well”;<sup>256</sup> the speech goals of the program are “inconclusive and difficult to evaluate,”<sup>257</sup> as “is often the case for both government-subsidized speech and speech in a nonpublic forum”;<sup>258</sup> and finally, “[a] reasonable person is unlikely to attribute the message . . . solely to private speakers or solely to the government.”<sup>259</sup> In short, four of the five factors lead to inconclusive results, failing to indicate that either the government or a private entity was speaking alone, and the other factor shows that private speech elements predominate over admittedly present governmental speech elements.

One suspects this sort of result will not be unusual in applications of Professor Corbin’s five-pronged test. For example, she asserts that “religious speech in private schools, such as prayers led by parochial school teachers, becomes mixed speech when the schools accept government vouchers.”<sup>260</sup> The Supreme Court, of course, has held that such speech is not attributable to the government in any way, because the government’s money was distributed to private individuals who then voluntarily chose to give it to a religious school rather than a secular one.<sup>261</sup> What of religious universities that accept federal grant and loan funds, such as Pell Grants—does all speech in religious universities (even speech by the students) become mixed speech because the universities accept government funds that effectively enable the speech? The beef ads in *Johanns*, characterized by the Supreme Court as government speech, would apparently become mixed speech,<sup>262</sup> as would all government-

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<sup>252</sup> *Id.* at 628.

<sup>253</sup> *Id.* at 640.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 641.

<sup>256</sup> *Id.* at 642.

<sup>257</sup> *Id.* at 643.

<sup>258</sup> *Id.* at 643 n.199.

<sup>259</sup> *Id.* at 646.

<sup>260</sup> *Id.* at 624.

<sup>261</sup> *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002).

<sup>262</sup> The beef ads were funded by a federal government program to encourage beef consumption and were communicated to the public through private media outlets. The government was seemingly not the “literal speaker” (prong one) and would not be associated with the speech in the public mind (prong five), but funded the speech (prong three) and exercised significant control over it (prong two).

subsidized “private” speech, including the student publications at issue in *Rosenberger*.<sup>263</sup> Federal and state tax exemptions presumably help to “pay for” speech in churches too—does all speech from the pulpit become mixed speech because of prong three?

Other prongs in the five-prong formulation appear to be almost guaranteed to produce equivocal results (and therefore result in an overall finding of mixed speech): the first prong, for example, requires judges to determine the identity of the “literal speaker,” a term which is all too unclear in many speech applications.<sup>264</sup> Prong four, analyzing the speech goals of the program in which the speech appears, includes the nebulous terms “program”<sup>265</sup> and “speech goals.”<sup>266</sup> By the terms of the test, of course, the inability to reach a clear result under any single prong requires a finding of mixed speech.<sup>267</sup> Thus, Professor Corbin’s approach means at least this: much speech that courts have previously determined to be “private” or “governmental” would now be treated as “mixed.”

Professor Corbin admits that her definition of mixed speech “cuts a wide swath and [would] significantly change First Amendment jurisprudence.”<sup>268</sup> Effectively, however, the change would only be as drastic as her prescription for what to do with mixed speech once it has been classified. Along these lines, she proposes applying “some intermediate level of scrutiny to measures that constitute viewpoint discrimination on mixed speech.”<sup>269</sup> Her test would allow the government to impose such restrictions only if “(1) it has a closely tailored, substantial interest that is clearly and publicly articulated; (2) it has no alternate means of accomplishing the same goal; and (3) private speakers have alternate means of communicating to the same audience.”<sup>270</sup> Applying this “rigorous intermediate scrutiny”<sup>271</sup> to specialty license plates, she concludes that most types of viewpoint restrictions would not pass the test,

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See *supra* notes 44–50 and accompanying text (providing relevant factual references for *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005)).

<sup>263</sup> See Corbin, *supra* note 27, at 690 n.474 (“The *Rosenberger* Court’s characterization of the student publication as purely private speech is itself debatable.”). For a brief discussion of *Rosenberger*, see *supra* notes 51–54 and accompanying text.

<sup>264</sup> See *supra* note 189 and accompanying text. Professor Corbin, in fact, cautions those applying this prong to be aware that some anonymous speech is hard to trace to any literal speaker, and some ostensibly literal speakers may in fact be working as agents for someone else—in which case, presumably, the literal speaker analysis may change. Corbin, *supra* note 27, at 629–30.

<sup>265</sup> For the difficulties inherent in defining the relevant “program,” see *supra* notes 186–88 and accompanying text.

<sup>266</sup> Professor Corbin notes that for “government-subsidized speech” as well as any “speech in a nonpublic forum,” the results under this prong will “often” be “inconclusive and difficult to evaluate”—which means the speech must be classified as mixed. Corbin, *supra* note 27, at 643 n.199.

<sup>267</sup> *Id.* at 628.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 675.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

but regulations prohibiting hate speech and religious endorsements would;<sup>272</sup> she also suggests that prohibitions on certain other “distasteful” speech, such as “sexually provocative messages,” might pass the test, although she does not explicitly apply intermediate scrutiny to those restrictions.<sup>273</sup> In any event, she avers, much of the benefit of intermediate scrutiny would be to force judges to do explicitly what she believes they already do implicitly; applying intermediate scrutiny to a wide range of mixed speech “renders transparent the inevitable balancing [of governmental and private interests] that courts perform.”<sup>274</sup>

Applying intermediate scrutiny to such a large class of speech restrictions, however, is problematic. First, the many forms of speech that would be swept into this mixed speech category differ from one another in important ways. There are important differences, for example, between a federal grant program funding beef ads that is designed to promote beef consumption,<sup>275</sup> on the one hand, and a public university program funding student pamphlets that is designed to foster the expression of diverse student views on campus,<sup>276</sup> on the other. The former program is a part of a class of programs in which government has determined to reach an audience with a particular message and has paid private parties to carry that message,<sup>277</sup> the latter program is a part of a very different class of programs in which the government has determined to provide resources for private parties to create and convey their own messages.<sup>278</sup> These differences might be important enough to justify categorical deference to the government’s viewpoint restrictions within the former type of program and categorical suspicion of such restrictions within the latter type.<sup>279</sup>

Second, it is not self-evident that the traditional categorical treatment

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<sup>272</sup> *Id.* at 681–91.

<sup>273</sup> *Id.* at 687–89.

<sup>274</sup> *Id.* at 691.

<sup>275</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553–55 (2005).

<sup>276</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823–27 (1995).

<sup>277</sup> *Johanns*, 544 U.S. at 560–61.

<sup>278</sup> *Rosenberger*, 515 U.S. at 828–29.

<sup>279</sup> Indeed, this has been the Supreme Court’s approach to date, as it has applied the government speech doctrine and forum doctrine, respectively, to these cases. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001) (contrasting the application of government speech doctrine in *Rust* with the application of forum doctrine in *Rosenberger*). And even Professor Corbin does not advocate abandoning the private speech and government speech categories entirely. *See Corbin, supra* note 27, at 671, 692 n.480 (noting that “where the private or government components are sufficiently attenuated, courts may fairly categorize the speech as purely private or purely governmental”). This is curious if, as she asserts, those categories simply allow judges to mask a secret ad hoc decision process. *See id.* at 677–78 (stating that “categorizing mixed speech as private or governmental” is problematic because it allows judges to “make a value-informed decision” to label the speech without articulating how they are balancing the competing interests). In other words, if it is so important for judges to balance explicitly the competing interests in mixed speech cases, why should they not do so in *all* speech cases? Why not subject all speech restrictions to intermediate scrutiny? Might the judgment in a particular case that “private or government components are sufficiently attenuated” itself be masking a behind-the-scenes, value-informed balancing process that is never articulated?

simply masks ad hoc judicial balancing that already goes on behind the scenes—or that if it does, imposing intermediate scrutiny on restrictions of mixed speech will cause judging to be more forthright or consistent. In an effort to force judges to show their cards in mixed speech cases, Professor Corbin would require them to consider explicitly whether a given restriction is supported by a “substantial” governmental interest and whether the government could accomplish the same goal by other means.<sup>280</sup> But her evaluation of specialty license plates under this test provides a perfect illustration of the possibility of continued subterfuge. It turns out that, in her view, government reasons for banning particular plate designs are not “substantial” enough unless the designs would endorse religion (such as, perhaps, a “God Bless America” plate) or convey hate speech (such as a Nazi plate). Which governmental interests are prioritized, and which devalued, in reaching such conclusions?<sup>281</sup> The ranking of governmental interests in such an analysis is necessarily tied to a behind-the-scenes ranking of the harmfulness of particular viewpoints. Some viewpoints, apparently, are deemed more harmful than others, making the state interest in restriction (or disassociation) more “substantial” for some messages than for others. On what basis would a judge rank various viewpoints according to harmfulness? And would any judge articulate such a ranking? It seems fanciful to expect that intermediate scrutiny will force judges to do so; moreover, a ranking of this sort by a judge or other government official runs directly contrary to the First Amendment value of viewpoint neutrality toward speech.

### C. *Difficulties With the “Hybrid” or “Mixed” Speech Approach More Generally*

The “hybrid” or “mixed” speech approach is intuitively appealing because it recognizes the overlap at the margins between the conceptual categories of government speech and private speech. By forcing all speech into one of these two categories, we are bound to generalize and, in the process, ignore some key differences.

But the hybrid speech category does this, too. In fact, it is the function

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<sup>280</sup> Corbin, *supra* note 27, at 675–76 (using the case of specialty license plates to illustrate the application of the “intermediate scrutiny” test and the resulting advantages of its application in the courtroom).

<sup>281</sup> Regarding the hypothetical rejection of “God Bless America” plates, the state’s interest in complying with the Establishment Clause probably cannot count as a “substantial” interest, since the Court has suggested that such governmental endorsements of “God” do not violate the clause. *See Van Orden v. Perry*, 545 U.S. 677, 686–92 (2005) (holding that the placement of a monument inscribed with the Ten Commandments is not a violation of the Establishment Clause); *County of Allegheny v. ACLU*, 492 U.S. 573, 602–03, 657, 671–74 (1989) (Kennedy, J., concurring in part and dissenting in part) (joined by Rehnquist, C.J., and White & Scalia, JJ.) (cautioning against placing too much weight on a few religious words that have been used throughout the United States’ heritage). Indeed, our national motto is “In God We Trust.” 36 U.S.C. § 302 (2000).

of jurisprudential categories to generalize, and the fact that two (or even three) categories do so is not in itself a reason to create a third (or fourth), particularly if the newly minted category does not give judges much guidance for deciding who wins when speech falls within that category. Moreover, there is value, confirmed by long experience, in setting up a presumption against viewpoint restrictions directed against the messages of private speakers. But to apply that presumption effectively, we must distinguish between the messages of private speakers and the messages of public speakers. Arguably, the mixed speech category is not a serious attempt to do that; it looks more like giving up.

A broad “mixed” or “hybrid” speech category may even allow government to game the system by actually *creating* one of the mixed-speech factors in order to convert private speech into mixed speech, thus forcing increased judicial deference to viewpoint restrictions. For instance, when the government wants to oppose a private point of view, it could simply give itself prior approval authority over private speech in some venue and thus claim that the speech is mixed speech because, under prong two, the government exerts substantial “control” over the message. In that case, the restriction itself is being used as evidence that the message is partially the government’s and that the government therefore has a greater interest in imposing the restriction. This is circular.

It is not impossible to conceptualize the two-category approach. A government may deny resources to a few disfavored speakers—and even forge alliances with competing speakers—without really intending to send any message of its own. Judges need not sense some element of “government speech” in such arrangements or shield such viewpoint-biased discrimination from normal free speech scrutiny. The danger that government will use discriminatory allocations of its property to silence a certain viewpoint or skew debate is no less real when some of the private competing viewpoints (predictably enough) conspire with the government to accomplish this result, or at least to advance their own preferred messages.

#### VI. AN ALTERNATIVE APPROACH: THREE KINDS OF GOVERNMENT SPEECH

Assuming we wish to continue allowing the government to send its own messages, it is plainly necessary for judges to be able to identify government speech across a wide range of Speech Clause cases. Additionally, to the extent government may violate the Establishment Clause with its own expression, judges need to be able to identify

government speech in that context as well.<sup>282</sup> It seems desirable to use one uniform test for identifying government speech in all contexts, since there is no obvious reason to define the term differently in Speech Clause and Establishment Clause cases. As noted in Parts IV and V, neither the four-pronged test nor the hybrid speech approach shows much promise of helping judges make more uniform or objective decisions, nor do these approaches track closely the jurisprudence of the Supreme Court in the area of government speech.

This section suggests a simpler approach to identifying government speech, a test which explains and reconciles the holdings of the Supreme Court across the gamut of its speech and establishment cases. Additionally, this section argues that this simpler test offers a more accurate measurement of what matters in the definition of government speech and, because it is less subjective than the alternatives, is likely to result in more judicial consistency as well.

The Supreme Court has found government speech to be present in perhaps three key circumstances. Accordingly, the proposed test would pose three questions:

- (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?

If any of the above questions must clearly be answered in the affirmative, then the message is government speech; otherwise, the message is private speech. The remainder of this section explains each of these three circumstances in more detail.

A. *Did the Government Independently Generate the Idea of Reaching an Audience with This Particular Message in This Medium?*

A central concept in the whole notion of government speech is the idea

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<sup>282</sup> See *infra* notes 381–88 and accompanying text (discussing Establishment Clause violations caused by certain kinds of government speech).

that government should be free to express its own messages.<sup>283</sup> But how do we know whether the message is really “its own message” or, instead, that of a private party? This first factor focuses on the most obvious meaning of “its own message”: that the government came up with the message in the first place, or at least embraced it enough to generate the idea of communicating it to an audience in this medium.

In *Rust v. Sullivan*—the case which, according to the Supreme Court, contained the first exposition of the government speech doctrine—Congress came up with the idea of reaching an audience (the clients of family planning clinics) with a particular message (encouraging family planning without abortion) through the “medium” of the advice rendered by physicians and staff working in the clinics.<sup>284</sup> The Court clearly believed all of this was Congress’s idea, a finding which was crucial in classifying the message as government speech: “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”<sup>285</sup> The Court later described the *Rust* opinion as showing that the government can “use[] private speakers to transmit specific information pertaining to *its own program*” and “to promote *a particular policy of its own*.”<sup>286</sup> Similarly in *Johanns*, the Court’s conclusion that the beef ads constituted government speech was anchored in the finding that “[t]he message set out in the beef promotions is *from beginning to end the message established by the Federal Government*.”<sup>287</sup> The fact that the literal speakers were private entities, and the fact that some private actors exercised some editorial control in the creation of the ads, were factors of secondary importance, at most: “When, as here, 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>288</sup> The fact that the government “sets the overall message” is surely crucial to a finding of government speech.

Just as certainly in other cases, 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. Hence, in

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<sup>283</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”).

<sup>284</sup> *Rust v. Sullivan*, 500 U.S. 173, 178–81, 193–94 (1991).

<sup>285</sup> *Id.* at 193.

<sup>286</sup> *Rosenberger*, 515 U.S. at 833 (emphasis added).

<sup>287</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–61 (2005) (emphasis added).

<sup>288</sup> *Id.* at 562 (emphasis added).

*Rosenberger*, the Court found viewpoint restrictions on university-funded student speech to be improper because the government had not crafted or “favor[ed]” any particular message but instead had “expend[ed] funds to encourage a diversity of views from private speakers.”<sup>289</sup> Similarly, in *Southworth*, although the university made no claim that the state-subsidized student extracurricular speech was government speech, the Court recognized that viewpoint discrimination might be permissible if “the state-controlled University’s . . . own funds [were being used] to advance a particular message.”<sup>290</sup> And in *Velazquez*, while recognizing that the federal funding program for legal services attorneys was not designed with the purpose of “encourag[ing] a diversity of views,” the Court emphasized that viewpoint discrimination was improper because the program was not designed “to promote a governmental message.”<sup>291</sup> The attorneys receiving this governmental funding would in fact be representing clients in claims against the government; therefore, the government could not have intended these attorneys to convey a particular message set by the government, “even under a generous understanding of the concept [of governmental speech].”<sup>292</sup>

Governments might conceivably “set the overall message” either by crafting the message themselves or by adopting a message or slogan originally developed by others. In this latter case, however, it is important to be sure that the government has in some meaningful sense originated the communication, rather than just selectively subsidizing private communication, a move that would skew private debate and perhaps run afoul of existing forum doctrine.<sup>293</sup> The origination question attends to this concern by asking whether it was the government’s idea to use this medium to reach an audience with the particular message being sent. For example, if the government wants to embrace the privately originated slogan “Just Do It” as part of a government program to encourage fitness, the fact that Nike originally crafted the slogan should not prevent a finding of government speech when the government pays for the development and broadcast of television ads containing the slogan. Assuming Nike and the government reached an agreement as to the government’s use of the slogan, the crucial factor to consider is whether the government intentionally embraced the slogan and originated the idea of running these television ads containing it. If so, then those ads constitute government

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<sup>289</sup> *Rosenberger*, 515 U.S. at 834.

<sup>290</sup> Bd. of Regents of Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 229 (2000) (emphasis added).

<sup>291</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

<sup>292</sup> *Id.* at 542–43.

<sup>293</sup> See *supra* note 2 and accompanying text.

speech.<sup>294</sup>

On the other hand, this kind of government speech will not include the types of messages that the Supreme Court has held to be private speech in a government forum. For example, a message expressed by demonstrators in city streets and parks will not be deemed government speech under question one because it was the private speakers' idea, not the government's, to reach an audience with this particular message.<sup>295</sup> The government's idea was not to send an "overall message," but rather to open up public property for the expression of various yet-to-be-determined private messages. Likewise, the messages expressed in student group publications on public university campuses will not constitute government speech under question one, because it was not the school's idea to reach an audience with the particular messages contained in the publications.<sup>296</sup> If these messages do not count as government speech under the other two questions either, then the messages would be private speech, and it follows that governmental viewpoint discrimination in such contexts would be impermissible.<sup>297</sup> By the same token, messages endorsing religion in such forums would raise no Establishment Clause concerns because there would be no state action embracing the particular message; the governmental role was limited to opening up government resources to private speakers on a viewpoint-neutral and religion-neutral basis.<sup>298</sup>

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<sup>294</sup> Of course, other ads featuring the slogan "Just Do It" would not be government speech, to the extent that Nike and not the government came up with the idea of reaching an audience with those particular ads.

<sup>295</sup> See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757–60 (1995) (holding that the placement of unattended holiday displays in a state-owned plaza known for public events was protected private speech); *Hague v. CIO*, 307 U.S. 496, 515–16 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

<sup>296</sup> See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (holding that the government's rights were not at issue because the expression sprang "from the initiative of the students, who alone give it purpose and content," and not the state-controlled university); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833–35 (1995) (noting a difference between permissible government regulation of state university speech and impermissible viewpoint discrimination against private student speech, even when it receives university funding).

<sup>297</sup> See *Rosenberger*, 515 U.S. at 828–30, 834 (reviewing cases in which the Court struck down viewpoint discrimination against private speech); *Capitol Square*, 515 U.S. at 761 (holding that while the state may regulate the "time, place, and manner" of private speech in public forums, it is sharply restricted in regulating "content"); see also *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (noting that governmental discrimination based on viewpoint is forbidden in all speech forums).

<sup>298</sup> See *Rosenberger*, 515 U.S. at 839–42 (noting the acceptability of state university funding directed to a student religious publication when the university funded all student journals); *Capitol Square*, 515 U.S. at 762–63 (reiterating the maxim that private religious speech in a public forum does not equal the government endorsement of religion).

B. *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?*

While the first question of the three-question test will likely be sufficient to identify the majority of government speech, a relatively small amount of what the Court has considered government speech does not arise in that way. In fact, in an opinion just issued in *Pleasant Grove City v. Summum*, the Supreme Court has clarified that government speech can also be created when a government accepts, embraces, and communicates a donated message.<sup>299</sup> Private entities may originate messages and design communicative media containing those messages, and then donate the media/messages to the government. If the government chooses to reject the donation, as it surely would have a right to do,<sup>300</sup> then presumably no government speech arises from the attempted donation;<sup>301</sup> but if the government chooses to accept and display the donated property, the government now owns and controls the property and may have embraced communication of the message so strongly that the message of that particular display ought to be regarded as governmental speech.<sup>302</sup> This would seem particularly true if the display, or the property on which it is erected, has been clearly reserved for the expression of government messages rather than being opened to multiple private speakers.

A common scenario is the donated monument. Suppose a private civic group designs and pays for construction of a six-foot-tall granite monument containing the text of the Ten Commandments, and then offers to donate the monument to a state government for display on the grounds of the state capitol building, where nearly forty other state-owned historical monuments and markers are displayed over twenty-two acres.<sup>303</sup> The state chooses to accept the donation and allow the display, so the state selects the precise site for the monument, and the group pays for the erection of

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<sup>299</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009).

<sup>300</sup> *See, e.g., Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1089, 1093–95 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000) (holding that a publicly owned radio station was permitted to reject the donation of funds from the Ku Klux Klan, and refuse to acknowledge such donation on air, based on viewpoint and reputation of the Klan).

<sup>301</sup> *See id.* In *Knights*, the Eighth Circuit found that the government’s on-air acknowledgements of underwriters constituted government speech—but of course, the Klan’s particular message did *not* constitute government speech, since the government rejected the donation and refused to acknowledge the Klan. *See id.* at 1093.

<sup>302</sup> Again, the same message on a different, privately owned display on private property would not be government speech under this factor, just as a privately originated “Just Do It” ad would not count as government speech under the first factor. *E.g., supra* note 294 and accompanying text.

<sup>303</sup> The facts presented here are taken from *Van Orden v. Perry*, 545 U.S. 677, 681–82 (2005) (plurality opinion).

the monument there and also adds an inscription naming the group and specifying that the group “presented” the monument to “the people and youth” of the state.<sup>304</sup>

The first question of this Article’s three-factor test will not clearly indicate in this scenario that the monument is government speech, because it was the private organization, not the government, that independently generated the idea of reaching an audience with this particular message in this medium. The government did not come up with the idea for the monument independently, but only erected it at the suggestion of the private group. Answering the second question, however, clarifies that the monument is indeed government speech; the media, both the monument and the capitol grounds, were owned and controlled by the government and clearly reserved for expressing only those messages that the government regarded as its own. The media and format are important. Here, although the government may (at least implicitly) invite private speakers to demonstrate in person in its parks or other public spaces, the city has not even implicitly invited private parties to erect unattended, permanent monuments there. The format of the park and the monuments standing in it strongly indicate that unattended park monuments are reserved for government messages.

The Supreme Court focused on exactly these considerations while addressing very similar facts in *Pleasant Grove*.<sup>305</sup> The Court noted that one could assume the public grounds were never opened generally to private speakers’ monuments for the purpose of encouraging private speech or raising revenue, and the government did not actively encourage donations of monuments; every donated monument had likely been screened by the government, not just to assure that no distasteful message was present, but to assure that the message was something the government wanted to say—something “worthy” of being displayed on the grounds.<sup>306</sup> The donated monument may have begun as private speech, but under these circumstances, when the government accepted and displayed it, it became government speech. The upshot of this determination is that no private speech rights are violated when the government refuses to accept and display some other group’s donation; and on the other hand, any religious endorsements on successfully donated and displayed monuments must be considered the state’s expression for Establishment Clause purposes. This, indeed, seems to be the way the Supreme Court has viewed such monuments even before the most recent term—although in 2005 the Court determined, on one set of facts involving Ten Commandments monuments,

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<sup>304</sup> *Id.*

<sup>305</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132–35 (2009).

<sup>306</sup> *Id.* at 1132–34.

that such a state expression did not violate the Establishment Clause.<sup>307</sup>

Moreover, the reasoning in *Pleasant Grove* suggests that a “donated” display could be considered government speech even if legal ownership of the donated property itself were less clear, as long as the other considerations noted above were still present and the government exercised a sort of effective ownership and control over the display. Thus if a monument were designed and funded by a private group, and the group then asked the government for permission to erect it as a permanent fixture on government property in front of the county courthouse,<sup>308</sup> the government’s affirmative grant of permission would arguably convert the monument’s message into government speech, whether or not the government ever became the legal owner of the monument.<sup>309</sup>

Similarly, the Supreme Court has found an improper governmental endorsement of religion—which indicates that the government was expressing something—when a government agreed to allow a private organization to display a crèche on government property and to store the crèche in a governmental storeroom when it was not being displayed.<sup>310</sup> This case involved both a crèche and a menorah. The crèche was technically the property of a private Catholic organization called the Holy Name Society,<sup>311</sup> and the menorah was technically the property of a private Jewish organization called Chabad,<sup>312</sup> but both the crèche and the menorah remained at all times on government property, being stored and maintained by the government even when not on display, and were decorated by government employees during the holiday season.<sup>313</sup> The menorah was even assembled, erected, and disassembled by government employees,<sup>314</sup>

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<sup>307</sup> See *Van Orden*, 545 U.S. at 691–92 (plurality opinion) (referring to monuments on the grounds of Texas State Capitol as “[Texas’s] Capitol grounds monuments” and upholding the display of a Ten Commandments monument because “*Texas’ display* of this monument” did not violate Establishment Clause (emphasis added)); *id.* at 702 (Breyer, J., concurring in judgment) (“[T]he State sought to reflect moral principles.”). While I assert that Ten Commandments monuments under these circumstances constitute government speech, and also that a majority of justices suggested as much in *Van Orden*, I express no opinion here regarding the ultimate outcome in *Van Orden* or the proper application of the Establishment Clause to such monuments.

<sup>308</sup> See *Staley v. Harris County*, 461 F.3d 504, 506–07 (5th Cir. 2006), *vacated as moot*, 485 F.3d 305 (5th Cir. 2007) (referring to the placement of a privately constructed monument at the main entrance of a courthouse).

<sup>309</sup> The Fifth Circuit found that such a display, which contained an open Bible, violated the Establishment Clause because “the monument . . . had come to have a predominately religious purpose.” *Id.* at 515. Since private entities and their messages cannot violate the Establishment Clause, the opinion seems to be premised on the assumption that the government was speaking by displaying this monument. The opinion nowhere mentions who legally owned the monument after it was erected—perhaps because no one knew. The consideration seems to have been irrelevant.

<sup>310</sup> *ACLU v. County of Allegheny*, 842 F.2d 655, 657 (3d Cir. 1988), *aff’d in part, rev’d in part*, 492 U.S. 573 (1989).

<sup>311</sup> *Id.* at 657.

<sup>312</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 587 (1989) (Blackmun, J., joined by Stevens & O’Connor, JJ.).

<sup>313</sup> *ACLU*, 842 F.2d at 657–58.

<sup>314</sup> *Id.*; *County of Allegheny*, 492 U.S. at 587 (Blackmun, J., joined by Stevens & O’Connor, JJ.).

and the crèche was flanked by a plaque stating that the crèche had been “Donated by the Holy Name Society.”<sup>315</sup> A majority of the Court found that, under the circumstances, the government had impermissibly endorsed religion by allowing display of the crèche,<sup>316</sup> while a different majority found that by allowing display of the menorah, flanked by a large Christmas tree and a sign saluting liberty, the government had either endorsed something besides religion,<sup>317</sup> or had endorsed religion permissibly.<sup>318</sup> But in any case, the analysis suggests that both displays involved government speech—that is, governmental endorsement of *something*—notwithstanding the fact that the crèche and the menorah were technically owned by private groups.<sup>319</sup>

Although it is a closer case, the government’s broadcast of the messages written by donors in *Knights* probably also gave rise to government speech.<sup>320</sup> In that case, a government-owned radio station received monetary donations from a variety of private entities and was required under federal law to “acknowledge[] on air any individual or group source of funding for a particular broadcast matter,” although the acknowledgements had to be “value neutral” and could not “promote” the donor.<sup>321</sup> The announcement might be drafted in the first instance by the donor itself or by the government, but the wording of all such underwriting announcements had to be approved by the government before being read on air by a government employee.<sup>322</sup>

Not all speech broadcast by public stations is the same type of speech. The Supreme Court noted two years prior to *Knights* that “[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity,” and that “[such] programming decisions . . . constitute communicative acts.”<sup>323</sup> The Court also held in that case, however, that “candidate debates [broadcast by

<sup>315</sup> *County of Allegheny*, 492 U.S. at 580 (Blackmun, J., joined by Stevens & O’Connor, JJ.).

<sup>316</sup> *Id.* at 601–02 (Blackmun, J., joined by Brennan, Marshall, Stevens, & O’Connor, JJ.).

<sup>317</sup> *Id.* at 616 (Blackmun, J.).

<sup>318</sup> *Id.* at 662–63, 670–71 (Kennedy, J., concurring in part and dissenting in part) (joined by Rehnquist, C.J., and White & Scalia, JJ.).

<sup>319</sup> See *infra* notes 381–82 and accompanying text; see also *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001), *supra* Part IV.A. (discussing *Wells*). The holiday display in *Wells* seems to have been the property of the government, either donated by private entities or partially funded by them. See *id.* at 1137–38. But even if the components of the display, including the sign, had all been created by private sponsors and donated to the city for display on public property, it is difficult to believe the court would have concluded under the four-pronged test that the message involved private and not government speech. See *id.* at 1141–43 (applying the test and concluding that the display constituted government speech). And this result would be the same under the second question of the test this Article proposes for identifying government speech.

<sup>320</sup> *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1087–89 (8th Cir. 2000) (stating the facts of the case).

<sup>321</sup> *Id.* at 1088.

<sup>322</sup> *Id.* at 1088, 1094 n.10.

<sup>323</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

public broadcasters] present the narrow exception to the rule<sup>324</sup> and constitute a nonpublic speech forum.<sup>325</sup> These results are predictable under the test this Article suggests. When public broadcasters choose what to broadcast, the content choices are government speech under question one of the three-question test, because the government came up with the idea of reaching an audience in this medium with that content. In analyzing candidate debates, however, the focus shifts to the particular messages delivered by each candidate. The government in no way endorses what each candidate says, simply by broadcasting the debate. The debate—to the extent it is broadcast by a public broadcasting station—thus constitutes a government-provided speech forum of some type for private speakers. Applying the three-question tests yields the same result: the government did not independently generate the idea of reaching an audience with a particular candidate’s message (say, decreasing taxes or building a new road); nor was the literal speaker a government employee; and while the medium and format in which the messages appeared were effectively owned by the government, the medium and format were not clearly reserved for the purpose of expressing government-approved messages.

The more difficult question is the classification of the underwriting announcements in *Knights*. The Eighth Circuit found the messages to constitute government speech.<sup>326</sup> The second factor of the three-factor test suggests this result as well. Factor one would not indicate government speech because the government did not come up with the idea of reaching an audience with the particular message drafted by, say, the Smith Charitable Trust. But under the circumstances, the second factor is probably satisfied because the government-owned medium and format here were clearly reserved for the purpose of expressing government messages, not to raise revenue or encourage private speech. The revenue-raising part of the analysis is the closest call, but on the whole, the acknowledgement program does not seem to have been put in place to encourage donations to the station, but rather to satisfy legal requirements, and perhaps secondarily, to give donors a “free gift”—akin to the ubiquitous tote bag offered to donors by a number of charitable organizations.<sup>327</sup> The “message,” in the form of written words on a piece of paper, may or may not have been “donated” by a private group along with its money, but the government’s affirmative decision to accept and read the donated message—along with all the other facts present here, including government ownership and control of the medium—makes this look like government

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<sup>324</sup> *Id.* at 675.

<sup>325</sup> *Id.* at 676.

<sup>326</sup> *Knights*, 203 F.3d at 1093.

<sup>327</sup> *See id.* (noting that the program is enforced by federal statute and is an “acknowledgement” and not a promotion).

speech. In addition, the fact that private speakers were never allowed to speak freely on public radio underwriting spots—value bias and promotion of products or organizations being forbidden by the government—makes this program substantially different from governmental programs widely inviting the public to buy ad space to promote private groups and messages,<sup>328</sup> and suggests that even privately composed underwriting messages constitute government speech when they are accepted, approved, and read on air by government employees in order to comply with federal law.

*C. Is There a Clear Literal Speaker Who Is Employed by the Government to Send Messages on This Subject in This Format?*

The first and second questions of the proposed test will likely identify most of the speech the Supreme Court has called “government speech” in its cases to date. But the Supreme Court has suggested in *Garcetti v. Ceballos*<sup>329</sup> that there may be one further way a message could be deemed government speech. Hence, the third question is included here.

In *Garcetti*, a deputy district attorney wrote a memorandum to his supervisors recommending dismissal of a pending criminal case due to misrepresentations contained in an affidavit that had been used to obtain a critical search warrant.<sup>330</sup> His supervisors decided to proceed with the prosecution anyway, and the trial court later rejected the defense’s challenge to the warrant.<sup>331</sup> In a subsequent action invoking his rights under the Speech Clause, the deputy district attorney claimed that after these events he was subjected to a series of adverse employment actions which were designed to retaliate against him for the memorandum.<sup>332</sup> The Court rejected his First Amendment claim on the ground that “his expressions were made pursuant to his duties as a calendar deputy” and therefore did not constitute protected private speech: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . .”<sup>333</sup> In other words, those statements are government speech, not private speech.

This holding fits tolerably well with the government speech doctrine, at least if one may assume that government employees who speak “pursuant to their official duties” have been hired by their employers to convey the government’s messages. In such cases, the employee’s governmental superiors must be allowed to approve the messages even

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<sup>328</sup> For a discussion of such programs, see *infra* notes 354–62 and accompanying text.

<sup>329</sup> 547 U.S. 410, 421 (2006).

<sup>330</sup> *Id.* at 413–14.

<sup>331</sup> *Id.* at 414–15.

<sup>332</sup> *Id.* at 415.

<sup>333</sup> *Id.* at 421.

before they are released, as well as to discipline the employee after publication if she failed to tailor the message to the government's expectations about the content of what is, after all, its own message.<sup>334</sup> On the other hand, if the message does not arise from the employee's message-sending duties—if the speaker is not employed to send messages on this subject in this medium—then the message might well constitute private speech, particularly if it concerns a matter of public interest.<sup>335</sup> And of course, if it is unclear who the “literal speaker” is, the speech cannot be the kind of speech that the Court found in *Garcetti*.<sup>336</sup>

The third factor of the proposed government speech test is designed to make sure *Garcetti* speech is identified as government speech, assuming there might be cases where neither of the first two factors clearly indicate this. Of course, the speech appearing within a calendar deputy's disposition memo will constitute government speech under the first factor if “the government” may be said to have come up with the idea of rendering the particular advice contained in the memo; but where a government employee expresses a viewpoint *at odds* with that of his supervisors, as in *Garcetti*, it will be difficult to reach such a conclusion. Under the second factor of my test, the memo will constitute government speech if the medium and format (here, intra-office memos sent by government employees within a government office) were effectively owned and controlled by the government and reserved for the purpose of expressing government-approved messages, not private speech. It might well be thought that the *Garcetti* facts indicate precisely this kind of government speech. But on the other hand, one might argue, the very fact

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<sup>334</sup> I do not intend to express any view about the difficult cases that may arise in particular applications of the *Garcetti* rule—for example, when employment status or duties are unclear. *See id.* at 424–25 (noting that the scope of an employee's duties could be a matter for “serious debate” in future cases, and noting that speech by academics that is “related to scholarship or teaching” could present an especially difficult case); *id.* at 436, 438–39 (Souter, J., dissenting). In such cases, the third question might not indicate government speech. Similarly, the third question would not indicate government speech if the identity of the “literal speaker” were unclear in a particular case. For a discussion of some of the difficulties in identifying “literal speakers,” see *supra* notes 189–90 and accompanying text.

<sup>335</sup> *See Garcetti*, 547 U.S. at 419 (“[S]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” (internal citations omitted)); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568, 573–74 (1968) (“Statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”).

<sup>336</sup> No doubt “literal speakers” are difficult to identify in many situations. *See supra* notes 189–90 and accompanying text (illustrating this difficulty). But this poses no difficulty in prong three of the proposed test, because whenever a literal speaker cannot clearly be identified, the solution is clear: there can be no finding of government speech under this prong. In other words, unlike the four-pronged test, the test does not require the identification of a “literal speaker” of every message; the “literal speaker” factor is not serving as one of several factors to be weighed together in distinguishing between government and private speech in every situation. Question three merely sniffs out one kind of government speech: the kind arising when there clearly *is* a literal speaker employed by the government and having particular job responsibilities.

that “rogue memos” like this one are sent belies effective governmental control of the medium and indicates that not all messages sent in this medium and format are “government-approved.” Additionally, it might be argued, the *Garcetti* Court did not focus on government ownership and control of the medium, but upon the employment status and duties of the literal speaker.<sup>337</sup> Accordingly, the third factor is offered here to cover the instance of the employee paid by the government to send government messages, who then sends messages contrary to the government’s wishes; the purpose is to make doubly sure that speech sent pursuant to such duties—even noncompliant speech—is classified as government speech in cases where employment status and duties to send government messages are clear.<sup>338</sup> Not only does this treatment accord with Supreme Court precedent, but it is probably necessitated by the whole notion of government speech. The government needs to be able to assure that those it employs to convey government speech are doing so accurately; if the government cannot control the content of its intended messages, the government speech doctrine would become a nullity.<sup>339</sup>

## VII. USING THE THREE-PART TEST TO UNDERSTAND PAST AND FUTURE CASES

### A. *Explaining Supreme Court Precedents*

The three-part test for identifying government speech is intended to be descriptive. I have suggested the test, not just as a straightforward way of measuring what seems to be the essence of government speech, but also as a method of describing what the Supreme Court has actually found to be government speech. In other words, the three-factor test provides a method of reconciling the Supreme Court precedents. Applying the test to the Court’s establishment and free speech cases yields results that mirror those reached by the Court.

#### 1. *Private Speech*

As a starting point, the Court has been clear that governmental funding of speech does not always create government speech. The Court has squarely held that “even in the provision of subsidies, the government may

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<sup>337</sup> See *Garcetti*, 547 U.S. at 420–22 (noting that a “controlling factor” in Ceballos’s case was that his speech was made pursuant to his duties “as a calendar deputy”).

<sup>338</sup> See *supra* note 334 (discussing this aspect of the third factor).

<sup>339</sup> See *Garcetti*, 547 U.S. at 422–23 (“Official communications have official consequences, creating a need for substantive consistency and clarity. [Governmental] [s]upervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”).

not ‘ai[m] at the suppression of dangerous ideas,’<sup>340</sup> a holding that only makes sense if government-funded speech sometimes constitutes private, not government, speech. Hence, when a federal program disbursed grants to fund only art which program administrators considered to be of sufficient artistic merit and sufficiently representative of “general standards of decency,” the art thus subsidized was deemed private speech and the funding restrictions were required to be viewpoint-neutral, although no forum for speech was created.<sup>341</sup> Similarly, when a federal program disbursed grants to pay legal services attorneys to represent private clients in claims against the federal government, the subsidized attorneys’ speech was deemed private speech and the funding restrictions were required to be viewpoint-neutral, although no forum for speech was created.<sup>342</sup> And when the government expends its own funds to acquire books, internet connections and terminals, or other materials and resources for a public library or public school library, the Court has indicated that the messages contained in the materials and resources thus acquired still constitute private and not government speech, although the library is not a forum for speech.<sup>343</sup> Decisions to remove materials from an existing library collection therefore must be viewpoint-neutral,<sup>344</sup> although the Court has

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<sup>340</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983)).

<sup>341</sup> *See Finley*, 524 U.S. at 586–87 (“If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.”); *see also id.* at 611 (“The Government freely admits . . . that it neither speaks through the expression subsidized . . . nor buys anything for itself with its . . . grants.”) (Souter, J., dissenting); *FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984) (holding that a federal statute violated the Speech Clause by forbidding public broadcasting grants to be distributed to broadcasting stations that “engage in editorializing”; such editorials are private speech protected by the Speech Clause; and the funding restriction was too coercive); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148–58 (1946) (finding that a postmaster violated the Speech Clause when he exercised authority to revoke second-class mailing privileges for publications he deemed to be insufficiently advancing public welfare; although speech contained in second-class mailings was subsidized by government, it was still private speech protected by the First Amendment, and the postmaster’s content rules were too arbitrary and restrictive); *cf. Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093, 1100–01 (2009) (finding that a state law prohibiting public employee payroll deductions to fund a union’s political activities did not violate the Speech Clause; although the union’s political activities constituted private speech, the payroll restriction was viewpoint-neutral); *Regan*, 461 U.S. at 540 (federal tax regulations did not violate the Speech Clause by denying certain beneficial tax status to private organizations that devoted a substantial part of their activities to political lobbying; although the lobbying messages constituted private speech protected under First Amendment, the regulations were viewpoint-neutral).

<sup>342</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–43, 547–49 (2001).

<sup>343</sup> *See United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 203–07 (2003) (plurality opinion) (noting that internet access, in a public library, bought with public funds, facilitates communication by private parties but does not constitute a public forum for such speech); *see also id.* at 236 (Souter, J., dissenting) (“[I]n extreme cases [one could] expect particular [book acquisition] choices [by public libraries] to reveal impermissible reasons (reasons even the plurality would consider to be illegitimate), like excluding books because their authors are Democrats or their critiques of organized Christianity are unsympathetic.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–72 (1982) (plurality opinion).

<sup>344</sup> *See Pico*, 457 U.S. at 870–72 (holding that “local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books”).

suggested that heightened judicial scrutiny is inappropriate in the context of decisions, necessitated by limited funds, whether to acquire certain materials in the first place.<sup>345</sup>

The three-factor test would likewise indicate private speech in each of the instances above, even if no forum was created. In none of these cases did the government independently generate the idea of reaching an audience with any of the particular subsidized messages; nor were the funded messages expressed in a medium or format effectively owned by government and clearly reserved for government messages; nor was the literal speaker a governmental employee. But varying the facts slightly could yield a different result. For example, if the government expends funds as a patron commissioning particular works of art for display to the public on public property, the funded artwork might well constitute government speech, for two independently sufficient reasons: (1) the government may have independently come up with the idea for the particular work of art and for its ultimate display in this medium, before the work was commissioned; and (2) when the artwork was finally displayed, the medium and format of the display would be effectively owned by the government and likely reserved for governmental messages, not opened to multiple private speakers.<sup>346</sup>

Of course, when the government does create or maintain a speech forum, at least some speech within that forum will be private speech,<sup>347</sup> and the restrictions on use of the forum must be viewpoint-neutral.<sup>348</sup> Unfortunately, the Court has not been entirely clear about what counts as a “forum” for these purposes. The Court has distinguished between the “traditional public forum,” the “designated public forum, whether of a limited or unlimited character,” and “all remaining public property.”<sup>349</sup> Since that enumeration, the Court has also suggested, logically enough, that there is an important distinction to be made within the latter category between a “nonpublic forum” and other public property which is not a

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<sup>345</sup> See *Am. Library Ass'n*, 539 U.S. at 205 (“Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the National Endowment for the Arts, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.”); see also *Pico*, 457 U.S. at 871–72 (“[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools . . . . [O]ur holding today affects only the discretion to *remove* books.”).

<sup>346</sup> See *Finley*, 524 U.S. at 610–11 (Souter, J., dissenting) (noting the permissibility of viewpoint discrimination in such contexts).

<sup>347</sup> See *supra* notes 233–38 and accompanying text.

<sup>348</sup> See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (noting that when governmental property functions as any kind of speech forum, whether public or nonpublic, the government may not “suppress expression [in the forum] merely because public officials oppose the speaker’s view”).

<sup>349</sup> See, e.g., *Int'l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (defining each of the three types of forums).

forum of any type.<sup>350</sup> The distinction is important because the existence of a forum—even a nonpublic one—will suggest the presence of private speech<sup>351</sup> and the requirement of viewpoint neutrality,<sup>352</sup> which will not be the case with all public property.

The Court has not always used forum language precisely, a fact which sometimes poses challenges for understanding the Court's conclusions and reconciling those with the government speech doctrine. In *Lehman v. City of Shaker Heights*,<sup>353</sup> a leading Supreme Court case about governmental programs to sell advertising space, a city sold ad space on public transit cars to a variety of commercial and non-commercial speakers.<sup>354</sup> In upholding a city rule excluding political advertising from the ad space, a plurality of the Court stopped short of characterizing the ads as some kind of government speech, but did state flatly that “[n]o First Amendment forum is here to be found.”<sup>355</sup> Taken literally, that means the ad space did not constitute even a nonpublic forum. But *Lehman* was decided a decade before the forum doctrine was fully announced in *Cornelius*<sup>356</sup> and *Perry Education Association*,<sup>357</sup> and the literal reading does not square well with later opinions suggesting that forums are created when public property is opened to a variety of private speakers, such as advertisers<sup>358</sup> or political candidates.<sup>359</sup> Indeed, lower courts have subsequently interpreted the statement in *Lehman* to mean “no public forum is here to be found,” and that advertising spaces such as those at issue in *Lehman* constitute nonpublic forums.<sup>360</sup> Even the Supreme Court itself has suggested this

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<sup>350</sup> See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) (noting that when a public television station aired a debate among political candidates, “the . . . debate was a *forum of some type*” and that “[t]he question of what type must be answered by reference to our public forum precedents” (emphasis added)); see also *id.* at 677 (“Other government properties are either nonpublic fora or not fora at all.”).

<sup>351</sup> See *supra* notes 233–38 and accompanying text.

<sup>352</sup> See *supra* note 348 and accompanying text.

<sup>353</sup> 418 U.S. 298, 303 (1974) (plurality opinion).

<sup>354</sup> *Id.* at 300–01.

<sup>355</sup> *Id.* at 304.

<sup>356</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 804–06 (1985) (holding that solicitation in the context of the Combined Federal Campaign is speech in a nonpublic forum).

<sup>357</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (finding that an interschool mail system was a nonpublic forum).

<sup>358</sup> See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 675, 679 (1992) (finding airport terminals to be “generally accessible to the general public,” to contain “various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types,” and to be “nonpublic fora” for expression); see also *Cornelius*, 473 U.S. at 806 (finding that an annual fundraising drive in the federal workplace constituted “a nonpublic forum”).

<sup>359</sup> See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675–76 (1998) (holding that a publicly owned television station did not violate the First Amendment when it refused to allow a candidate to participate in the nonpublic forum of a televised debate).

<sup>360</sup> See *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965–67 (9th Cir. 1999) (citing *Lehman* as support for the holding that the advertising space on a public high school's baseball field fence was a nonpublic forum); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123,

interpretation in a later case.<sup>361</sup> Probably the best reading of *Lehman*, then, is that the Court found the approved ads to constitute private speech in a nonpublic forum. The three-factor test would likewise suggest that the ads constituted private speech: The government did not come up with the idea to promote a certain brand of cigarettes or a certain church on public transit cars;<sup>362</sup> nor were the ad spaces clearly reserved for government-endorsed messages; nor was the literal speaker a government employee.

Many times, of course, the existence of a forum is more obvious. Hence when a city maintains a public square and allows a variety of religious and non-religious private demonstrators to express themselves there, the demonstrators' messages are private speech (notwithstanding their location on public property and amidst public buildings), and as such do not raise Establishment Clause concerns when they endorse religion.<sup>363</sup> Moreover, when a public university subsidizes a fund which pays for the speech of a variety of student groups, the university has created a speech forum, the funded speech is private speech, and the funding restrictions must be viewpoint-neutral.<sup>364</sup> And when a public school offers its facilities to a variety of private groups for "social, civic, or recreational uses" but denies use "by any group for religious purposes,"<sup>365</sup> the school has created a speech forum, the speech in the forum is private speech, and the restriction forbidding religious uses cannot stand because it is not viewpoint-neutral.<sup>366</sup>

The three-factor test would likewise indicate private speech in each of these instances involving forums. The government did not independently generate the idea of reaching an audience with any particular message

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129 (2d Cir. 1998) (noting that the Court in *Lehman* "ha[d] considered the forum non-public"). Sometimes, where past governmental policies have allowed broad access to the government's ad space, courts have even distinguished *Lehman* and have found the space to constitute a designated public forum. See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998) ("SEPTA has no long-standing practice of prohibiting ads like [the ones at issue in the case] . . . nor does it have any policy pursuant to which [the] ads were removed . . . . Because we find that SEPTA has created a designated public forum, content-based restrictions on speech that come within the forum must pass strict scrutiny to comport with the First Amendment."); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232, 1233 (7th Cir. 1985) (holding that public transportation advertising space became a public forum because the government maintained "no system of control" over advertisements selected and had "allowed its advertising space to be used for a wide variety of commercial, public-service, and political ads").

<sup>361</sup> See *Cornelius*, 473 U.S. at 801 (noting that in *Lehman*, "the Court treated the advertising spaces on the buses as *the forum*" (emphasis added)).

<sup>362</sup> See *Lehman v. Shaker Heights*, 418 U.S. 298, 300 (listing cigarette companies and churches as two of the groups that had advertised in the ad spaces).

<sup>363</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760–63 (1995).

<sup>364</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229–33 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>365</sup> *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993) (holding that denying a church access to school premises to show a religious film series violates the Freedom of Speech Clause).

<sup>366</sup> *Id.* at 391–94.

appearing in the forum; nor was the literal speaker a governmental employee; and while the messages were likely expressed in some medium or format effectively owned by government, the status of that property as a forum makes it unlikely that the medium and format were clearly reserved for government messages.

The examples above illustrate that government support and funding of a message do not always create government speech, but the waters may be muddied further when it is unclear who really provided the funding. Much depends on whether we are looking for the immediate source or some ultimate source. The Court has determined that the source should be identified as the most immediate one we can find who had real control over fund allocation. In *Zelman v. Simmons-Harris*,<sup>367</sup> a case involving public funding of an educational voucher program which allowed parents to direct the vouchers to private religious or non-religious schools if they wished, challengers asserted that the program violated the Establishment Clause because the program allowed public money to be used to fund religious expression in those recipient schools that were religious.<sup>368</sup> The Court rejected the claim, holding in essence that the religious expression was private speech funded with private money, since parents chose whether to fund it.<sup>369</sup> Of course, the money had come to the parents from the government at an earlier time; but if the parents' spending choices were truly voluntary, the source of the religious schools' funding was the parents, and the religious speech by private school teachers remained private. The result is identical under the three-factor test: The government did not come up with the idea of praising God in the classroom; the religious message was not expressed in a medium or format effectively owned by government; and the literal speaker was not a government employee.

The physical setting or environment of speech can also make it difficult to determine whether the speech is governmental or private. Occasionally private speech can be identified even in settings of extensive governmental control, although the Court has sometimes been sympathetic to the government's need to censor such private speech. For example, when a journalism course in a public high school requires students in the course to produce a school newspaper, the Court has said that the student-written articles in the newspaper constitute private speech<sup>370</sup> and the

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<sup>367</sup> 536 U.S. 639 (2002).

<sup>368</sup> *Id.* at 644–48.

<sup>369</sup> *See id.* at 652–55.

<sup>370</sup> *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–72 (1988) (referring multiple times to the issue as one involving “student speech” and “personal expression”); *id.* at 273 (referring to articles at issue as “student speech in school-sponsored expressive activities”).

newspaper might constitute a nonpublic forum,<sup>371</sup> although it does not constitute a public forum.<sup>372</sup> The Court held that the school is allowed to exercise a great deal of control over the content of such speech,<sup>373</sup> but it is still private speech. The three-factor test probably points to the same result, but it is admittedly a bit more difficult to apply here. Government speech would not be indicated by factors one or three: it was the student's idea, not the government's, to write a newspaper story about the particular subject (in this case, students' experiences with pregnancy and divorce),<sup>374</sup> and the literal speaker (the student author) was not a government employee. But factor two is a closer call. Because the government effectively owned the medium and format of communication (the school newspaper and school grounds), the question would boil down to whether this medium and format were clearly reserved for the purpose of expressing only governmental messages and not opened to multiple private speakers for their own expression. If the newspaper often contained student opinions, it would probably be difficult to say the medium and format were clearly reserved, and on balance this factor would not indicate government speech either. Even if the conclusion under this factor went the other way in this close case, however, the error might well be harmless, because of the Court's determination that private speech in a public school newspaper can be subjected to extensive governmental censorship<sup>375</sup>—the same result which would obtain if the speech were regarded as government speech.

## 2. *Government Speech*

Where the Supreme Court has found the presence of government speech, the speech is one of the three kinds listed in the three-factor test. Some cases of this sort have already been mentioned above.<sup>376</sup> In addition to those, consider a handful of recent Establishment Clause cases in which the Court found the Clause was violated because of a message.<sup>377</sup> Whether

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<sup>371</sup> See *id.* at 270 (describing actions of school officials with regard to school newspaper by saying that “they ‘reserve[d] the forum for its intended purpos[e]’” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (emphasis added))).

<sup>372</sup> See *Kuhlmeier*, 484 U.S. at 267–70.

<sup>373</sup> *Id.* at 271–73 (noting that when a public school regulates expressive activities that “may fairly be characterized as part of the school curriculum,” the restriction may be broad and need only be “reasonably related to legitimate pedagogical concerns”).

<sup>374</sup> *Id.* at 263 (noting content of articles at issue).

<sup>375</sup> See *supra* note 373 and accompanying text.

<sup>376</sup> See *supra* notes 284–88 and accompanying text; notes 303–39 and accompanying text.

<sup>377</sup> I do not mean to suggest that this is the only possible kind of Establishment Clause violation. It may well be possible for the government to violate the Clause without “government speech.” What I *am* arguing is that *if* the Clause is violated by a *message*, then that message must constitute “government speech.”

the standard used is the *Lemon* test,<sup>378</sup> the endorsement test,<sup>379</sup> or the coercion test,<sup>380</sup> private speech alone cannot violate the Establishment Clause;<sup>381</sup> a message cannot violate the Clause unless it was the government's message.<sup>382</sup> In cases where the Court has found that a particular message violated the Establishment Clause, the three-factor test would identify the message as government speech. For example, when a public school scheduled public prayers into the agenda of its graduation ceremonies and invited a local clergyman to deliver the prayers, even advising him on the wording of the prayers, the prayers could be characterized as government speech under the first factor: the government (that is, a government employee—the school principal—acting in his official capacity) independently came up with the idea of reaching an audience with this message in the graduation ceremonies.<sup>383</sup> Likewise, when a county erects a “Foundations of American Law and Government”

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<sup>378</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (providing that the test requires the governmental action to satisfy three independent requirements: (1) it “must have a secular legislative purpose”; (2) “its principal or primary effect must be one that neither advances nor inhibits religion”; and (3) it “must not foster ‘an excessive governmental entanglement with religion’” (internal citations and quotation marks omitted)). See *McCreary County v. ACLU*, 545 U.S. 844, 859–65, 881 (2005) (applying the *Lemon* test); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314–17 (2000) (applying the *Lemon* test).

<sup>379</sup> See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307–10 (providing a recent application of the endorsement test).

<sup>380</sup> See *id.* at 310–12 (providing a recent application of the coercion test).

<sup>381</sup> See, e.g., *id.* at 302 (“[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” (quoting Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion))); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”).

<sup>382</sup> Justice O’Connor, joined by Justices Souter and Breyer, has stated a view that at first sounds contrary to the one I am asserting, but upon investigation, the contradiction is largely illusory. In one Establishment Clause case, she wrote, “I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism.” *Capitol Square Review & Advisory Bd.*, 515 U.S. at 774 (O’Connor, J., concurring in part). On its face, this statement raises a question as to the meaning of “direct government speech.” If “direct” is not a significant qualification, one wonders how a government can possibly send any “message of endorsement” without “speech.” Later in the opinion, however, she clarified her view somewhat:

Where the government’s operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of . . . mistaken attribution of private speech to the State, but because the State’s own actions [in administering the forum], and their relationship to the private speech at issue, *actually convey* a message of endorsement.

*Id.* at 777 (internal citations omitted). Thus, in such situations, Justice O’Connor apparently believes the state is acting to send a message separate from the message of the private speaker, a message that endorses what the private speaker is saying. On this understanding, violation of the Establishment Clause still comes from government speech—in this case, the governmental message of endorsement sent by the government’s actions in administering the forum. Without necessarily endorsing Justice O’Connor’s view of how endorsement is to be identified in public forums, I think in the end she is saying what I am saying: messages that violate the Establishment Clause constitute government speech.

<sup>383</sup> See *Lee v. Weisman*, 505 U.S. 577, 587–89 (1992).

display in its courthouse, consisting of a framed copy of the Ten Commandments and eight other framed historical documents of equal size,<sup>384</sup> it is relatively easy to characterize the display as government speech under factor one and factor two as well, whether or not the elements of the display were donated to the county.<sup>385</sup>

Less clear, perhaps, was the nature of a student-led prayer at a public school football game. In that case, however, the Court emphasized the unique history of the school's policies governing such messages. For many years this public high school had scheduled student-led public prayers at home football games, and only later—after litigation—adopted a policy to allow students to vote on whether to have a popularly-elected student deliver “a brief invocation and/or message” to begin the games.<sup>386</sup> The school also promulgated content rules applying to any message thus delivered.<sup>387</sup> A student was elected under this policy and delivered prayers at the games.<sup>388</sup> Under these circumstances, the Court found that the “prayers bear ‘the imprint of the State’”<sup>389</sup> and did not constitute private speech.<sup>390</sup> The outcome would likely be the same under factor one of the three-factor test: the history at this school indicated that the government independently came up with the idea of reaching an audience with prayers over the loudspeaker at home football games, and the latest policy was not an effort to create a forum for private speakers, but merely the government's attempt to assure that the prayers continued.<sup>391</sup>

#### B. *Future Applications—Specialty License Plates*

A uniform method of identifying government speech would prove especially useful in one set of cases that has recently divided the federal courts of appeals: the cases involving specialty license plate programs.<sup>392</sup> These programs have already been discussed to some extent,<sup>393</sup> but it might be useful to apply the three-factor test to them more directly and suggest the proper legal resolution of these cases.

License plates vary, as do the state programs established to regulate them. The proper answer to the government speech question will likely

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<sup>384</sup> See *McCreary County v. ACLU*, 545 U.S. 844, 851–56 (1992).

<sup>385</sup> See *supra* notes 302–19 and accompanying text for a discussion of governmental monuments and displays and the application of the three-factor test to them.

<sup>386</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 295–98 & n.6.

<sup>387</sup> *Id.* at 298 n.6.

<sup>388</sup> *Id.* at 298.

<sup>389</sup> *Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

<sup>390</sup> *Id.* at 310.

<sup>391</sup> See *id.* at 306–07, 309–11, 315 (reaching similar conclusions after analyzing history and context of policy).

<sup>392</sup> See *supra* note 9.

<sup>393</sup> See *supra* notes 9–17 and accompanying text; notes 72–114 and accompanying text; notes 133–41 and accompanying text; notes 152–85 and accompanying text.

depend on the type of license plate, or even the type of specialty plate program, at issue. With regard to any particular program or type of plate, we will want to know whether it involves one of the three types of government speech thus far recognized by the Supreme Court.

As to standard-issue plates, it is difficult to view the messages contained there as anything but government speech. Motorists do not choose to display those messages, since presumably the law requires that they must; moreover, the government crafted the message and also came up with the idea of putting it on standard-issue plates. If a private motorist disagrees with the message, the state has to allow him not to display it—this is the teaching of *Wooley v. Maynard*<sup>394</sup>—but the Court did not reach this result because the message “Live Free or Die” included some component of private speech; rather, the Court held that private speech rights are violated when the government compels a private motorist personally to convey *the government’s own* message.<sup>395</sup> The messages contained in the alphanumeric combinations on vanity plates, by contrast, ought to be regarded as private speech. Although the government owns the license plate and the government’s name is embossed on it, no one—including the government—views the alphanumeric combinations (or all elements of all license plates, for that matter) as a medium or format clearly reserved for the government’s own messages. And of course the government did not come up with the idea of putting any of the particular chosen messages on a license plate.

Specialty plates are the most difficult case of all, but calling them hybrid speech merely hides the ball. It would be more accurate, perhaps, to say that specialty plates (like vanity plates) contain some government speech and some private speech on each plate. The elements of government speech would include the state name, any state motto or other design that the state has required for all license plates, and the overall dimensions, materials, and construction of the plate (to the extent these elements could be deemed expressive). These are elements which are present only because the government came up with the idea of making license plates in this way with these messages. It might also be that messages honoring or identifying a particular group selected by the state—say, Purple Heart recipients or firefighters<sup>396</sup>—could be considered

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<sup>394</sup> 430 U.S. 705, 717 (1977).

<sup>395</sup> See *id.* at 715 (“New Hampshire’s statute in effect requires that appellees use their private property as a ‘mobile billboard’ for *the State’s ideological message*—or suffer a penalty.” (emphasis added)).

<sup>396</sup> Tennessee, for example, offers both these plate designs. The state groups its specialty plates into categories, including “Clubs/Groups,” “Collegiate Plates,” “Disabled Plates,” “Emergency Management,” and “Military/Veterans.” See Tennessee Department of Revenue, Specialty License Plates, <http://tennessee.gov/revenue/vehicle/licenseplates/specialty.htm> (last visited Aug. 31, 2009). The Purple Heart plate is classified within the “Military/Veterans” category and is available only to Tennessee residents who can prove that they have been awarded the Purple Heart; there is no charge to

government speech, assuming that these groups did not petition the government for issuance of the plates and the government was not trying to give these groups a way to raise money and public awareness for some cause.<sup>397</sup> But when a particular organization's logo or design appears on a plate only because the *organization* came up with the idea of trying to qualify for the issuance of a specialty plate bearing that design, the design is not properly viewed as government speech; those logos and designs are private speech. For one thing, the government did not independently come up with the idea of putting that particular message on a specialty plate, or even with some "overall message" to be conveyed by its specialty plate program. For another, assuming the program allows or encourages private applications of some sort (whether through legislative lobbying or through paperwork filed with a state bureaucratic office), the medium or format of specialty plate designs are not clearly reserved for government messages; instead, they are open to multiple private speakers for the purpose of raising revenue for the state and the organization and, to a lesser extent, for encouraging the speech of private organizations and motorists. Finally, it is clear that the literal speaker, whoever that may be, is not a government employee whose job it is to send messages on license plates concerning subjects like adoption or NASCAR.

These sorts of specialty plate programs are not reasonably viewed as the state's bully pulpit for sending its own messages, but rather as a state-regulated forum for the expression of a variety of private messages. The fact that any such messages must be approved in advance by the state suggests, not government speech, but the possibility of improper viewpoint discrimination among private speakers. Using such evidence to show either government speech or a governmental component of hybrid speech is to use evidence of viewpoint discrimination as a justification for

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the motorist for this plate. See Tennessee Department of Revenue, Specialty License Plates—Military/Veterans: Purple Heart, <http://tennessee.gov/revenue/vehicle/licenseplates/militaryveterans/militarydesc.htm#purpleheart> (last visited Aug. 31, 2009). The Firefighter plate is classified within the "Emergency Management" category and is available only to Tennessee residents who can prove that they are current or retired members of a "bona fide" "firefighting unit." The charge for this plate is \$21.50, which is the same as the charge for a standard plate. See Tennessee Department of Revenue, Specialty License Plates—Emergency Management: Firefighter, <http://tennessee.gov/revenue/vehicle/licenseplates/emergency/emergdesc.htm#firefighter> (last visited Aug. 31, 2009). The standard plate is listed as "Automobile/Motor Home" within the "Miscellaneous" category. See Tennessee Department of Revenue, Specialty License Plates—Miscellaneous, <http://tennessee.gov/revenue/vehicle/licenseplates/misc/miscdesc.htm#automobile> (last visited Aug. 31, 2009).

<sup>397</sup> To the extent a qualified private motorist chooses such a plate instead of a standard-issue plate, the message "I am a Purple Heart recipient" or "I am a firefighter" would also be the private speech of the motorist. This might be the closest thing to true "hybrid speech." But that should not affect the analysis. The fact that the government's predetermined message happens to be endorsed by a private speaker should not mean that the government is speaking any less or that it is less free to specify which of these sorts of messages it will issue in this way. Nor should any of this affect our analysis under the Establishment Clause; the private speaker has a First Amendment right to endorse religion, but no First Amendment right to demand that the government endorse religion first, thereby allowing her to join in.

viewpoint discrimination.

### VIII. CONCLUSION

First Amendment principles require judges to differentiate between the messages of the government and those of private parties. Messages endorsing religion cannot violate the Establishment Clause unless the government crafts or adopts the message as its own. And governmental restrictions on a message's viewpoint cannot violate the Speech Clause unless the message is someone else's. The distinction between government speech and private speech makes sense because we want to allow the government to send its own messages as a participant in the marketplace of ideas, but we do not want to allow the government to allocate its vast resources discriminatorily so as to hobble whatever private viewpoints it disfavors. If this distinction between government and private speech makes sense, then it should be recognized—even in the hard cases in the middle.

Thus far, the Supreme Court has recognized the distinction but has given only limited guidance about how to identify government speech in questionable cases. Still, what the Court has said can be largely distilled to three factors that independently indicate the presence of government speech. Compared to the single-prong, four-pronged, and mixed speech approaches developed over the past decade by federal judges and commentators, these three factors seem not only somewhat less subjective, but also more closely tied to the essence of government speech. In short, the presence of any one of these three factors tends to show that the government has developed or adopted, in the words of the Court, a “programmatically message of the kind recognized in *Rust* . . . .”<sup>398</sup> Governments that do this are indeed sending their own messages.

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<sup>398</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).