THE ELUSIVE MEANING OF GOVERNMENT SPEECH

INTRODUCTION

Dr. Irving Rust, medical director of a Planned Parenthood clinic in the Bronx, New York, spent most days counseling women on their options when confronted with an unplanned pregnancy.[1] His clinic, like many other Planned Parenthood clinics across the United States, depended on federal funding.[2] In fact, federal funding for Dr. Rust's clinic amounted to a quarter of its total budget.[3] In 1970, Congress implemented Title X, which allowed the Secretary of Health and Human Services[4] to distribute federal funds to private organizations like Planned Parenthood that were involved in the operation of "family planning" projects.[5]

However, these federal funds came with a condition. Dr. Rust could no longer counsel his patients advocating abortion as a method of family planning, and was expressly prohibited from referring a pregnant woman to an abortion provider.[6] Title X funds were limited to "be used only to support *preventive* family planning services"[7] such as "preconceptional counseling, education, and general reproductive health care."[8] If a patient was to inquire specifically about abortion, all Dr. Rust could say was that his clinic "d[id] not consider abortion an appropriate method of family planning and therefore [would] not counsel or refer for abortion."[9]

Dr. Rust, along with other doctors and Title X grantees, sued the Secretary of Health and Human Services claiming that the conditional funding requirements were an impermissible restriction on their First Amendment right to free speech.[10] Surely those doctors had a right to give honest, private advice to their patients, regardless of the content, unencumbered by funding restrictions? Not so. The Supreme Court sided with the government, stating that these restrictions were in fact permissible,

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1. William H. Honan, *Dr. Irving Rust, 71, Lead Plaintiff in Abortion Counseling Lawsuit*, N.Y. TIMES (Sept. 8, 2001), http://www.nytimes.com/2001/09/08/nyregion/dr-irving-rust-71-lead-plaintiff-in-abortion-counseling-lawsuit.html.

2. *Id.*

3. *Id.*

4. Under the administration of President George H.W. Bush, the Secretary of Health and Human Services was Dr. Louis W. Sullivan. *Id.*

5. Rust v. Sullivan, 500 U.S. 173, 178 (1991).

6. *Id.* Title X also prohibited clinics from engaging in any sort of activities that advocated abortion. This included: (1) lobbying legislation favoring abortion; (2) providing speakers advocating abortion; (3) using legal action to make abortion available as a method of family planning; and (4) paying dues to any abortion activist groups. *Id.* at 179–81.

7. H.R. REP. NO. 91-1667, at 8 (1970) (Conf. Rep.), *as reprinted in* 1970 U.S.C.C.A.N. 5080, 5081 (emphasis added).

8. 42 C.F.R. § 59.2 (1989).

9. 42 C.F.R. § 59.8(b)(5) (1989).

10. *See Rust*, 500 U.S. at 181.

basing their decision on what has recently come to be known as the "government speech doctrine."[11]

The government speech doctrine stands for the principle that when the government engages in speech, insofar as it is determining the content of its own message, it can avoid First Amendment limitations.[12] In other words, the government can support a particular message by discriminating as it sees fit against opposing messages.[13] For example, a government program discouraging forest fires by posting signs stating "Only You Can Prevent Forest Fires" does not require a note underneath with the diametrically opposed view (i.e., "Forest Fires are Fun for the Whole Family").[14] Normally, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[15] It must be viewpoint neutral in its evaluation of private expression.[16] However, so long as the government is expressing its own viewpoint, it may restrict expression in exactly the way that is forbidden in other contexts.[17] The premise for this rationale is the idea that it would be impossible for the government to function if it could not adopt a view for the benefit of the community by undercutting itself in the next breath.[18] Ultimately, the Supreme Court has determined that the major check on this power is the democratic electoral process.[19]

Examples of government speech are rarely, if ever, obvious. Often, the government speaks through actors such as private parties and motivates these speakers with government subsidies.[20] Sometimes, it is not clear that the government is the speaker. For example, in the case of Dr. Rust, the Court determined that the message the government was attempting to

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11. *Id.* at 178.

12. Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 61 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.") (quoting Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015)); *see also* Wooley v. Maynard, 430 U.S. 705, 715 (1977).

13. *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384–85 (2001).

14. Garrett Epps, *Are There Limits to Government Speech?*, ATLANTIC (Mar. 29, 2015), http://www.theatlantic.com/politics/archive/2015/03/are-there-limits-to-government-speech/388943/.

15. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

16. *See id.* at 96.

17. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696 (2011) ("[P]ursuant to government speech doctrine, the government may be able to restrict private expression 'because of its message, its ideas, its subject matter, or its content,' so long as in so doing it is expressing its own viewpoint.").

18. *See* Rust v. Sullivan, 500 U.S. 173, 194 (noting that Congress may promote democracy without promoting a competing political philosophy such as communism).

19. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468–69 (2009); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

20. For example, the government may choose to implement programs that encourage art by funding private parties' artwork, approving some and rejecting others on ambiguous criteria such as "decency and respect." Nat'l Endowment of the Arts v. Finley, 524 U.S. 569, 579 (1998).

convey was a distaste for abortion as a method of family planning.[21] The government chose to convey this message through doctors like Dr. Rust who were employed by private organizations.[22] Unfortunately, because of this quasi-private role the government can play as patron of its own message, the government speech doctrine is unclear and perhaps unworkable. The Court has created a precedent of cases that are difficult to reconcile, using many different tests (or sometimes no recognizable test at all) that leave challengers of the government wondering how and when their speech will be silenced.

This Note aims to shed light on the discrepancies in jurisprudential analysis that have led to a muddled government speech doctrine. It also attempts to set forth a neutral principle with which to evaluate government speech cases moving forward. Part I introduces the government speech doctrine through a historical illustration of Supreme Court precedent. These cases are categorized by the role of the government in either patronizing a government message or regulating private speech, based upon the Court's ruling. Part II engages academic literature on the topic of government speech, creating a forum of discussion that suggests several potential methods of analysis for government speech precedent. Lastly, Part III ventures to present a coherent methodology of analysis for evaluating government speech cases.

I. CATEGORIES OF GOVERNMENT SPEECH

With respect to the government, the Court has generally recognized three different categories of speech.[23] The first is government-as-speaker, the second is government-as-patron, and the third is government-as-regulator-of-private-speech.[24] When the government acts on its own behalf, as in the first two categories, it is not subject to First Amendment limitations.[25] However, government regulation of private speech is subject to strict scrutiny, and therefore, the government must have a compelling reason for abridging speech in order to succeed on a constitutional challenge of its regulation.[26] The ultimate issue is the tenuous distinction

21. *See Rust*, 500 U.S. at 177.

22. *See id.*

23. Though the categories can be described using different names, for all intents and purposes, these categories, through their definition and scope, fit into and encompass the three mentioned above. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005) (creating a distinction between compelled-speech, compelled-subsidies, government-compelled subsidies of government speech, and private speech); *Finley*, 524 U.S. 569, 611 (1998) (Souter, J., dissenting) (discussing government-as-buyer, government-as-speaker, government-as-regulator-of-private-speech, and government-as-patron).

24. *Finley*, 524 U.S. at 611.

25. *See* Blochner, *supra* note 17.

26. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

between government-as-regulator-of-private-speech and government-as-patron of its own message.

A. Government-as-Speaker

The government may act by directly speaking.[27] For example, the President may make a statement to the public "arguing that . . . tax cuts to large businesses are the best way to spur the economy."[28] Or, the government might create a program that aims to assist smokers in quitting.[29] The government can choose to advertise one method of quitting, like nicotine gum, over other methods.[30] It does not matter if the stance the government takes is "hotly contested political[ly]"; the government has the right to state its position without First Amendment limitations.[31] Generally, these examples are obvious, as they do not involve the use of private agents that trigger the government-as-patron or government-as-regulator-of-private-speech analysis.[32]

B. Government-as-Patron

A government can act as patron of speech when it has a particular goal in mind and fulfills that goal by using private citizens to disseminate its message.[33] In effect, the private citizen who receives the government sponsorship becomes a mouthpiece with which he voluntarily espouses the government position.[34] For example, the government may initiate a program to fund art that displays "American creativity and cultural diversity, professional excellence, and . . . appreciation of the arts."[35] In doing so, the government is entitled to control its message by withholding sponsorship from private artists who do not conform to the message. Along the same lines, the government may "offer a prize for the best essay sounding patriotic themes."[36] A private individual can win this prize only if

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27. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 183 (1996).

28. Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in Student Speech Cases*, 83 ST. JOHN'S L. REV. 1047, 1057 (2009).

29. *See* Bezanson & Buss, *supra* note 13.

30. *See id.* at 1384–85.

31. Davis & Rosenberg, *supra* note 28.

32. *See, e.g.*, Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012) (holding that the FDA Family Smoking Prevention and Tobacco Control Act was not a violation of the tobacco company's right to free speech).

33. Bezanson & Buss, *supra* note 13, at 1385.

34. Davis & Rosenberg, *supra* note 28.

35. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998) (quoting 20 U.S.C. §§ 954(c)(1)–(10)).

36. Davis & Rosenberg, *supra* note 28.

he writes an essay that conforms with the purpose of the program. Over the course of the government speech doctrine's limited history, the Court has consistently placed the government in the role of patron in several fundamental cases.

1. *Rust v. Sullivan*

The first of these cases, and the founding case of the government speech doctrine, is *Rust v. Sullivan*.[37] In *Rust*, the government, through its Title X program, provided federal funding for family-planning services.[38] The program placed restrictions on funding for medical clinics to prevent the discussion of abortion as a method of family planning.[39] A doctor could not discuss abortion with a patient, nor could the clinic "engag[e] in activities that 'encourage, promote or advocate abortion as a method of family planning.'"[40] Not only that, but clinics that wanted to continue abortion-related activities needed to organize their Title X projects separately both physically and financially from any of these activities.[41] Petitioners contended that because the regulations prohibit all information on abortion while compelling a clinic to convey information to continue a pregnancy to term, the government impermissibly discriminated on the basis of viewpoint and in violation of the First Amendment.[42]

In a majority opinion written by Chief Justice Rehnquist, the Court evenhandedly asserts the program's constitutionality.[43] The Court concludes that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an

37. 500 U.S. 173 (1991). *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale . . . [of] governmental speech . . . 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.'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995))); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374 (2010) ("According to accepted wisdom, the government speech doctrine, as articulated by the U.S. Supreme Court, had its genesis in *Rust v. Sullivan*."). It is also worth mentioning that the doctrine was implied in an earlier case, *Wooley v. Maynard*, in which the Supreme Court acknowledged the importance of communicating official, and sometimes partial, messages to the government. 430 U.S. 705 (1977).

38. Rust v. Sullivan, 500 U.S. 173, 178 (1991).

39. *Id.* at 180.

40. *Id.* (quoting 42 CFR § 59.10(a)) (mentioning that "[f]orbidden activities include lobbying for legislation that would increase the availability of abortion[,] . . . providing speakers to promote abortion[,] . . . using legal action to make abortion available in any way[,] . . . and paying dues to any group that advocates abortion").

41. *Id.* (citing 42 CFR § 59.9).

42. *Id.* at 192.

43. *Id.* at 178.

alternative activity consonant with legislative policy."[44] According to the Court, "[t]his [was] not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope."[45] In effect, the Court determines that the government is putting forth its own message—that it does not agree with abortion as a method of family planning—and any language by doctors agreeing with abortion is outside of the predetermined limits of its message.[46]

The Court then goes on to rebut the petitioners' arguments, and in doing so provides some insight into its analysis in determining that the funding restrictions are merely to ensure that the federal program's message is conveyed correctly.[47] The petitioners contended that "even though the government may deny [a] . . . benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[48] In response, the Court stated that:

> [H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project* . . . . The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities.[49]

The Court creates a distinction between an employee working within the scope of the Title X project activities with the private individuals who are not in any way restricted in their speech.[50] In this distinction, the majority seems to push the logic that this is truly the government's message, and that the Title X employees, in agreeing to work for the private organization funded by Title X, are also agreeing to be a voluntary advocate for the government's message. They can always "choose" to work for another clinic if they do not agree with the message.

The problem with this logic is that realistically, a doctor working at one institution cannot take on and off his "Title X hat" as easily as he can shrug

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44. *Id.* at 193 (quoting Maher v. Roe, 432 U.S. 464, 475 (1977)).
45. *Id.* at 194.
46. *See id.*
47. *Id.*
48. *Id.* at 196 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
49. *Id.*
50. *Id.* at 199.

off and hang up his white coat at the end of the day. He cannot rush to the building next door (assuming there is a physically *and* financially separate building) every time a woman requests abortion-related information to be free of Title X's scope. Not only that, but many private clinics like Planned Parenthood are given a certain degree of federal funding, likely Title X funding.[51] Therefore, if a doctor wants to remain working for a clinic helping indigent women he will likely still be subject to the same Title X stipulations. Ultimately, through this rationale, the Court held that the regulations were not facially invalid, as the government was merely acting as patron of its own message and therefore did not violate the First Amendment.[52]

2. *National Endowment of the Arts v. Finley*

The next case in which the Court placed the government within the "patron" category was *National Endowment of the Arts v. Finley*.[53] In *Finley*, respondents applied for funding of their artwork from the National Endowment of the Arts (NEA).[54] "Applications for NEA funding are initially reviewed by advisory panels composed of experts in the relevant field of the arts."[55] These panels report their recommendations to the National Council on the Arts which then makes final recommendations to the NEA Chairperson.[56] The Chairperson has ultimate approval in awarding grants.[57] An advisory council initially recommended approval of the respondents' artwork.[58] However, in 1965, the NEA disbursement statute changed its criteria for evaluating artwork. This new provision provided for criteria of "artistic excellence and artistic merit . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[59] Respondents challenged the language of the new provision as impermissible viewpoint discrimination under the First Amendment and void for vagueness.[60] They argued that "the provision [was] a paradigmatic example of viewpoint discrimination

51. U.S. Dep't of Health and Human Servs., *Title X Grantees*, Office of Population Affairs(Mar. 16, 2018), https://www.hhs.gov/opa/title-x-family-planning/title-x-grantees/index.html.

52. *Rust*, 500 U.S. at 178.

53. 524 U.S. 569 (1998).

54. *Id.* at 577.

55. *Id.* at 573.

56. *Id.*

57. *Id.*

58. *Id.* at 577.

59. *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1)).

60. *Id.* at 578.

because it reject[ed] any artistic speech that either fails to respect mainstream values or offends standards of decency."[61]

The majority under Justice O'Connor held that the provision and its decency criteria "neither inherently interfere[d] with First Amendment rights nor violate[d] constitutional vagueness principles" and therefore was facially valid.[62] Several key arguments form the majority's reasoning: (1) other attempts to put constraints on speech in the NEA statute had been explicit;[63] (2) the additional language of "decency and respect" were meant more as a definition for artistic excellence than stand-alone criteria;[64] and (3) the "decency and respect" criteria do not expressly silence speakers by threatening censorship.[65] Most of the argument rests on the fact that the criteria themselves without context are not sufficiently viewpoint discriminatory to invalidate the statute on its face. The majority leaves open the opportunity for an as-applied challenge when the "decency and respect" criteria are used in a situation to engage in viewpoint discrimination, not "on the basis of [a] hypothetical application to situations not before the Court."[66]

The majority further explains the funding criteria as a message that Congress promulgated in support of art in the United States, which is vital for preserving the nation's artistic heritage.[67] The program originated from the government and therefore was not an opportunity to encourage private speech, but an opportunity for the government to espouse a message of "artistic heritage" through the patronage of voluntary, private parties.[68] The majority opinion briefly explains Congress's capabilities in enforcing its own message, stating that it may "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."[69]

However, perhaps the first and most helpful layout of government speech thus far comes from Justice Scalia's concurrence in conjunction with Justice Souter's dissent. While their conclusions are different, Justices Scalia and Souter both agree that the criteria themselves are viewpoint discriminatory. Scalia states that:

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61. *Id.* at 580.

62. *Id.* at 573.

63. *Id.* at 581 (noting a provision that states "[o]bscenity is without artistic merit, is not protected speech, and shall not be funded" (quoting 20 U.S.C. § 954(d)(2))).

64. *Id.* at 581.

65. *Id.* at 583.

66. *Id.* at 584 (quoting FCC v. Pacifica Found., 438 U.S. 726, 743 (1978)).

67. *Id.* at 584–85.

68. *Id.* at 584.

69. *Id.* at 588 (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

> To the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes. In other words, the presence of the "tak[e] into consideration" clause "cannot be regarded as mere surplusage; it means something." And the "something" is that the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not. This unquestionably constitutes viewpoint discrimination.[70]

He furthers his argument by indicating that it "makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether" the government achieves its viewpoints directly,[71] by officially advocating for its position,[72] or by subsidizing private actors who then advocate the government's message.[73] Even though the majority left open the opportunity for an as-applied challenge, applying Scalia's rationale, it is likely that any challenge on viewpoint discrimination would fail, because the government is promulgating the message and therefore may discriminate to ensure proper deliverance of its message.

In dissent, Justice Souter makes first mention of the "government-as-patron category," along with "government-as-speaker" and "government-as-buyer" categories.[74] He states that when the government is acting in its role as speaker or buyer, it is "entitled to engage in viewpoint discrimination."[75] He then goes on to say that when the government is acting as patron (which he defines as when the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"), it is not free from First Amendment limitations.[76] His main argument in dissent is that the NEA is not actually promulgating any sort of message and therefore is not immune from First Amendment scrutiny. Although Justice Souter uses the label "government-as-patron" to analogize this case to

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70. *Id.* at 592–93 (Scalia, J., concurring) (citation omitted).

71. *Id.* at 598 (including through "government-employed artists paint[ing] pictures . . . or government-employed doctors perform[ing] abortions").

72. *Id.* ("establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control").

73. *Id.* ("funding private art classes, for example, or Planned Parenthood").

74. *Id.* at 610–11 (Souter, J., dissenting).

75. *Id.* (providing that "if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page").

76. *Id.* at 613 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)).

Rosenberger,[77] he is truly defining the role of the government-as-regulator-of-private-speech.

Up to this point, the Court declined to articulate a test or an identifiable list of factors for consideration that may have created a more defined government speech doctrine. The Court also, in evaluating the role of government-as-patron, generally declined to explicitly invoke the government speech doctrine. This only leads to further confusion when lower courts attempt to evaluate cases based on the doctrine which the Court claims dates back to *Rust*. Ambiguous standards and distinctions between what constitutes private speech and funding a government message should not suffice in a doctrine whose implications are vast and sweeping.[78]

3. *Pleasant Grove City v. Summum*

However, in more modern cases, such as *Pleasant Grove City v. Summum*,[79] the Court has seemed more conscientious in creating multifactor tests to shape the doctrine when analyzing the role of government-as-patron. These tests, while much more illustrative of the Court's reasoning, have also created confusion, as the evolution of such multifaceted tests seems to include or exclude different factors.[80]

In *Summum*, respondent Summum, a religious organization, petitioned the government to erect a monument in Pioneer Park symbolizing its religion.[81] The government denied the petition.[82] Respondents filed suit, stating that the government discriminated on the basis of viewpoint in approving a similar Ten Commandments monument while denying the Summum monument.[83] The majority opinion written by Justice Alito employs a two-factor test in analyzing government speech, looking first to whether the government has a history of using a particular medium of communication, and then whether the government exercises direct control over the message.[84] If the government exercises both direct control and historically uses a particular mode of communication, it acts in the role of

77. 515 U.S. 819.

78. Cohen v. California, 403 U.S. 15, 26 (1971) (stating that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

79. 555 U.S. 460 (2009).

80. *Id.* at 462.

81. *Id.* at 465 (describing the monument "which would contain 'the Seven Aphorisms of SUMMUM' and be similar in size and nature to the Ten Commandments monument" approved in lieu of the Summum monument (citation omitted)).

82. *Id.* at 466.

83. *Id.*

84. *Id.* at 462.

patron to advance its own message.[85] Ultimately, the Court determined that the placement of a monument in a public park, even if the monument was offered by a private organization, constituted government speech, and therefore the government could exercise viewpoint discrimination in denying the Summum monument.[86]

The Court begins its analysis by making similar sweeping statements as were present in *Rust* and *Finley* about the ability of the government to avoid First Amendment limitations when patronizing private speech to conform to its own messages. For example, "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[87] Or "[if] the citizenry objects, newly elected officials later could espouse some different or contrary position."[88] The majority then, pursuant to the first factor of its test, undertakes a historical analysis of the presence of monuments in conveying government messages:

> Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.[89]

To the second point of the analysis, the Court illustrates the City's method of granting final approval authority to the monuments as a way of exclusively controlling the message. The City has set forth criteria in making monument selections, it takes ownership of all monuments that are put on display within the park, and it consistently manages the monuments within the park to assure compliance with its message.[90]

Justice Breyer's concurrence takes a different approach, focusing instead on the proportionate burden on speech rather than its

85. *Id.* at 468.

86. *Id.* at 481.

87. *Id.* at 468.

88. *Id.* at 468–69 (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)). For example, in *Rust*, once the Clinton Administration took over, the Title X policy was reversed. *See* Honan, *supra* note 1 (citation omitted). Dr. Rust was even quoted at a White House ceremony for the occasion as saying, "Thank you, Mr. President. I'm no longer gagged." *Id.*

89. *Summum*, 555 U.S. at 470.

90. *Id.* at 473.

categorization.[91] His approach looks more to the purpose of categories "such as 'government speech,' 'public forums,' [and] 'limited public forums' . . . lest we turn 'free speech' doctrine into a jurisprudence of labels."[92] In his attempt to look beyond the categorization, he believes "it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[93] Justice Breyer then discusses the potential for market distortion, and in doing so, determines that the City's action in preventing Summum from erecting its monument "does not disproportionately restrict Summum's freedom of expression."[94]

Justice Souter's concurrence also provides another potential test for evaluating government speech, established and deemed by scholars as the "reasonable observer inquiry" or "literal speaker" test.[95] He describes "the best approach . . . [as asking] whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."[96] He is concerned with the implications of a "per se" or bright-line rule in favor of one with a little more room for interpretation.[97] He also notes his concern that eventually, monuments and "chatter" surrounding the monuments will "make it less intuitively obvious that the government is speaking."[98]

Summum provides the first real illustration of an array of factors courts might consider in determining when the government is speaking. Although the majority determined that the monuments were in fact government speech, Justices Breyer, Souter, and Alito used different approaches to come to the same conclusion. In fact, Souter's "reasonableness test" is adopted in *Walker*,[99] as an additional factor in the government speech analysis.

4. *Walker v. Texas Division, Sons of Confederate Veterans*

Finally, and most recently in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[100] the Court created a three-factor test to find

91. *Id.* at 484 (Breyer, J., concurring).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 487 (Souter, J., concurring); *see also Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2009) [hereinafter *Developments in the Law*].

96. *Summum*, 555 U.S. at 487 (Souter, J., concurring).

97. *Id.* at 485.

98. *Id.* at 486.

99. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

100. *Id.*

the patronage of the government in establishing its message through license plates. The prongs of the test are as follows: (1) whether the government has a history of using this medium of communication; (2) whether a reasonable observer would conclude the government was speaking; and (3) whether the government exercises direct control over the message.[101] In *Walker*, the Sons of Confederate Veterans requested a design for a specialty license plate that contained the image of a Confederate flag.[102] The government rejected the application, and the Sons of Confederate Veterans brought suit on the grounds that the rejection constituted a violation of the First Amendment right to free speech.[103]

The Court, in a majority opinion written by Justice Breyer, concluded that license plates constituted government speech, and therefore the Texas government had the right to reject the Confederate flag design.[104] For the first factor—historical analysis—the Court considered the lengthy history of license plates as a communication of state and vehicle identification numbers.[105] The Court then argued that Texas license plates are closely identifiable with the government, as plates are issued and mandated by the state and essentially serve as government IDs; therefore, a fully informed, reasonable observer would likely identify license plates with the government.[106] Lastly, the Court decided that Texas maintained direct control over the messages given that the state essentially holds ultimate veto power as to the content, design, and consideration of the message it portrays.[107]

C. Government-as-Regulator-of-Private-Speech

The main distinction between government-as-patron and government-as-regulator is that a government regulation controls and abridges the speech of private citizens. In contrast, government patronage merely uses willing private citizens to espouse the message that originated from the government. This is the only interaction in which the government is subject to First Amendment restrictions. Examples that the Court has recognized as regulation of private speech include limiting funds to a religious newspaper organization because of their religious affiliation;[108] conditioning certain

101. *Id.* at 2247.

102. *Id.* at 2243–44.

103. *Id.* at 2245.

104. *Id.* at 2253.

105. *Id.* at 2248 (noting that "Arizona became the first State to display a graphic on its plates" in 1917, and that Texas did the same in 1919).

106. *Id.* at 2248–49.

107. *Id.* at 2249 (stating that the Texas Board exercises final approval authority over any potential plate selections).

108. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

facets of legal representation on receipt of government funds;[109] and discriminating "invidiously" using subsidies to "ai[m] at the suppression of dangerous ideas."[110] The Court has also decided a few cases in which it deemed the role of the government to be regulator of private speech.

1. *Rosenberger v. Rector and Visitors of the University of Virginia*

The first of these cases is *Rosenberger v. Rector and Visitors of the University of Virginia*.[111] In *Rosenberger*, a public university imposed a mandatory student activity fee that it used to fund student groups portraying varying viewpoints.[112] A group of students formed an organization at the University of Virginia to publish a magazine that expressed Christian viewpoints.[113] This student organization, entitled Wide Awake Productions (WAP), petitioned for funding from the joint student activity fee.[114] The University denied funding to publish the Christian magazine "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[115] The petitioners filed suit alleging that refusing to authorize this payment was a violation of their First Amendment right to free speech as well as free exercise of religion.[116]

In a majority opinion written by Justice Kennedy, the Court held that the University could not engage in viewpoint discrimination to deny funding when the forum in which the students were speaking was one of the University's own creation.[117] According to the Court, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[118] This indicates that the Court, unlike the government-as-patron cases, distinguished *Rosenberger* as within the realm of private speech. The Court even directly mentions *Rust*, stating that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[119] Here however, the "University declares that the student groups . . . are not

109. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

110. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1987) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

111. 515 U.S. 819.

112. *Id.* at 824.

113. *Id.* at 825–26.

114. *Id.* at 825, 827.

115. *Id.* at 822–23.

116. *Id.* at 827.

117. *Id.* at 829–30, 837.

118. *Id.* at 828.

119. *Id.* at 833 (citing Rust v. Sullivan, 500 U.S. 173, 196–200 (1991)).

the University's agents, are not subject to its control, and are not its responsibility."[120] Therefore, "[t]he 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," or it will be in violation of the First Amendment.[121] Rarely does the government so clearly disavow responsibility for speech than in this context, making it all the more clear that WAP is a private speaker, not merely an outlet for the University's message.

The Court then continues its reasoning by moving to forum analysis.[122] The Supreme Court distinguishes between three types of forums: traditional public forums, designated or limited forums, and nonpublic forums.[123] Justice Kennedy frames the student activity fund as a limited "metaphysical" forum of the University's creation.[124] Within a limited forum, the government may discriminate based on content "if it preserves the purposes of [the] limited forum," while viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations."[125] Therefore, given that the University discriminated on the basis of viewpoint in denying funding based on WAP's particular religious viewpoint, the denial of funding was in direct violation of its right to free speech.[126]

2. *Legal Services Corp. v. Velazquez*

Finally, and perhaps the most contentious case of the government-as-regulator, is *Legal Services Corp. v. Velazquez*.[127] In *Velazquez*, the Court struck down a funding restriction that denied funding if a private legal assistance organization made "an effort to amend or otherwise challenge existing welfare law."[128] In other words, funding from the government program may limit a client's access to complete representation. The Court determined that the fundamental right to counsel would be ill-served if the

120. *Id.* at 835.

121. *Id.* at 829 (citation omitted).

122. *Id.*

123. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (introducing the concept of forum analysis).

124. *Rosenberger*, 515 U.S. at 829–30.

125. *Id.*

126. *Id.* at 832, 837. Finally, though beyond the scope of this Note, the Court held that the University did not violate the Establishment Clause as its policy of creating a student activity fund was neutral toward religion. *Id.* at 840, 846. Justice Souter believes that the Establishment Clause issues would be dispositive. *Id.* at 863–64 (Souter, J., dissenting). However, Justice Kennedy notes that money is not moving directly from the University to Wide Awake Productions—the state is only funding their printing costs. *Id.* at 842 (majority opinion).

127. 531 U.S. 533 (2001).

128. *Id.* at 536–37, 549.

representation of a client could not encompass all potential avenues for legal argument.[129] The Court determined that the government was acting as regulator of private speech, and as such must act in a viewpoint-neutral manner.[130]

Arguing that it was merely conditioning funding on the proper execution of a government program, the government in *Velazquez* stated that the facts were nearly identical to *Rust*.[131] In fact, scholars like Professor Goldberg, for example, even state that *Velazquez* seems to be the same case as *Rust*, "but in lawyer's clothing."[132] Both deal with professionals, in relationships where clear and open communication are paramount—in that if an attorney cannot represent an individual adequately he may go to jail, and if a doctor cannot treat an individual adequately, he may lose his life—being restricted in their ability to provide adequate representations to their clients. However, the Court inserted language indicating that the funding program was actually the government playing the role of regulator of private speech, not patron:

> [L]ike the program in *Rosenberger*, [this] program was designed to facilitate private speech, not to promote a governmental message . . . . [A]dvice 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.[133]

"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 . . . ."[134]

Determining which type of speech is present, and by extension the role the government plays in any situation, is critical, as it will likely be dispositive in a free speech case.[135] Often, identifying the government as the patron of speech will lead to the conclusion that its program—and by association its conduct—is constitutional.[136] On the other hand, if the government is acting as regulator, it likely will not have a sufficiently compelling justification and the Court will determine its conduct to be

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129. *Id.* at 546.

130. *Id.* at 542.

131. Brief for the United States at 30, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (Nos. 99-603, 99-960).

132. Steven H. Goldberg, *The Government-Speech Doctrine: "Recently Minted;" But Counterfeit*, 49 U. LOUISVILLE L. REV. 21, 27 (2010).

133. *Velazquez*, 531 U.S. at 542–43.

134. Olree, *supra* note 37, at 377.

135. Davis & Rosenberg, *supra* note 28, at 1059.

136. *Id.*

unconstitutional.[137] Part II will look to how scholars have synthesized Supreme Court precedent and attempted to create a coherent test or framework with which to categorize the role of the government in these so-called government speech cases.

II. EVALUATIVE FRAMEWORKS ADVOCATED BY SCHOLARS

Cases like *Rust* and *Velazquez*, factually similar yet per the Court legally distinguishable, create the discrepancies that many scholars have taken issue with in government speech analysis. Why, given their similarities, does one analysis conclude that the government is merely a patron in granting funds to the clinic, and the other determines that government is surpassing its bounds by regulating private speech between an attorney and her client? Where is the line drawn? Different scholars have advocated different principles to rationalize these cases including: inconsistency of government speech with fundamental principles of the First Amendment, the literal speaker test, and multi-factor tests based on any or all of the above.

A. Contrary to the Fundamental Purpose of the First Amendment

One approach many scholars advocate is limiting the scope of government speech in a way that is consistent with the fundamental purpose of the First Amendment. Scholars who promote this approach first define the purported "purpose of the First Amendment," and then attempt to determine what constitutes a violation of this approach.

According to Professor Krotozynski, First Amendment jurisprudence has historically been analyzed through the lens of two main theories.[138] The theory with the greatest impact on the scope of the government speech doctrine is a marketplace of ideas theory, advocated initially by Justice Holmes.[139] The marketplace of ideas theory states that the First Amendment is meant to cultivate competing ideas attempting to be expressed within a society.[140] "Citizens are free both to speak and to listen as they think best; truth is served by a free and full competition of ideas within the community . . . ."[141] The idea is that market forces will drown

137. *Id.*

138. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 13 (2006).

139. *Id.* at 14. On the other hand is the democratic self-governance theory. *Id.* at 13. This theory discusses First Amendment protections as a way of allowing anything worth hearing to be spoken, not just those ideas that have the greatest impact on the market. *Id.* at 15.

140. *See id.* at 14.

141. *Id.*

out voices that do not have the political wherewithal to create enough of an impact on the market and therefore are not worth hearing.[142] This theory is a generally accepted principle with which some scholars have attempted to reconcile government speech.

Professors Bezanson and Buss, for example, also advocate proceeding with the "marketplace of ideas" theory as the justification for First Amendment protection, though they apply it in the government speech context.[143] They start by identifying the government as an entity that can speak, and then recognizing that in some instances even if the government is a speaker in the forum, it is not always entitled to First Amendment immunity.[144] They look specifically to "whether the particular mode of communicating in question sufficiently advances, or perhaps avoids undermining, the purposes and desired effects of First Amendment free speech."[145] Through this end, Bezanson and Buss then proceed through three fundamental inquiries: (1) whether government speech can monopolize a marketplace for communication by excluding private speech;[146] (2) whether deception and distortion were present in the government's presentation of information;[147] and (3) who exactly deserves attribution for a message, a private speaker or the government.[148]

Each of these inquiries is directly relevant to promoting the purpose of the First Amendment as protection against hindering the free-flowing marketplace of ideas. Protecting against speech market monopolies allows an open forum in which all speech is encouraged, not just speech in conjunction with the government. According to Bezanson and Buss, when "the government expresses a point of view, it must do so either in a previously existing speech market or in a new one created by or in connection with the government communication."[149] Here, the authors create a distinction between general opportunities for speech and government-created markets. An example they provide to illustrate this distinction is the *Rust* case, where the government message is communicated through family-planning clinics. Indigent women who approach Title X clinics can only receive certain information, but under Bezanson and Buss's logic, when considering the preexisting market, "there remain extensive opportunities for other views to be expressed on

142. *Id.* at 14–15.

143. *See* Bezanson & Buss, *supra* note 13, at 1386–87, 1505–09.

144. *Id.* at 1380, 1487.

145. *Id.* at 1487. The desired effects of First Amendment free speech to Bezanson and Buss are the avoidance of monopoly, distortion, and deception on behalf of the government. *Id.* at 1487–88.

146. *Id.* at 1488–91.

147. *Id.* at 1491–94.

148. *Id.* at 1495–96.

149. *Id.* at 1488.

every aspect of the abortion issue, including the opportunity to attack, explain, and counter the government's Title X messages."[150] Therefore, as in *Rust*, the government is entitled to immunity because it does not monopolize the *general* speech market in a way that prevents the opportunity for private speech.[151]

Deception and distortion also factor into Bezanson and Buss's analysis of identifying government speech.[152] However, these factors seem to be outgrowths of the same theoretical discussion of monopoly. The reason that a monopoly is dangerous, and the reason that private speakers need to receive First Amendment protection when the threat of the government monopolizing the market is great, is through the market distortion a monopoly can create.[153] When the market is distorted in such a way that the government is the only intelligible speaker, this undermines the purpose of the First Amendment in protecting the free-flowing marketplace of ideas.[154] Distortion can occur, according to Bezanson and Buss, whether the government is deliberately deceiving private receivers of its message as to its origin, or whether the government messenger innocently fails to disclose the origin of the message.[155] They also note that when professionals or experts are involved, the possibility for distortion is even greater, as "an audience might assume that the expert is communicating views based solely on the expert's informed judgment."[156]

Ultimately, however, Bezanson and Buss also acknowledge the difficulty and ambiguity in this approach by stating:

> But to us the [government speech] cases reflect something less than this, something more ambiguous or, at least, more inchoate. They look more like an experiment borne of felt necessity on the one hand, and theoretical confusion on the other hand, tried out gingerly on a case-by-case basis. At the very least, the cases reflect a doctrinal development that is far from complete. Virtually all of

150. *Id.*

151. *Id.*

152. *Id.* at 1491.

153. *See id.* at 1487–90.

154. *See generally id.* at 1487; *supra* note 145 and accompanying text.

155. *See* Bezanson & Buss, *supra* note 13, at 1491.

156. *Id.* at 1493. The final point that Bezanson and Buss make is regarding attribution. *Id.* at 1495. Attribution issues arise when the government uses private speakers to endorse its messages. *Id.* For example, in *Finley*, the actual artwork, while a reflection of the NEA's message, was created by private parties. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998). This issue also creates a distortion in the market that does not allow the speaker to identify the government in the message. *See* Bezanson & Buss, *supra* note 13, at 1509.

> the opinions have left room for later interpretation on alternative grounds.[157]

As recognized above, the main problem with using this approach is its ambiguity. There are many potential "purposes" for the First Amendment, and scholars have written entirely separate books attempting to justify the jurisprudence.[158] Therefore, while courts have considered the effect of the government as a distorter of the market in the freely flowing marketplace of ideas, it is but one of a large array of factors that underpins the First Amendment and therefore does not create a satisfying definition in a doctrine shrouded by ambiguity.

B. The "Literal Speaker" Test

The literal speaker test is otherwise known as the reasonable observer inquiry.[159] It asks whether a fully informed inquiry of a reasonable observer could identify the government in the message.[160] If the answer is yes, then the speech in question is government speech and thus exempt from First Amendment scrutiny.[161] Some scholars have advocated the use of this test to distinguish the government-as-patron of its own message from government-as-regulator-of-private-speech.

The reasonable observer inquiry was first introduced by Justice Souter in his dissent in *Johanns*.[162] Justice Souter felt that the check of the democratic process on government speech "was ill served in [*Johanns*] because it was far from clear to observers that the government was behind the campaign."[163] He asserted that if the government conceals itself as the originator of the message, this cannot justify the burden on First Amendment interests by the private parties purported to be representing those views.[164] He continued to establish the idea through his concurrence in *Summum*.[165]

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157. Bezanson & Buss, *supra* note 13, at 1509.

158. *See* KROTOZYNSKI, JR., *supra* note 138, at 16; ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

159. *See Developments in the Law*, *supra* note 95, at 1295–96.

160. *See id.* at 1294–95.

161. *See id.* at 1295.

162. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 580 (2005) (Souter, J., dissenting) ("[T]he First Amendment cannot be implemented by sanctioning government deception by omission . . . of the sort the Court today condones . . . .").

163. *Developments in the Law*, *supra* note 95, at 1294.

164. *Id.*

165. Pleasant Grove City v. Summum, 555 U.S. 460, 487 (2009) (Souter, J. concurring) (noting that the best approach in identifying government speech is to ask if "a reasonable and fully informed observer would understand the expression to be government speech"); *see also Developments in the*

In the Article *Developments in the Law—State Action and the Public/ Private Distinction* [hereinafter *Developments in the Law*], the authors advocate use of Justice Souter's approach to evaluate speech as government speech.[166] The authors state that "Justice Souter's observer test provides the most promising doctrinal framework around which to build a coherent jurisprudence of government speech."[167] They state that the advantage of this test is its ease of administration, and its clearer and more direct approach. Given that this standard constitutes a variation on the "reasonable person" test present in tort law, "it should be relatively easy for the lower courts to administer."[168] As the analysis is only a "single question, Justice Souter's test provides a clearer and more direct approach to finding government speech than do" other multifactor tests advocated by courts and scholars, discussed *infra*.[169] The authors also purport that "[t]he marketplace of ideas is well served when participants know the sources of the ideas they encounter, because knowing who is promoting an idea may help one to analyze it," further underscoring that this approach does not run afoul of purposes of the First Amendment.[170]

Even though this test is essentially a "reasonable person" test and is likely simpler to apply than multifactor analyses, considering this element alone oversimplifies government speech. Looking to a reasonable observer's analysis will not lead to the correct outcome when private entities are delivering the government message in a way that is not obvious.[171] In fact, the authors acknowledge this point, stating that "difficulties of accurate attribution in the government speech context create a type of state action problem wherein the government may speak without appearing to and thereby evade democratic consequences."[172]

C. Multifactor Tests

Finally, some scholars have advocated a conglomeration of these tests in an attempt to combat the intricacies that arise when the government

Law, *supra* note 95 (providing an analysis of government speech cases by exclusively using Souter's "reasonable observer" test).

166. *Developments in the Law*, *supra* note 95.

167. *Id.* at 1295.

168. *Id.*

169. *Id.*

170. *Id.* at 1301.

171. For example, in *Rust*, the doctor was the person giving the message to the patient. Rust v. Sullivan, 500 U.S. 173 (1991). It may not be clear even to a fully informed observer that the funds from the government could condition and manipulate what the doctor is entitled to say. *Id.*

172. *Developments in the Law*, *supra* note 95, at 1302.

takes a quasi-private position, as in cases where the government uses funding to advocate its message through private speakers.[173]

As evidenced by the recent court cases *Summum* and *Walker*, the Court has recently entered into the realm of multifactor tests in its analysis of government speech. Professor Olree's Article, *Identifying Government Speech*, provides a comprehensive summation of lower court as well as Supreme Court advocated tests.[174] He also advocates his own, three-factor test centered around three questions, which purports to be "a simpler approach to identifying government speech . . . which explains and reconciles the holdings of the Supreme Court across the gamut of its speech and establishment cases."[175] The three questions he considers are:

> (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?[176]

According to Professor Olree, if the answer to any of the above questions is yes, then the message is government speech and is entitled to immunity from First Amendment scrutiny.[177]

The first question is an attempt to identify the government in the message. Professor Olree uses *Rust* as an example to illustrate that when the Court considers that the message comes from Congress, through its funding program in Title X, the message is government speech regardless of who is used as the medium for that message.[178] In his words, "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."[179] He also tackles the contradiction with *Velazquez*, "recognizing that the federal funding

173. *See, e.g.*, *supra* note 171.
174. *See* Olree, *supra* note 37.
175. *See id.* at 411.
176. *Id.*
177. *Id.*
178. *Id.* at 412.
179. *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 178–81 (1991)).

program for legal services attorneys was not designed . . . 'to promote a governmental message.'"[180]

Professor Olree states that the first factor will identify the majority of government speech.[181] The two additional factors may encompass cases like *Summum*, where there is government speech "when a government accepts, embraces, and communicates a donated message."[182] According to Olree, "[p]rivate entities may originate messages and design communicative media containing those messages, and then donate the media/messages to the government."[183] Rejection of any donations does not amount to government speech, "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" now becomes government speech.[184]

A multifactor approach is likely the most effective way to recognize government speech. While multifactor tests are often criticized for their ambiguity—and indeed, the evaluation of multiple factors and questions may not create completely consistent analysis—looking to more than one factor is the only way to identify government speech while considering the intricacies presented when the government acts to promulgate its message by funding private speakers. The government as a quasi-private actor (when it funds private parties to promulgate its message) cannot always be identified using the literal speaker test, nor can any purported "purpose" of the First Amendment alone attempt to reconcile every facet of action by the government.

III. ADVOCATING A COHERENT DOCTRINAL FRAMEWORK

As is evident from the illustrations above, courts and scholars have looked to multiple combinations of factors in analyzing the extent of government patronage. However, I argue that a two-factor test is the best approach to analyzing and identifying government speech. Specifically, the proposed test would be as follows: (1) can a fully informed inquiry of a reasonable observer identify the government in the message (the literal speaker test) or (2) does the government, in discriminating against a particular viewpoint, create a monopoly of expression that leaves private individuals without an alternative outlet of expression? If the answer to the

180. *Id.* at 413 (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001)).

181. *Id.* at 415.

182. *Id.*

183. *Id.*

184. *Id.* The final factor that Olree considers is the literal speaker in relation to the government. *Id.* at 420. This is distinguishable from the literal speaker test. Olree advocates this question to identify government agents that are operating to deliver a message on the government's behalf. *Id.* at 420–22.

first inquiry is yes, then government speech is present. If the answer to the second inquiry is no, then government speech is present—and along with government speech, immunity from First Amendment limitations.

A. How the Two-Factor Analysis Addresses Issues the Court Has Considered

The literal speaker test portion of the analysis is appropriate because it allows the electorate to identify the government message and keep it accountable to the democratic process, which the Court has identified as the major check on government speech.[185] Not only that, but this factor also falls in line with what the majority of the Court has considered in *Walker*, as well as Justice Souter's concurrence in *Summum.*[186]

The test also encompasses any historical analysis that is present in both *Summum* and *Walker*. If the government has historically used a particular medium of expression, a reasonable person would be able to identify the government in its message and use the political process to effectively eliminate the controversial speech if the general electorate felt so inclined. Speech is not abridged when associated with the government because the reasonable person will realize he must look elsewhere for an opportunity to speak, as the government is entitled to espouse any message it so chooses. Without the knowledge that the government funds a message, a private citizen will not know to take his speech elsewhere and thus will be abridged from voluntarily expressing himself. This prong of the test also, as discussed by the authors of *Developments of the Law*,[187] is essentially a "reasonable person" test, providing ease of application for the lower courts.

Next, the majority of the Court, while not generally considering it as an explicit factor, consistently considers the availability of other opportunities to speak, or the monopoly of the government on the mode of expression.[188] Justice Breyer, in his concurrence in *Summum*, also looked directly to the potential for market distortion.[189]

"[I]t is well recognized that protecting government speech means running the risk that the government will drown out dissenting private voices due to the volume of its voice and the power of the outlets through

185. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

186. *See, e.g.*, *id.* at 2239; Pleasant Grove City v. Summum, 555 U.S. 460, 485–87 (2009) (Souter, J., concurring).

187. *Developments in the Law*, *supra* note 95, at 1295.

188. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 597 (1998) (Scalia, J., concurring) (stating that "[t]he NEA is far from the sole source of funding for art—even indecent, disrespectful, or just plain bad art").

189. *See Summum*, 555 U.S. at 484–85 (Breyer, J., concurring).

which it can communicate."[190] The concern of the expansion of the government speech doctrine is the risk of market distortion and the displacement or monopolization of private speech.[191] By inserting itself in the marketplace, the government may "employ[] devices to conceal [its] messages in private speech" or leverage, induce, or direct private speakers by government ownership.[192] Ultimately, "[g]overnment is Hobbes's Leviathan with the biggest bullhorn in the world," and this fact likely impacts the Supreme Court's attempt to distinguish between regulation and patronage.[193] By taking into account government monopolization of speech avenues and the potential for market distortion, the concerns of the government speech doctrine circumventing the purpose of the First Amendment—the free and full disclosure of ideas—will be alleviated.

B. Applying the Test

An application of the test to cases the Court has considered will illustrate the distinction between government-as-patron of its own message and government-as-regulator-of-private-speech. In *Rust*, in the context of a doctor and patient, it may be that a reasonable person would realize that a clinic is funded, at least in part, by the government. Political disputes regarding the funding and defunding of Planned Parenthood would likely emphasize this point. A reasonable, fully informed observer under Souter's analysis could see a Planned Parenthood clinic as representing the government's opinions on healthcare, or even its positions on abortion. However, this factor is not entirely conclusive. Planned Parenthood may provide an easy example, but what about clinics that lack government signage? The average individuals seeking aid from a clinic might also assume that the clinic is private if its government support is not made obvious in some way by the physician. In this instance, considering the second factor allows for a more convincing determination.

As to the second factor, the mere absence of funding present in *Rust* does not automatically constitute the government regulating private speech. In fact, the Title X regulations allow for abortion facilities at clinics that receive government patronage, so long as they are kept financially and physically separate from the clinic itself.[194] Therefore, the absence of funding clearly does not create market distortion sufficient to prevent expression on abortion entirely. Not only that, but if a patient came to the

190. *See* Blocher, *supra* note 17, at 708.

191. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 31–37 (1983).

192. *See* Bezanson & Buss, *supra* note 13, at 1381.

193. Epps, *supra* note 14.

194. Rust v. Sullivan, 500 U.S. 173, 180 (1991).

clinic looking for an abortion and realized that services and information about the procedure would not be offered, it is likely that there are other doctors who would provide services if they still wished to speak about them.

Under the two-factor test, government speech in *Rust* is recognized by the second factor, leading to the government's ability to speak free of First Amendment limitations, as was decided by the Court. That being said, when a patient goes to the doctor, she wants the best medical advice she can receive, not a government policy statement. The implications of government speech in this area reach far beyond the scope of this Note, which seeks only to illustrate situations in which government speech may be identified. The fact that this two-factor test confirms the Court's determination that any speech derived from the Title X funding was government speech only further serves to aid in the application of this test. It allows for an opportunity to categorize the Court's analysis into two fundamental inquiries, using its own language and holding. This simply serves to break down the neutral principle that the Court has been using into factors that are easy to apply to difficult scenarios considered by district and circuit courts.

Looking further to *Rosenberger*, the literal speaker test again may not be as illuminating. A fully informed, reasonable observer may say that the government was involved in the public university's school newspaper message, implying that there might be government speech present. However, student organizations, while a reflection of the university, may not necessarily have to espouse certain limited values to receive university funds. Perhaps under this line of thought, a reasonable observer would come to the conclusion that the student organizations were speaking privately and were then being regulated impermissibly by the government. Given the ambiguity of the government's role in *Rosenberger* under the literal speaker test, the second prong must be the determining factor.

In *Rosenberger*, where a Christian newspaper was denied funding based on its religious affiliations, these students have no other mode of expression of ideals than through the funding of this newspaper. In effect, as Professors Bezanson and Buss put it, the university created a mode of expression and then placed a monopoly on that expression by discriminating based on the viewpoint of organizations worth funding.[195] Without the government's funding, the newspaper cannot publish its issue. On this public university campus, the only way for the student organization to publish the magazine is to depend on the portion of the student activity fee it receives for each publication. Therefore, denying funding to student

195. *See* Bezanson & Buss, *supra* note 13, at 1405–09.

newspapers is within the realm of private speech, and thus the government must be viewpoint-neutral and abide by First Amendment limitations.

Again, the two-factor test serves to support the Court's analysis by supporting both the checks that the Court has placed on governing speech (by allowing democracy to check that speech when it can be reasonably identified) and preventing the government in its speech from using its power to create an absolute message to the absolute exclusion of other views. Thus, as in *Rosenberger*, when the government is using its power to fund universities to prevent students from publishing a newspaper that expresses their views and values, in so doing it is also absolutely preventing the expression of these views through this medium.

Finally, take the license plate cases (see *Walker*), where an advocate requests a Confederate Flag specialty license plate, but the government denies the application.[196] This is a case in which the two-factor analysis and the Court's differ. A general license plate, with numbers and letters, has been used extensively throughout history as a medium of communication by the government to the general populace. Thus, a reasonable person would likely see the government in this message, as these plates essentially function as government IDs. This is not disputed. However, these are not general license plates; these are specialty plates. A reasonable person would probably not think that the government is endorsing the Confederate flag, or supporting the University of Alabama, or any other potential specialty plate that may be crafted. These specialty plates generally come from the entity that designs them, and thus, a reasonable person would be likely to think that these were not the views of the government but of a private citizen.

To the second prong, should the members of the group still want to promote their admiration for the Confederate flag, there may be other avenues to do so, but not of the same medium. Once they are denied a specialty license plate there is not another way for them to state their views on the ID tag of their vehicle. While they may be free to apply a Confederate flag bumper sticker on their car, like in *Rosenberger*, where the students could not publish their newspaper and thus were abridged in their speech, the Sons of Confederate Veterans cannot now publish their views on their license plates. The students in *Rosenberger* also could have hung flags out of their windows or placed bumper stickers on their cars to express their Christian beliefs, but the Court recognized that when such a mode of expression was removed entirely from their use, this creates a market distortion such that First Amendment limitations should be present.[197] The same is true in the *Walker* case, both to remain consistent

196. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

197. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

with previous precedent and as a result of the second factor of the two-factor analysis. Thus, although the two-factor test contradicts the holding in *Walker*, it does not contradict precedent and serves to outline the neutral principle that the Court previously stood upon, though it deviated slightly in its analysis of *Walker*. Not only that, but it creates a more delineated boundary of government speech, striving to keep government speech a manageable doctrine that will not serve to crowd out private speech.

Taking the analysis a step further, and though not present in the *Walker* case, is the idea of vanity license plates, which are in the same vein as specialty license plates. These are personalized license plates created with letters and numbers chosen exclusively by the person who applies for the tag. If the Court continued the analysis under the *Walker* factors, it would likely come to the same outcome that vanity plates are government speech, under the guise that a reasonable person should associate the government with license plate tags given their historical use of communication between government and citizen. This cannot possibly be true, given that a reasonable person would not take the vanity license plate saying "XCUZE M3" as the government's polite sentiment on the bumpy conditions of the highway system. While the implications of vanity license plates could cover the scope of another Note, its mention here simply serves to provide a situation in which the two-factor test would prove useful in keeping speech that is inherently private, private, even in situations where the test contradicts holdings of the Court.

IV. CONCLUSION

The Court has created a muddled government speech jurisprudence that has left both it and scholars struggling to create a neutral principle with which to continuously evaluate its decisions. Ultimately, this Note concludes that the neutral principle the Court creates is a distinction between the role of a government-as-patron of its own message and government-as-regulator or encourager of private speech.[198] Where private speech is concerned, the First Amendment states that: "Congress shall make no law . . . abridging the freedom of speech," and therefore in any situation where the government is effectively abridging or regulating this speech, it acts impermissibly and should be barred from the activity.[199]

The distinction between patron and regulator should be evaluated through a two-factor test: first, whether a reasonable observer may identify

198. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 599 (1998) (Scalia, J., concurring) ("I regard the distinction between 'abridging' speech and funding it as a fundamental divide . . . .").

199. U.S. CONST. amend. I.

the government in the subsidized message, and second, whether the subsidy itself restricts complete access of expression, thereby creating market distortion. The ability to identify government speech is imperative to preserve an individual's First Amendment right to private expression. The government is not entitled to regulate private speech, and identifying these situations is crucial to preserving that freedom.

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