

THE END OF GOVERNMENT SPEECH

G. Alex Sinha[†]

Thirty years ago, the Supreme Court created the government-speech doctrine to protect certain forms of government action against First Amendment challenges. The government must speak to govern, the thinking goes, and the First Amendment regulates private rather than governmental speech. Therefore, government action that is classified as “government speech” should not be vulnerable to free-speech claims. The doctrine has since been used accordingly, vaccinating certain government programs against the First Amendment. For example, the doctrine has insulated regulations banning federally funded medical providers from counseling patients about abortion; advertising campaigns spearheaded by the federal government; state-level choices about which specialty license plates to approve; and municipal decisions about which privately funded statues to install in public parks. The doctrine now features in dozens of decisions in federal and state courts, and the Supreme Court continues to deploy it—most recently in May 2022.

Commentators have complained about the government-speech doctrine for years. They have been especially critical of the Court’s use of the doctrine, which appears unnecessary at times and inconsistent or even unprincipled at others. And they have offered a range of suggested reforms meant to steady the ship, such as the adoption of certain transparency requirements for government speech. This Article offers the deepest, most sweeping critique yet of the government-speech doctrine: the

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doctrine cannot be saved. It is intrinsically unconstitutional, and it should be eradicated in its entirety. More specifically, this Article argues that the government-speech doctrine is anchored in a conceptual mistake: it is not that the government can sidestep its burdens under the First Amendment whenever it communicates, but rather that the benefits of the First Amendment do not extend to government communication. Moreover, although governments communicate ceaselessly, there is no such thing as government speech, and doing away with that fiction will clarify First Amendment jurisprudence considerably. Instead, the Article outlines a more elegant replacement for the government-speech doctrine—and one that remains true to the First Amendment: the recognition of a new type of forum for governmental communication that subsumes the traditional, limited, and nonpublic forums the Court has long recognized.

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INTRODUCTION

Over the last thirty years, the Supreme Court has created and augmented a significant exception to the First Amendment—an exception this Article argues is inherently unconstitutional and doctrinally unsustainable. The Court started down this path by recognizing that its typical mechanism for handling the government’s suppression of private speech¹ was inadequate.² In previous instances where the government restricted private expression, the Court developed an approach for assessing whether the government had violated the First Amendment.³ The Court would begin by asking where this discrimination took place: a traditional public forum that historically served as a venue for robust private expression, like a public park;⁴ a designated public forum that the government elected to open for modes of private expression, like a municipal theater;⁵ or a nonpublic forum that lacked a history of being used (by private citizens) or opened (by the government) for private expression, like a polling place on election day.⁶ After categorizing the venue in question, the Court would then select some corresponding level of scrutiny for assessing whether the government’s actions violated the First Amendment.⁷

But in the early 1990s, the Court began to confront the possibility that sometimes the government impinges on private expression based on content or viewpoint⁸ through the unavoidable act of endorsing some

¹ Before introducing the government-speech doctrine, the Court relied primarily on forum analysis. For a summary of the forum categories, see *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983). See generally Lyriisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1980 (2011) (“The starting point for examining modern public forum doctrine is *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.”).

² See Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 810 (2010) (“The three-part government forum doctrine[, which preceded the government speech doctrine,] worked well for many years, but in due course it ran into a few problems—namely, the government’s felt need to selectively admit certain points of view into its forum and not others.”).

³ Throughout this Article, I use the term “government” generically to describe action by federal, state, or local authorities.

⁴ *Perry Educ. Ass’n*, 460 U.S. at 45.

⁵ *Id.* (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)).

⁶ *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885–86 (2018).

⁷ See *id.* (summarizing standards of review for suppression of private speech in each type of forum).

⁸ Strictly speaking, the Court distinguishes between content discrimination and viewpoint discrimination, and it is particularly skeptical of the latter. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one

policies or propositions over others.⁹ The government must speak to govern, the Justices have told us, so we must treat the government's own speech differently.¹⁰ The Court began working this conclusion into its First Amendment jurisprudence in 1991, in *Rust v. Sullivan*, when it upheld a gag rule that conditioned the distribution of certain federal funds to medical providers on their refusal to counsel patients on abortion.¹¹ Although *Rust* did not explicitly introduce the term "government-speech doctrine,"¹² the Court has since made clear that the rationale behind its decisions rested on the special status of government speech.¹³ In essence, the Court attributed the silence that the Reagan administration demanded of medical providers to the government rather than to the medical providers.¹⁴ The Court invoked the necessity of government speech as the basis of its analysis.¹⁵

speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. 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." (citations omitted)). The line between the two concepts can be elusive, however, and I will use both terms more or less interchangeably throughout this Article to refer to the government's perceived need to engage in expressive activity that the Court has historically treated as constitutionally suspect.

⁹ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (recounting recent precedents affirming 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'" (citation omitted) (quoting *Rosenberger*, 515 U.S. at 833)).

¹⁰ See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

¹¹ See generally *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹² Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 905 (2010).

¹³ See *Velazquez*, 531 U.S. at 541 ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J. concurring) (listing *Rust* among the Court's "decisions relying on the recently minted government speech doctrine").

¹⁴ *Rust*, 500 U.S. at 193 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983))).

¹⁵ See *id.* at 194 ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals,

In the years since, the Court has built up its jurisprudence around the government-speech doctrine. The Court has extended the reach of the doctrine to cover, *inter alia*, compelled subsidies tied to certain television advertising schemes promoted by the federal government;¹⁶ state decisions concerning the approval of specialty license plates;¹⁷ municipal determinations about the installation of privately funded statues in public parks;¹⁸ and, arguably, the statements of government employees made in their professional capacities.¹⁹ Meanwhile, the Court has rejected the doctrine's applicability to trademarks,²⁰ a *Rust*-style gag rule for attorneys,²¹ and the flying of flags on one—but probably only one—of three flagpoles standing in front of Boston's City Hall.²²

because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.”). For a brief description of the recent state of the gag rule, see Amy Goldstein, *Biden Administration Reverses Trump Rule Barring Federally Funded Family Planning Clinics from Abortion Referrals*, WASH. POST (Oct. 4, 2021, 4:17 PM), https://www.washingtonpost.com/health/biden-administration-title-x-abortion/2021/10/04/33451c1a-223c-11ec-9309-b743b79abc59_story.html [<https://perma.cc/6SQG-W5WC>].

¹⁶ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). The Court has distinguished compelled-subsidy cases that upheld First Amendment challenges because “[i]n all of [those cases], the speech was, or was presumed to be, that of an entity other than the government itself.” *Id.* at 559; *see, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 416–17 (2001) (striking down a compelled-subsidy scheme very similar to the one that survived judicial scrutiny in *Johanns* because the government did not timely raise the government-speech doctrine).

¹⁷ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

¹⁸ *Summum*, 555 U.S. at 464.

¹⁹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The majority's analysis does not dwell on the government-speech doctrine, but one of the dissents interprets the holding as relying on the doctrine. *See id.* at 436–37 (Souter, J., dissenting).

²⁰ *Matal v. Tam*, 137 S. Ct. 1744, 1758–59 (2017).

²¹ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 533 (2001).

²² *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). The Court's analysis in *Shurtleff* turns in nontrivial part on the fact that Boston has sometimes permitted private citizens to fly their own selected flag, temporarily, from the specific flagpole at issue. By contrast, the other two flagpoles consistently fly flags chosen by the City—the American flag and the flag of the Commonwealth of Massachusetts, respectively. *Id.* at 1588.

The doctrine has proved unpopular with scholars, who question its completeness,²³ consistency in application,²⁴ and implications.²⁵ Commentators have also tried to connect the dots left by the Court to glean the parameters of the doctrine using the various decisions that accept or reject it.²⁶ This Article argues that such efforts are unavailing. The criticisms of the doctrine offered to date are fine as far as they go, but they are also needlessly glancing. Attempting to cobble together a consistent understanding of the doctrine only obscures its deeper theoretical incoherence. Although some commentators and Justices have noticed that the doctrine threatens to become hopelessly overbroad,²⁷ they have not followed that observation to its natural conclusion: the doctrine simply cannot be reconciled with traditional First Amendment jurisprudence, and it must be discarded entirely.²⁸

²³ See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1488 (2001) (questioning whether the government-speech doctrine can properly allow the government to “monopolize a speech marketplace and thus exclude other private communications”); *id.* at 1491 (questioning the propriety of allowing the doctrine to deceive audiences about the source of the communication or distorting the ideas that reach its audience); Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 844–48 (2010) (questioning the power of the government-speech doctrine to facilitate government “ventriloquism”—the government’s misleading use of private speakers to advance a governmental message); Norton & Citron, *supra* note 12, at 909 (arguing that the question of “why *not* require government to identify itself as the message’s source . . . remains the great unanswered question in the Court’s government speech doctrine”); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 699–700 (2011) (summarizing three limitations that may improve the doctrine).

²⁴ See, e.g., Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1286 (2010) (arguing that “[t]he Court’s distinctions are either nonexistent . . . or utterly baffling” but attempting to “reconcil[e] these disparate holdings”); Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 85 (2011) (arguing that “the contours of the doctrine are blurred” and that this “has caused great confusion in the lower courts . . . [about] how or when to apply the doctrine”).

²⁵ See, e.g., Blocher, *supra* note 23, at 706 (dedicating an entire section to emphasizing the “simple but under-recognized proposition[that] government speech often (albeit not always) limits private expression”); Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1197 (2016) (arguing that a recent government speech decision—*Walker*—“takes the Court’s growing deference to government institutional actors and puts it on steroids, allowing the government to disfavor private speech in the name of protecting its image”); Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 232 (2021) (expressing concern that the government-speech doctrine might empower “First Amendment capture”—that is, that “contested speech will be categorized as government speech, giving the government the ability to eliminate competing viewpoints entirely”).

²⁶ See Gey, *supra* note 24, at 1270–1307 (running through six “manifestations” of the doctrine in important recent cases and distilling key principles from each).

²⁷ See *supra* text accompanying note 25 (offering some examples).

²⁸ Steven Gey advocates for limiting the doctrine in such a way that it “basically ceases to exist.” Gey, *supra* note 24, at 1314. This is the closest call I can find for the rejection of the doctrine, but even that falls short of the critique offered below.

Part I of this Article unpacks the argument behind the government-speech doctrine and argues that the doctrine rests on a conceptual mistake. The Court anchors the government-speech doctrine in the conclusion that a key part of the First Amendment—the Free Speech Clause—does not apply to government speech.²⁹ There are two salient ways of interpreting that seemingly obvious proposition. The first holds that, when the government communicates, it is exempted from the burdens of protecting certain First Amendment rights of the public (burden exemption). The second holds that, when the government communicates, it does not retain the benefits of First Amendment protections (benefit exemption). The Court has held that burden exemption serves as the foundation for the government-speech doctrine, but Part I argues that only benefit exemption is defensible.

Part II demonstrates just how pernicious burden exemption can be by showing that it is inherently unconstitutional. Although the Court has applied burden exemption uniquely in the context of government speech, there is no principled basis for that restriction. Burden exemption menaces individual rights both within the First Amendment context and beyond. Crucially, there is no workable principle that restrains the government-speech doctrine—and therefore burden exemption—from reaching the most quintessential form of governmental communication: the law itself. Part II also argues that the Court’s partial recognition of the threat of burden exemption and its ad hoc attempts to neutralize that threat thus far are inadequate.

Part III considers and rejects the two most limited responses to the threat of burden exemption: sustaining the government-speech doctrine with ad hoc exceptions (as the Court has done for three decades) or finding a principled basis for defining a narrower version of the doctrine. Finally, Part IV reveals the promise of a third option: replacing the government-speech doctrine outright. In fact, Part IV argues that there is no such thing as “government speech” at all, and abandoning that notion considerably clarifies First Amendment jurisprudence. Part IV closes by sketching out a replacement for the government-speech doctrine: the recognition of a new type of forum³⁰ that subsumes traditional forum

²⁹ See *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (“[O]ur cases recognize that ‘[t]he Free Speech Clause . . . does not regulate government speech.’” (second alteration in original) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009))).

³⁰ At least one scholar has tried to interpret the government-speech doctrine itself as a new kind of forum. See *Bezanson*, *supra* note 2, at 811 (“The government speech doctrine began, and it has survived, as something other than its name implies. The doctrine does not protect the government’s ability to speak. Instead, it grants the government a *forum* for its expression that can span time, place, and space, and in which only ideas it favors may be spoken, and other ideas with which the government would ordinarily have to compete may be excluded.”). The Court does not appear to

analysis and allows the government to abandon viewpoint neutrality and (at times) suppress counter-messaging from private citizens. Part IV concludes by offering basic rules within that forum to balance the government's need to communicate with core First Amendment requirements.

I. PICKING APART THE ARGUMENT FOR THE GOVERNMENT-SPEECH DOCTRINE

Let us begin with the elephant in the room: how could the government-speech doctrine have persisted for the past three decades if it is inherently unconstitutional? The shortest answer is that the Court felt it had no choice but to introduce the doctrine when traditional forum analysis proved inadequate for analyzing certain types of cases.³¹ The more detailed answer is that a simple, superficially plausible, but ultimately invalid argument renders the doctrine enticing.³²

A. *Identifying the Argument*

Embedded in the Court's government-speech-doctrine jurisprudence is an argument with three premises. First, the government must speak to govern; it must endorse certain propositions and, in doing so, abandon viewpoint neutrality.³³ It must also, at certain times and in

agree, however. *See, e.g.,* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215–19 (2015) (considering and rejecting existing forum categories for specialty license plates and then declining the obvious opportunity to consider the government-speech doctrine as identifying a new kind of forum); *see also id.* at 215 (“We have previously used what we have called ‘forum analysis’ to evaluate government restrictions on purely private speech that occurs on government property. But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.” (citation omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985))). Indeed, there is a great deal of difference between the government-speech doctrine and a new type of forum. But Bezanson's view suggests that the proper replacement for the doctrine should be conceived from scratch as a forum, which is what I attempt to develop below. *See infra* Section IV.C (sketching out the parameters of the forum).

³¹ *See* Bezanson, *supra* note 2, at 809–10 (providing this account of the origin of the government-speech doctrine).

³² This argument does not appear—at least in the form presented below—in any of the Court's cases on the government-speech doctrine, but the premises undergird the Court's relevant jurisprudence.

³³ Scholars regularly accept this proposition as well. *See, e.g.,* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 1 (2019) (“Governments must speak in order to govern, and so governments have been speaking for as long as there have been governments.”); Corbin, *supra* note 25, at 225 (“Government speech is inevitable; the government cannot operate without speaking.”).

certain places, suppress counter-messaging from private citizens, thereby discriminating based on viewpoint.³⁴ As the Court has put it, “A government entity has the right to ‘speak for itself.’ ‘[I]t is entitled to say what it wishes,’ and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.”³⁵ We may call this the “Necessity Premise”: as a matter of necessity, we must make some allowances for government speech, for there is no practical alternative.

Second, all speech may be classified on a binary basis as emanating either from a governmental source or from a private one.³⁶ We can refer to this as the “Exclusivity Premise.” One function of this exclusive approach to categorization is that the Court classifies some speech as governmental despite acknowledging its First Amendment implications for private citizens.³⁷

Third, and finally, the doctrine relies significantly on the notion that the Free Speech Clause of the First Amendment does not apply to the government’s own speech.³⁸ As the Court has put it, “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”³⁹ This claim seems obvious in some sense, and it captures something important. The First Amendment protects private interests against certain forms of governmental interference; its application to the government’s own communications must be different in some way.⁴⁰ We may call this the “Exemption Premise” because it holds

³⁴ The Court explicitly accepts that the necessity of government speech manifests in a need to discriminate based on viewpoint. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (expressing concern that too many governmental programs would be rendered “constitutionally suspect” if governmental funding amounted to unconstitutional viewpoint discrimination).

³⁵ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (citations omitted) (first quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); and then quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view . . .”).

³⁶ *See Corbin*, *supra* note 25, at 244 (“Under the current binary regime, . . . speech must be labeled either private speech or government speech . . .”).

³⁷ *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) (“Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons.”); *see also Rust*, 500 U.S. at 191 (acknowledging that the constitutional claims of the private medical providers carry “some force,” but not enough force to win).

³⁸ In fact, sometimes the Court uses broader language to suggest that First Amendment scrutiny more generally is inappropriate for government speech. *See infra* text accompanying notes 50, 52.

³⁹ *Summum*, 555 U.S. at 467; *see Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (citing the restatement of this principle).

⁴⁰ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

that we must exempt government action from certain First Amendment considerations.

Taken at face value, this trio of propositions would seem to suggest that important parts of the First Amendment should be set aside in the common and necessary scenarios where the government is speaking. In summary form, the argument runs something like the following:

- (1) Necessity: Governance is impossible without allowances for government speech.
- (2) Exclusivity: In any given instance, we can classify speech as emanating either from the government or from private parties.
- (3) Exemption: The Free Speech Clause of the First Amendment does not apply to government speech.

Therefore, in those instances where we determine that the government is speaking, of necessity, we will set aside Free Speech Clause analysis altogether.

B. *The Flaw in the Argument*

The conclusion of the argument above takes us to absurd places. Fortunately, the conclusion does not actually follow from the premises.⁴¹ Take each premise in turn.

The Necessity Premise is perhaps the simplest, and it is also the most difficult to dispute. Although we may disagree about the extent of this necessity, it is genuinely hard to see how the government could operate without making some factual and value-laden endorsements at the expense of competing alternatives. I accept the Necessity Premise, and I am aware of nobody who rejects it. The main trouble with the Necessity Premise is that it pressures us toward an incorrect interpretation of the Exemption Premise.⁴² We may have no choice but to grant the necessity of certain forms of government viewpoint discrimination, but we should note that the Necessity Premise alone does not necessarily compel the government-speech doctrine specifically.

The second claim, the Exclusivity Premise, is neither here nor there. On one hand, it is arguably too strong. Some scholars have urged the recognition of “mixed” speech that is simultaneously private and

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁴¹ One could attempt to construct an alternative argument for the doctrine, but that is not a promising route because the criticisms offered below target the doctrine itself rather than just this argument behind it.

⁴² See text accompanying *infra* note 53.

governmental in material respects.⁴³ Perhaps specialty license plates represent mixed speech because they bear a semi-tailored message approved by the state, yet are specifically selected from a range of options by private motorists.⁴⁴ The Court's embrace of the Exclusivity Premise forecloses the possibility of acknowledging mixed speech as such.⁴⁵

But a weaker and less controversial version of the Exclusivity Premise would still function as a reasonable substitute in the argument for the government-speech doctrine. Even advocates of mixed speech should acknowledge that at least some communications emanate exclusively or entirely from the government. In other words, even if we recognize three categories of speech rather than two (namely, private, governmental, and mixed), we should be prepared to acknowledge that some speech will populate each category. A world with mixed speech does not necessarily foreclose purely governmental speech.⁴⁶ Additionally, the primary virtue of acknowledging mixed speech is that doing so may facilitate a more nuanced or protective First Amendment jurisprudence.⁴⁷ If we adopt the Exclusivity Premise but create a properly tailored government-speech doctrine that protects the private speech interests that arise in cases that could plausibly be regarded as mixed, we would arrive at substantially the same place.⁴⁸ These distinctions serve a doctrinal function, and we can use them however we like. The Exclusivity Premise is not the source of the problem.

The third claim, the Exemption Premise, is the most important. What does it mean to say that the First Amendment (or, alternatively, the Free Speech Clause of the First Amendment) does not apply to the government?⁴⁹ There are two salient interpretations of this claim: either the government is free from certain First Amendment burdens when it speaks (burden exemption), or it is free from certain First Amendment

⁴³ See Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607–08 (2008).

⁴⁴ See *id.* at 619.

⁴⁵ See Corbin, *supra* note 25, at 241 (arguing for a mixed-speech modification to the government-speech doctrine); see also *id.* at 244 (referring to the Court's current classification practices as "binary").

⁴⁶ Such a world may have *less* government speech, however, which could partially address concerns about the overbreadth of the current doctrine.

⁴⁷ See Corbin, *supra* note 25, at 244 (advocating for subjecting viewpoint discrimination in the context of mixed speech to "rigorous intermediate scrutiny" in part to provide better protection for the private expressive component).

⁴⁸ Of course, the doctrine is not well defined or particularly sensitive to the private speech interests at issue when classifying a communication as government speech, which presumably motivates mixed-speech-based correctives to the doctrine. See *id.*

⁴⁹ See *supra* note 38 and accompanying text (noting that the Court alternates between stating that the First Amendment does not apply to government speech and, more narrowly, that the Free Speech Clause of the First Amendment does not apply to government speech).

protections when it speaks (benefit exemption). In defending the government-speech doctrine, the Court does not even appear to recognize both options. Instead, it embraces burden exemption without hesitation or discussion. For instance, it has noted that “the Government’s own speech . . . is exempt from First Amendment scrutiny,”⁵⁰ and that when “the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.”⁵¹ It has also endorsed the proposition that the “Government is not restrained by the First Amendment from controlling its own expression.”⁵²

The pressure to interpret the Exemption Premise as exempting the government from First Amendment burdens flows naturally from the Necessity and Exclusivity Premises.⁵³ If we think government speech is necessary and widespread, then we feel compelled to facilitate it by removing rather than imposing constitutional constraints when the government is speaking. And if we take the Court’s preferred view of the Exclusivity Premise, namely that speech sources are a binary matter, then government speech functionally precludes private speech. In cases where the government is speaking, then, it would seem there is no private person who could raise a First Amendment claim anyway. Thus, we might think that the Exemption Premise should mean the government is free from First Amendment burdens.

But that cannot possibly be right. Only benefit exemption can be correct, and benefit exemption gets us nowhere in justifying the government-speech doctrine.⁵⁴ Constitutional rights are guaranteed to the people against the government, not vice versa.⁵⁵ And there is no

⁵⁰ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

⁵¹ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015).

⁵² *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring)).

⁵³ The perception of necessity is an especially significant factor behind the Court’s embrace of the government-speech doctrine. See *Walker*, 576 U.S. at 207–08 (“Were the Free Speech Clause interpreted otherwise, government would not work. . . . [I]t is not easy to imagine how government could function if it lacked th[e] freedom’ to select the messages it wishes to convey.” (alterations in original) (quoting *Summum*, 555 U.S. at 468)).

⁵⁴ Notably, and perhaps counterintuitively, benefit exemption actually could preempt some First Amendment claims: government officials who face restraints on their official expression may be unable to object under benefit exemption because their official expression would not be protected by the First Amendment. But that is not enough to ground the government-speech doctrine the Court has created, which typically preempts claims from private citizens, like doctors, beef producers, motorists, or religious groups.

⁵⁵ See *Downes v. Bidwell*, 182 U.S. 244, 380–81 (1901) (Harlan, J., dissenting) (“The glory of our American system of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power”); *United States v. Cruikshank*, 92

plausible way of reading the Establishment Clause as anything other than a First Amendment burden on the government.⁵⁶ The more natural reading of the Exemption Premise is that the government's own communications are not subject to First Amendment protection, not that the government can speak however it wants without worrying about harming the First Amendment interests of its citizens. The government does not need First Amendment benefits because those benefits would run against itself anyway. It is exempt from those benefits because they are not part of the text,⁵⁷ superfluous, and conceptually ridiculous.⁵⁸

By contrast, as the following Part illustrates, burden exemption conflicts with traditional First Amendment jurisprudence in numerous, irreconcilable ways. Burden exemption is quite different in principle from having a deferential standard of review for government action; it is quite literally a license to ignore constitutional limitations altogether.⁵⁹ Moreover, the Court acknowledges that government speech frequently implicates the First Amendment rights of citizens,⁶⁰ which means that

U.S. 542, 552 (1875) (“The right[s] of the people . . . [are] attribute[s] of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.”).

⁵⁶ See *infra* note 96 and accompanying text (discussing the Court's introduction of an exception to the government-speech doctrine to accommodate the Establishment Clause).

⁵⁷ The injunctions in the First Amendment explicitly restrict Congress. See U.S. CONST. amend. I.

⁵⁸ Justice Alito recently noted that the Court has “neither accepted nor rejected[the view] that governmental entities have First Amendment rights,” but he concedes that “[t]he text of the First Amendment also seems to exclude the possibility that the Federal Government has a constitutional right to speak, since it prohibits ‘Congress’ and other federal entities and actors from ‘abridging the freedom of speech.’” *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 & n.2 (2022) (Alito, J., concurring); see also *infra* Section IV.B (arguing that it is conceptually confused to regard governmental communication as “speech” for constitutional purposes).

⁵⁹ There are numerous contexts in which courts are highly deferential to government action challenged for purportedly violating the Constitution. Many regard rational-basis review this way—at least in some of its applications. See, e.g., Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1437 (2018) (critiquing the “blanket deference that courts apply to constitutional rational basis review”); Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 294–304 (2011) (comparing two different applications of rational-basis review, the much more common version of which sustains “virtually any classification” challenged on equal protection grounds). Some argue that the courts are extremely and excessively deferential to the government in the face of Eighth Amendment challenges claiming the infliction of cruel and unusual punishment. See, e.g., William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315 (2018) (examining judicial deference toward state punishment practices in the Eighth Amendment context).

⁶⁰ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) (“Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons.”); see also *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557–58 (2005) (noting that the Court previously disfavored “compelled subsidies”—where “an individual is required by the government to subsidize a message he disagrees with”—but suggesting that those cases would have been decided differently if the

burden exemption will necessarily result in the curtailment of constitutional rights. At minimum, before embracing burden exemption, the Court should have attempted to adopt clear and narrow parameters for what constitutes “government speech.” Yet the Court has struggled to do either of these things—presumably because, as I will argue below, they are impossible.

II. THE PERILS OF BURDEN EXEMPTION

The dangers of burden exemption flow, in large part, from the unavailability of a reasonable limiting principle: exactly how much government conduct is exempted from First Amendment burdens? To appreciate the difficulty of locating a reasonable limiting principle, we must confront the Court’s standard for identifying government speech.

A. *What Qualifies as Government Speech?*

To hear some Justices tell it, the Court has yet to provide a clear-cut test for government speech that reliably reveals when burden exemption applies.⁶¹ If true, that itself is remarkable for a thirty-year-old doctrine that is constitutionally minatory. To the extent that we have something like a test, it is also extremely broad: in holding that a state may reject citizen-nominated specialty license plates without infringing First Amendment rights, the Court found that a state’s decisions about whether to approve a design “are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”⁶² The Court drew this standard verbatim from an earlier decision, in which it upheld the power of a municipality to install some, but not other, privately funded statues in a public park.⁶³ Noting well the Justices’ equivocation about whether they have ever completely articulated the test for government speech—as well as their view that the inquiry is “not mechanical” but rather “driven by [the] case’s context”⁶⁴—

government had raised the government-speech doctrine); *Rust v. Sullivan*, 500 U.S. 173, 214–15 (1991) (Blackmun, J., dissenting) (criticizing the Court for overlooking the First Amendment implications of the Reagan-era gag rule on medical providers).

⁶¹ See *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring) (“As the Court now recognizes, [our earlier] cases did not set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government-speech doctrine.”).

⁶² *Walker*, 576 U.S. at 214 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)).

⁶³ See *Summum*, 555 U.S. at 472.

⁶⁴ *Shurtleff*, 142 S. Ct. at 1589.

I will still refer to this as the “test” because it is the closest articulation we have.

This test essentially comprises two elements. It captures action that (1) is intended to convey a government message (pursuant to substantial government control) and (2) has its intended effect. We might add a third criterion that factors in the historical significance of the form of government action in question,⁶⁵ although that requirement may easily be understood to qualify the first two prongs by affecting our interpretation of the intentions or effects of any form of governmental activity. According to the Court, this test appears to capture most statements of governmental employees operating in their professional capacities, regardless of whether they are speaking to private citizens.⁶⁶ The Court has also indicated that the test encompasses government speech that is open to multiple interpretations by civilian audiences—that is, speech that does not reliably convey any specific message endorsed by the government.⁶⁷ Expanding the universe of government speech to garbled governmental communication arguably extends the doctrine beyond its original rationale, which is rooted in the necessity of the government endorsing specific messages.⁶⁸

⁶⁵ See *id.* at 1589–90 (describing an inquiry that “look[s] to several types of evidence,” including “the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression”); see also *id.* at 1595 (Alito, J., concurring) (criticizing “the Court’s decision to analyze this case in terms of the triad of factors—history, the public’s perception of who is speaking, and the extent to which the government has exercised control over speech—that” *Walker* and *Summum* deployed). These summaries can plausibly be recast as consistent with earlier cases, inquiring into the aims and effects of the government’s action.

⁶⁶ See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”); see also *id.* at 438 (Souter, J., dissenting) (interpreting the majority’s opinion as an unnecessarily broad interpretation of the interaction between the government-speech doctrine and the professional speech of governmental employees). The Court has yet to decide whether this rule also applies to the teaching and scholarship of those working for public educational institutions. *Id.* at 425 (majority opinion).

⁶⁷ See *Summum*, 555 U.S. at 474 (discussing the range of meanings that civilians may attribute to public monuments, none of which need be endorsed specifically by the government to convert the installation of monuments in public parks into government speech).

⁶⁸ See *supra* Part I (discussing the role of necessity in giving birth to the doctrine); see also Gey, *supra* note 24, at 1262–64, 1295 (arguing that the government’s speech should not be protected when it has nothing specific or important to say). Despite the breadth of the rule from *Summum*, the Court worries at times that incoherence nullifies government speech. For example, that is part of the Court’s rationale for rejecting the applicability of the government-speech doctrine to trademarks: if trademarks amount to government speech, the government would be speaking nonsensically. See *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (“If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously

Even if the test we have is incomplete in some unspecified respect, its core structure is familiar in First Amendment jurisprudence.⁶⁹ When applied to state action, however, this approach sweeps practically everything into the bucket of government speech. Much governance is simply communication, whether about the government's own actions and plans, the state of the world, or what the populace should do and how we should do it.⁷⁰ Governmental reports, proclamations, roadway signage, and curricular decisions by public educational institutions (if not all public educational instruction) are all obvious instances of government speech under this standard. More consequentially, the quintessential form of government speech would seem to be the law—the U.S. Constitution, state constitutions, statutes, administrative rules and regulations, judicial opinions, and so forth. Indeed, the government-speech doctrine is itself government speech on any plausible understanding of the term. Surely if license plate designs and statue selection have the intended effect of communicating a government message, the law does too.⁷¹ And if the law is government speech, then burden exemption becomes completely unsustainable.

B. *The Logical End of the Government-Speech Doctrine*

If the government must speak to govern,⁷² we can hardly be surprised to find that government speech is all around us. Taken to its logical conclusion, the doctrine would swallow the bulk of the First Amendment—or more. For example, absent an ad hoc exception introduced by the Court,⁷³ the government-speech doctrine would wipe out the Establishment Clause—the very definition of a First Amendment

and incoherently. It is saying many unseemly things. It is expressing contradictory views.” (citation omitted)). Of course, the government does babble, express unseemly views, and contradict itself, whether we count trademarks or not. In fact, its ability to contradict itself is a source of great power. See *infra* Section IV.B (arguing that governmental communication is qualitatively different from private speech partly for this reason).

⁶⁹ The government speech test resembles the test used by the Court to identify whether nonverbal conduct by private citizens (such as displaying a modified American flag outside the window of one's apartment or performing a nude dance) is expressive enough to trigger First Amendment protection. See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (describing the test). For a discussion of the elements and significance of the *Spence* test, see G. Alex Sinha, *False Flags and the First Amendment: Lying Through Symbolic Speech*, 89 GEO. WASH. L. REV. ARGUENDO 133, 138–39 (2021).

⁷⁰ See NORTON, *supra* note 33, at 1 (offering some diverse examples).

⁷¹ See *infra* Section III.B (arguing for this view).

⁷² See *supra* Part I (explaining the Necessity Premise).

⁷³ See text accompanying *infra* note 96 (discussing this exception).

burden on the government's own speech.⁷⁴ On its face, the Establishment Clause prohibits the government from enacting any law “respecting an establishment of religion,”⁷⁵ and the Court has long held it to prevent the government from showing forms of favoritism toward certain religions⁷⁶ or toward religion over nonreligion.⁷⁷ Yet permitting governmental favoritism toward various propositions is the basis for establishing the doctrine in the first place.

The Court has only started to confront the perils of burden exemption.⁷⁸ Consistently applied, the notion that the First Amendment does not apply when the government speaks simply precludes the possibility that a statute or regulation could ever violate the First Amendment. Presumably, the Court would not tolerate that result, but only ad hoc limitations can justify resisting it. Moreover, nothing about the structure of the government-speech doctrine—or the argument that leads to it—precludes the introduction of analogous doctrines that displace other constitutional rights. Why not apply burden exemption wherever the government has a need to engage in an activity that is analogous to a private activity protected as a matter of constitutional right? Yet I can locate no other context in which the government has carte blanche exemption from respecting such rights based on the presumption that the government's own version of the rights in question trump our own.⁷⁹ Consider the following examples of analogous doctrines in the Second and Fourth Amendment contexts.

⁷⁴ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 485–86 (2009) (Souter, J., concurring) (urging the Court to take care in applying and expanding the government-speech doctrine because “[t]he interaction between the ‘government speech doctrine’ and Establishment Clause principles has not . . . begun to be worked out”).

⁷⁵ U.S. CONST. amend. I.

⁷⁶ See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (“Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion . . . or prefer one religion over another.”).

⁷⁷ See *id.* at 15–16 (“Neither a state nor the Federal Government . . . can pass laws which . . . aid all religions No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”).

⁷⁸ See *infra* Section II.C (discussing the Court's equivocal treatment of burden exemption).

⁷⁹ Just as there is a difference between a deferential standard of review and no standard of review, see *supra* text accompanying note 59, there is also a difference between identifying classes of people entirely outside the reach of certain constitutional protections and exempting state action from constitutional scrutiny even though it bears on core constituencies protected by the Constitution. For example, the Court recently stated that “it is long settled as a matter of American constitutional law that foreign citizens outside U. S. [sic] territory do not possess rights under the U. S. [sic] Constitution.” *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020). Although this statement clearly overstates the law, cf. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that aliens detained by the United States at Guantánamo Bay, Cuba, “have the constitutional privilege of habeas corpus”), burden exemption that threatens U.S. citizens within U.S. borders is qualitatively different.

Suppose a state encounters a gun shortage that makes it impossible to arm its police adequately, perhaps due to supply chain issues. The state enacts a statute preventing anyone within its jurisdiction from acquiring certain firearms until it deems the police adequately equipped with the enumerated makes and models. Aggrieved would-be gun owners sue to enjoin the statute as infringing on their rights under the Second Amendment. In its defense, the state invokes a new doctrine: the government-arms doctrine. It argues that the Second Amendment only protects the gun rights of private owners,⁸⁰ but it claims that the government must *also* own firearms to govern effectively. Although private citizens may feel that the policy burdens their rights, this new statute ultimately derives from the government's need to secure firearms for its law enforcement officials, which in turn flows from its broad police power.⁸¹ The state thus argues not that the ordinance survives the appropriate level of scrutiny under the Second Amendment,⁸² but rather that the Second Amendment simply does not apply.

The state's argument is structurally identical to the arguments advanced under the government-speech doctrine: the government needs to deploy guns to govern (necessity); all things considered, it is the government's interest in utilizing those guns that is primarily at issue here, despite its obvious Second Amendment implications (exclusivity); but the government's own gun ownership is not burdened by the Second Amendment, so the measure evades Second Amendment scrutiny (burden exemption).⁸³ Yet it is difficult to imagine a court approving this

⁸⁰ See U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

⁸¹ In theory, the ordinance should also count as a form of government speech. See *supra* Section II.A (discussing the test for government speech); *infra* Section III.B (arguing that the law is quintessential government speech under that test or any reasonable substitute). As a result, the town might also be able to argue that the ordinance is exempt from constitutional scrutiny on that basis, a possibility I discuss at the end of this Section.

⁸² Historically, the Court has been cagey about establishing a specific level of scrutiny "for evaluating Second Amendment restrictions," *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008), though it long suggested that some such level of scrutiny applies, *see id.* at 628–29 (striking down a challenged firearm restriction because "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, . . . [it] would fail constitutional muster"). Most recently, however, the Court clarified that regulations affecting private rights under the Second Amendment receive a special form of scrutiny: to regulate private conduct covered by "the Second Amendment's plain text . . . , the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

⁸³ In fact, the government-arms doctrine may have an even sturdier basis than the government-speech doctrine. The Second Amendment specifically refers to the basis for extending the right to bear arms, which is that "[a] well regulated Militia[is] necessary to the security of a free State." U.S.

argument.⁸⁴ If the state's policy survives a constitutional challenge, it should be because it withstands some measure of constitutional scrutiny, not because we set aside constitutional scrutiny altogether. Arguably, the government-arms doctrine should capture an even more intrusive statute that confiscates all privately owned guns adequate to the task of equipping the state's officers.⁸⁵

Now imagine a Fourth Amendment variation. Suppose an intelligence agency finds that a set of highly classified documents has gone missing from one of its facilities. There is no evidence of a break-in, so agency officials surmise that the documents must have been taken by someone with access to the room where the documents were stored. Beyond that conclusion, the agency has no immediate leads, so it dispatches agents to search the homes of all fifty employees with access to the room in question. Several employees resist the searches on Fourth Amendment grounds, alleging that the agency has no probable cause to search their homes.⁸⁶

The agency takes the following position: it is widely accepted that the government must be able to maintain secrecy around some of its operations, especially in national security contexts (necessity).⁸⁷ The government effectively possesses a functional equivalent to the right to privacy that the Fourth Amendment provides for individual citizens. The agency therefore proposes the government-privacy doctrine: when government action reflects its acknowledged necessity to maintain the secrecy around certain of its operations, we set aside the manifest Fourth Amendment implications of its conduct (exclusivity), and Fourth Amendment inquiries need not apply (burden exemption). The agency

CONST. amend. II. Therefore, the state might even argue that the security it aims to provide by arming its police speaks more directly to the constitutional language than gun ownership by random civilians.

⁸⁴ See generally *Heller*, 554 U.S. 570 (strongly endorsing individual rights to own firearms); *Bruen*, 142 S. Ct. 2111 (same).

⁸⁵ This version of the statute may introduce Fifth Amendment questions as well. See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). But as this Section argues, it is artificial to limit burden exemption to any specific constitutional right.

⁸⁶ See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

⁸⁷ See *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980))); see also *Heller*, 554 U.S. at 635 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for . . . [the] disclosure of state secrets . . .").

therefore argues that it is not a question of whether its searches survive Fourth Amendment scrutiny;⁸⁸ the Fourth Amendment is simply precluded by the government's need to maintain its own privacy, to be secure in its "papers[] and effects."⁸⁹ It does not matter that private Fourth Amendment interests are implicated here; after all, in the government speech context, the Court acknowledges that exempted government activity may have First Amendment implications too.

Once again, the basis for the government-privacy doctrine parallels the basis for the government-speech doctrine. Necessity pushes us to make accommodations for the government's right to classify information and protect it. Additionally, the searches undertaken by the agency derive from governmental privacy concerns rather than private ones. Should we not extend burden exemption to the context of the Fourth Amendment, at least under facts like these?

The mere possibility of such parallel doctrines underscores the risks of embracing burden exemption, but the absurd implications of burden exemption in fact reach even further. One oddity of the government-speech doctrine is that it only labels state action as government speech when that action arguably carries a First Amendment implication. In other words, the government invokes the doctrine only in response to First Amendment claims that it seeks to preempt.⁹⁰

But why stop there? Our "test" for government speech is quite simply indifferent as to whether state action implicates First Amendment interests. Instead, as noted above, the Court tells us to consider whether the government intends to, and then actually does, communicate a governmental message. Sometimes the government will successfully seek to communicate a message in a manner that implicates First Amendment rights. But sometimes it will successfully seek to communicate a message that implicates Second or Fourth Amendment rights, or statutory rights, or no rights at all. As a matter of consistency, the hypothetical state and intelligence agency above should be able to invoke the government-

⁸⁸ For one influential expression of Fourth Amendment protections in such a context, see *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). See also Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1749 n.4 (quoting Justice Harlan's phrasing and noting that the Court has repeatedly endorsed it).

⁸⁹ U.S. CONST. amend. IV.

⁹⁰ See Blocher, *supra* note 23, at 698 (noting that the doctrine "is an absolute government defense to First Amendment claims by individuals").

speech doctrine to defend their actions.⁹¹ The government-speech doctrine tracks the necessity or inevitability of government speech, and the test for government speech is completely blind to the rights that government speech implicates.⁹² So why not recognize that the state and the agency both had to speak—to vindicate important state interests, no less—and, in doing so, they had to displace constitutional rights outside the First Amendment context? Once more, nothing about the doctrine itself or the argument behind it supplies the requisite limiting principle.

C. *The Court's Efforts at Limiting Burden Exemption*

At some limited level, the Court is aware that the government-speech doctrine threatens to overwhelm our jurisprudence. Cases concerning the doctrine routinely advert to the doctrine's propensity to metastasize. For instance, the Court has observed that, "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. . . . [If over-expanded], government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents."⁹³ Justices writing for themselves or for minorities of the Court are especially prone to sounding the alarm about the unintended consequences of embracing the doctrine.⁹⁴

⁹¹ In other words, they should be able to plead the government-arms doctrine and the government-privacy doctrine, respectively, but then plead the government-speech doctrine in the alternative.

⁹² Increasingly, the Court seems worried about this possibility. For instance, Justice Alito's recent concurrence in *Shurtleff*—which notably lacked majority support among the Justices—attempts to impose a First Amendment threshold for burden exemption. I discuss this development below. See *infra* note 104.

⁹³ *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

⁹⁴ See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009) (Breyer, J., concurring) (endorsing the government-speech doctrine as a way of saving a city's discriminatory selection of private statues to place in public parks, but interpreting "the 'government speech' doctrine [as] a rule of thumb, not a rigid category[because were the city] to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, [such as] solely on political grounds, its action might well violate the First Amendment"); *id.* at 485–86 (Souter, J., concurring) ("I have qualms, however, about accepting the position that public monuments are government speech categorically. Because the government speech doctrine . . . is 'recently minted,' it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." (citations omitted) (quoting *id.* at 481 (Stevens, J., concurring))); *id.* at 487 (proposing to narrow the doctrine "[t]o avoid relying on a *per se* rule to say when speech is governmental, . . . [and instead] to ask whether a reasonable and fully informed observer would understand the expression to be government speech").

The only reason the threat has not been fully realized is that the Court has imposed ad hoc restrictions on the use of the doctrine to prevent some of its most objectionable results.⁹⁵ For example, as noted above, the Court has decided that the government-speech doctrine does not exempt government speech from scrutiny for Establishment Clause violations.⁹⁶ Further, despite finding that a government prosecutor's work product is essentially government speech, the Court has declared by fiat—again, it seems, of necessity—that this holding does not extend to “scholarship or teaching” at public educational institutions.⁹⁷ The Court also takes pains to remind us that various other checks might also apply, whether legal or political. It has suggested (albeit vaguely) that certain constitutional and statutory provisions—aside from the Free Speech Clause—may constrain government speech,⁹⁸ and so too may regulations and practice.⁹⁹ And the Court reminds us that the government remains “accountable to the electorate” for its advocacy activities.¹⁰⁰

The Court has also tried to read some of its government speech holdings narrowly to clip the doctrine's wings even further. For instance, the Court distinguishes the government's use of subsidies to control a

⁹⁵ The Court explicitly refuses to allow the government-speech doctrine to overwhelm its traditional forum analysis for private expression on government property. *See id.* at 469 (majority opinion) (restating the core of its forum analysis as a check on the government-speech doctrine). It therefore has no choice but to curb the doctrine on multiple fronts, despite the absence of a clear and principled way to do it.

⁹⁶ *Id.* at 468 (“[G]overnment speech must comport with the Establishment Clause.”).

⁹⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

⁹⁸ *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) (“Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech.”). Note, however, that the Court supports this proposition by citing a line of *Summum* that does not identify any specific constitutional provisions outside the Establishment Clause that serve as a check on the doctrine. *See id.* (citing *Summum*, 555 U.S. at 468).

⁹⁹ *See Summum*, 555 U.S. at 468 (“The involvement of public officials in advocacy may be limited by law, regulation, or practice.”).

¹⁰⁰ *Summum*, 555 U.S. at 468–69 (“And of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’ ‘If the citizenry objects, newly elected officials later could espouse some different or contrary position.’” (citation omitted) (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000))); *see Walker*, 576 U.S. at 207 (“[I]t is the democratic electoral process that first and foremost provides a check on government speech. . . . [T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 575 (2005) (Souter, J., dissenting) (“[One] fixed point of government-speech doctrine is that the First Amendment interest in avoiding forced subsidies is served, though not necessarily satisfied, by the political process as a check on what government chooses to say. . . . [I]f enough voters disagree with what government says, the next election will cancel the message.”).

government message from its funding of private speech,¹⁰¹ even in cases where the basis for that distinction is extremely thin, if present at all.¹⁰² The Court has even toyed with an internally inconsistent limitation on burden exemption, once suggesting that the Free Speech Clause still applies to restrict government speech when the government attempts to compel private citizens to express the government's message.¹⁰³ This suggestion betrays the Court's discomfort with burden exemption, but it neither aligns with the cases nor makes sense to say government speech is exempt from the First Amendment only if it complies with the First Amendment.¹⁰⁴

¹⁰¹ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542–43 (2001) (explaining this distinction); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (noting that *Rust* is inapplicable where 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”).

¹⁰² See *Velazquez*, 531 U.S. at 553–54 (Scalia, J., dissenting) (highlighting, quite persuasively, the elusiveness of the distinction between *Rust*, in which the Court upheld speech restrictions tied to government subsidies, and *Velazquez*, in which the Court rejected similar subsidies).

¹⁰³ See *Walker*, 576 U.S. at 208 (“[T]he Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to compel private persons to convey the government’s speech.”). Of course, that is precisely how dissenting Justices interpreted the gag rule in *Rust*, or the advertisements in *Johanns*. See *Rust v. Sullivan*, 500 U.S. 173, 209 (1991) (Blackmun, J., dissenting) (“While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other.”); *Johanns*, 544 U.S. at 571–72 (Souter, J., dissenting) (rejecting the majority’s holding because “a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own,” and favorably citing Thomas Jefferson’s assertion that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical” (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), reprinted in 5 THE FOUNDERS’ CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987))). This proposition is not a meaningful part of the doctrine, however—nor could it be, because it is internally inconsistent. See *infra* note 104 (explaining the difficulty with this suggestion in more detail).

¹⁰⁴ The Court’s most extended discussion of implementing a First Amendment screening exercise for the government-speech doctrine arises in Justice Alito’s recent concurrence in *Shurtleff*, which drew three votes. See *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1598–1600 (2022) (Alito, J., concurring) (proposing to “resolve this case using a different method for determining whether the government is speaking,” and then elaborating). More specifically, Justice Alito proposes that the test for government speech should encompass not only the government’s expressive intentions but also an inquiry into whether the government’s conduct “rel[ies] on a means that abridges private speech.” *Id.* at 1598. Justice Alito therefore suggests that “government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression in a way that ‘abridges’ the freedom of speech.” *Id.* at 1599. It is encouraging that Justice Alito appears to recognize that burden exemption constitutes a serious threat, but it makes no sense to say that government speech is “exempt from First Amendment attack” if the very first step in his proposed analysis is to scrutinize government speech for compliance with the First Amendment. Additionally, Justice Alito offers peculiar reasoning for adding this widget to the doctrine, claiming that “the doctrine is based on the notion that governmental communication . . . do[es] not normally ‘restrict the activities of . . . persons acting as private individuals.’” *Id.* (quoting *Rust*, 500 U.S. at

The impulse to introduce these restrictions derives from an obvious source. As we observed above, burden exemption is extremely dangerous, so it must be tightly controlled.¹⁰⁵ If it cannot be sharply limited based on clear principles, then it must be limited in an unprincipled fashion. But that is hardly a satisfying result. Unprincipled restrictions that are introduced on an ad hoc, rolling basis render the doctrine vague, inelegant, and unpredictable at best. This is precisely why commentators find the doctrine so frustrating and inconsistently applied:¹⁰⁶ the Court felt compelled to create the doctrine but has struggled to find a principled basis for restricting it.

III. CANVASSING OUR OPTIONS VIS-À-VIS THE GOVERNMENT-SPEECH DOCTRINE

Three primary possibilities lie before us. First, we could proceed as we have been, allowing courts both to deploy the doctrine and to create exceptions as needed. A second option would be to improve the doctrine by installing new features, invoking principles, or making distinctions that the Court has avoided thus far. A third, more radical possibility is to replace the doctrine altogether. I ultimately endorse replacement, but let us consider each in turn.¹⁰⁷

A. *Staying the Course*

Despite the foregoing criticisms of the government-speech doctrine—and of burden exemption in particular—perhaps the risks posed by the doctrine are relatively minor given the Court’s recognition

198–99). Although the Court has stated that a lot of governmental communication poses no First Amendment problems, *see id.* (quoting *Rust* to this effect), that has never been the basis for the doctrine. After all, by Justice Alito’s own stipulation, it would cost the government little to honor First Amendment protections if those protections are rarely necessary in the context of governmental communication. The basis for the doctrine is the opposite: the perceived *necessity* of exempting the government’s communications for fear of striking down too much governmental action. *See supra* Part I (underscoring the role of necessity). Justice Alito’s position illuminates a broader concern about the doctrine, which is that it largely serves as a capacious vehicle for judicial preference rather than offering a firm guiding hand. I also consider and reject a variation on Justice Alito’s suggestion below. *See infra* Section III.B.

¹⁰⁵ *See supra* Part II (detailing the dangers of burden exemption).

¹⁰⁶ *See supra* note 24 (offering some examples of scholars concerned about the doctrine’s consistency).

¹⁰⁷ We could conceive of a fourth option—eliminating the doctrine without replacing it—but that is a nonstarter for reasons discussed below. *See infra* Section IV.A (discussing the necessity of recognizing an alternative to the doctrine).

that it needs to be contained. In any event, the single most likely outcome is for courts to continue deploying the doctrine as they have been, taking each case as it comes and fashioning a patchwork of additional limitations as new fact patterns present themselves.

This approach is suboptimal for multiple reasons. First, the doctrine has rendered an entire area of First Amendment jurisprudence needlessly confusing and unpredictable. Because it lacks a clear test for application,¹⁰⁸ plausibly yields inconsistent holdings,¹⁰⁹ and continuously invites new limitations,¹¹⁰ it seems to function less as a legal doctrine and more as a proxy for the collective judicial intuition of any given majority on the Court. As a result, it is ill-suited for guiding either private or governmental behavior.

Additionally, and for similar reasons, we can expect the doctrine to generate bad results and incorrect holdings. Just as the doctrine provides inadequate guidance to parties, it also provides inadequate guidance to judges.¹¹¹ As discussed in more detail below, numerous government-speech cases have yielded questionable or clearly inappropriate outcomes,¹¹² and we can expect more of that if the doctrine remains standing as is.

Finally, and in some respects most importantly, the doctrine enshrines burden exemption into our law even though burden exemption is fundamentally at odds with our approach to constitutional adjudication. At the highest level, discerning First Amendment violations has always been a two-step inquiry: the first question is whether the government is involved in the right way, for only the government bears

¹⁰⁸ See *supra* text accompanying note 64 (citing the majority in *Shurtleff* for this proposition).

¹⁰⁹ See, e.g., Blocher, *supra* note 23, at 698 (noting that “federal appellate courts have struggled to articulate consistent rules reconciling . . . apparently incompatible principles” behind the doctrine and detailing some examples). Compare *Rust*, 500 U.S. at 173, with *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 533 (2001) (offering divergent holdings on quite similar fact patterns), and *id.* at 549–63 (Scalia, J., dissenting) (offering a detailed explanation of the inconsistency between the holdings of the two cases and defending the view that the restriction struck down in *Velazquez* “is indistinguishable in all relevant respects from the subsidy upheld in *Rust v. Sullivan*”).

¹¹⁰ See *supra* Section II.C (detailing the Court’s scattered limitations on the government-speech doctrine).

¹¹¹ See Blake Emerson, *The 5th Circuit’s Ambush Against the SEC Is Unprecedented and Shocking*, SLATE (May 20, 2022, 11:13 AM), <https://slate.com/news-and-politics/2022/05/5th-circuit-sec-securities-fraud-civil-service.html> [<https://perma.cc/8NM5-MH38>] (“Nebulous and ever-evolving constitutional standards give courts discretionary power to strike down federal statutes they don’t like.”). Vague standards cut the other way as well, empowering judges to sustain problematic restrictions.

¹¹² See *infra* Section IV.C.2 (offering a different way to analyze some of the key government-speech cases).

the burdens of the First Amendment;¹¹³ the second question, which we reach only if government action is at issue, is whether the action infringes a protected First Amendment interest.¹¹⁴ The government-speech doctrine essentially negates the traditional understanding of how we go about enforcing the First Amendment by turning the first prong of that process on its head. Suddenly, the mere fact that government action exists forms the basis for rejecting First Amendment claims outright rather than proof that a litigant has cleared the first hurdle. Such a doctrine cannot coexist harmoniously with longstanding First Amendment precedent. It is intrinsically unconstitutional. Even those government-speech cases that yield a reasonable result—or a result that is defensible under other appropriate principles—are decided on the wrong grounds per a doctrine that is built around burden exemption.¹¹⁵

B. *Refurbishing the Doctrine*

Our remaining choice is between attempting to rescue the doctrine and replacing it outright. At least one sitting Justice has expressed significant skepticism about *stare decisis*,¹¹⁶ and six Justices have recently overturned popular, long-standing precedent.¹¹⁷ This Court may therefore prove unusually amenable to uprooting and replacing the doctrine wholesale. But it is reasonable to consider the viability of a less radical solution first—namely, what might be done to save the doctrine.

I argue above that the test for government speech, such as it is, threatens to capture so much government action that a principled application of the test would render the doctrine comically potent. Improving the doctrine would require substantially weakening it. In fact, there is a coherent and constitutional version of the doctrine, but it looks

¹¹³ See U.S. CONST. amend. I (directing its prohibitions toward Congress rather than private individuals); *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 n.2 (2022) (Alito, J., concurring) (reading the text of the First Amendment to apply to “Congress’ and other federal entities and actors”).

¹¹⁴ There is no single case to cite for the standard of review applied to regulations that purportedly burden First Amendment rights because different situations invite different forms of judicial scrutiny. However, for a summary of the relevant standards for the limitation of private expression in different governmental venues—standards of special relevance in replacing the government-speech doctrine—see *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

¹¹⁵ Moreover, as I argue below, burden exemption is also an inelegant and overpowered solution to a problem that can be addressed more adroitly. See *infra* Part IV.

¹¹⁶ See generally Gregory E. Maggs, *Justice Thomas and Stare Decisis*, 2021 HARV. J.L. & PUB. POL’Y PER CURIAM 2 (2021).

¹¹⁷ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

quite different from what the Court has created, and it is too narrow to serve as a functional replacement. It is the version of the doctrine that eschews burden exemption, along the lines of what Justice Alito proposes in his *Shurtleff* concurrence.¹¹⁸

Suppose a private litigant brings a First Amendment claim. The Court considers this claim and finds state action present—a prerequisite for any First Amendment claim, after all.¹¹⁹ But, despite giving no special weight to the government’s need to communicate, the Court also finds the absence of any First Amendment implications whatsoever.¹²⁰ Thus, the challenge fails not because the state action survives the appropriate level of scrutiny for burdening First Amendment rights but because, upon consideration of the facts of the case, no First Amendment rights happen to be burdened in this situation at all. This version of the doctrine is plainly different from the actual doctrine, which purports to skip past the First Amendment screening exercise altogether.¹²¹

This variation on the government-speech doctrine raises fewer constitutional concerns, hangs together theoretically, and provides a reasonable basis for demarcating a distinctive subset of failed First Amendment claims: those that genuinely involve only government communication and no private free-speech rights.¹²² But it is too narrow to replace the current doctrine because it does not empower the government sufficiently to satisfy the consensus interpretation of the Necessity Premise. It would grant the government no special communicative prerogatives, and therefore it would not apply in most of

¹¹⁸ See *supra* note 104 (discussing Justice Alito’s position in some detail).

¹¹⁹ See *supra* note 113 and accompanying text.

¹²⁰ There are recent cases like this outside the context of the government-speech doctrine. See, e.g., *Ark. Times LP v. Waldrip*, 37 F.4th 1386, 1390, 1394 (8th Cir. 2022) (holding, questionably, that an Arkansas statute “requiring public contracts to include a certification that the contractor will not ‘boycott’ Israel” does not raise First Amendment issues because it concerns non-expressive commercial decisions and does not involve “the kind of compelled speech prohibited by the First Amendment”).

¹²¹ Even in a world with the government-speech doctrine, some subset of government communications will genuinely fail to implicate the First Amendment rights of private citizens. But this is not because government speech *cannot in principle* undermine First Amendment rights; instead, it will sometimes happen to follow from the facts of the case. It is the difference between saying: (A) when the government speaks, we will treat it as categorically exempt from the Free Speech Clause (subject to the ad hoc exceptions needed to keep this view from destroying the First Amendment entirely); and (B) sometimes when the government speaks, it will turn out that its speech does not implicate the free-speech rights of private citizens.

¹²² This form of the doctrine may track closer to Robert Post’s influential distinction between “regulations imposed upon persons” (“conduct rules”) and “internal directives guiding the conduct of state institutions” (“decision rules”). Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 176–79 (1996).

the major government-speech cases that the Court has already decided.¹²³ Indeed, the entire point of appealing to necessity is to create a doctrine that can override legitimate First Amendment interests; a version of the doctrine that happens to fit into the gaps already left by the First Amendment is a jurisprudential nullity. There would be no reason even to name such a doctrine.

If abandoning burden exemption renders the doctrine too narrow to serve its purpose, one might hope for some other principled limitations on the scope of burden exemption instead.¹²⁴ Yet the Court's inability to supply reasonable limiting principles is inauspicious, and I cannot locate a workable mechanism for segregating doctrine-eligible and doctrine-ineligible governmental communications. For example, one salient possibility is to distinguish "soft" government speech (such as the endorsement of some factual proposition by a politician) from "hard" government speech (such as the law).¹²⁵ Slippery as those concepts may be—perhaps they occupy opposite ends of a spectrum rather than constituting a binary—readers might share an intuition that there is a meaningful difference between exempting from constitutional scrutiny nonbinding endorsements of propositions by government actors and exempting rules, regulations, statutes, and the like. At minimum, it seems inappropriate to exempt the law categorically from First Amendment—and possibly other constitutional¹²⁶—strictures. Surely the Court would agree.¹²⁷ There are various ways of articulating some version of this

¹²³ The government-speech doctrine functions primarily to preempt First Amendment claims in contexts implicating First Amendment interests involving compelled speech and viewpoint discrimination. *But see supra* notes 14–19 (listing cases where the doctrine defeated such First Amendment claims). Even where the Court rejects the doctrine, the government invokes it to defeat First Amendment claims. *See supra* notes 20–22. By contrast, the version of the doctrine that omits burden exemption cannot defeat First Amendment claims; it can only "win" when there is no First Amendment claim to begin with.

¹²⁴ Even the most successful effort in this regard would require us to make peace with burden exemption, which I have argued is intrinsically unconstitutional. Although I find this objection insuperable, the Court has yet to recognize this conclusion, so it is worth canvassing some possibilities.

¹²⁵ *See* Bezanson & Buss, *supra* note 23, at 1440–41 (distinguishing between the government's promotion of a view and governmental regulation of private conduct). Strictly speaking, Bezanson and Buss have in mind a narrower distinction between the government's promotion of a view and its regulation of private *expression*, but some question the viability of that distinction. *See* Blocher, *supra* note 23, at 707.

¹²⁶ *See supra* Section II.B (offering examples of parallel doctrines that respond to the same logic as the government-speech doctrine but threaten other constitutional rights).

¹²⁷ *See* *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (noting that government speech precedents must be extended with care to prevent the government from "silenc[ing] or muffl[ing] the expression of disfavored viewpoints").

distinction; perhaps burden exemption should not apply to acts of legal significance, for instance.¹²⁸

As appealing as this might seem at first blush, it will not work. Even leaving aside the possibility that “government speech often is a limitation . . . on private expression,”¹²⁹ the foundational government-speech case, *Rust v. Sullivan*, sustained a regulation issued by the Secretary of Health and Human Services that denied certain medical providers federal funds if they counseled patients on abortion.¹³⁰ The doctrine was literally born from a case that saved a federal regulation from a First Amendment challenge, a regulation restricting what doctors could say to their patients. To improve the doctrine without overturning its foundational case, we would need a more nuanced distinction that carves out only a subset of the law that qualifies for burden exemption. Perhaps the doctrine should apply to soft speech, as well as to hard speech that empowers the government to engage in soft speech; or perhaps it should apply to soft speech as well as to hard speech that carries certain penalties but not others. But even these variations are insufficiently nuanced because the Court is also reluctant to include all soft government speech within the scope of burden exemption—for instance, at least for now, refusing to extend the doctrine to teaching and scholarship by public educators.¹³¹ If there are sound principles that define these parameters, they are numerous and subtle at best.

Alternatively, perhaps improving the doctrine will require overturning some of the Court’s cases. For instance, perhaps *Rust* was a mistake because it saved hard rather than soft speech, and correcting that mistake clears the way.¹³² Yet that is no good either. Even if the distinction between “soft” and “hard” government speech were consistent with the Court’s cases,¹³³ and despite its intuitive appeal, it is a completely artificial place to draw the line. There is no principled basis for exempting only

¹²⁸ It is conceivable that different formulations of this distinction would not be entirely coextensive, but no salient version offers promise.

¹²⁹ Blocher, *supra* note 23, at 707.

¹³⁰ See generally *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹³¹ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

¹³² *But see infra* Section IV.C.2 (arguing that *Rust* may be mistaken but for different reasons).

¹³³ *Rust* is arguably not the only case of this sort. Numerous government-speech cases validate state action that has legal significance for private citizens, usually in the form of binding decisions by state actors that restrict private modes of self-expression, such as *Johanns* (endorsing compelled speech for beef producers); *Walker* (allowing states to use viewpoint as the basis for rejecting specialty license plate designs against the wishes of private citizens); and *Summum* (permitting a municipality to use viewpoint to discriminate among private parties seeking to contribute a statue to a local park). See *supra* notes 16–18 and accompanying text (citing and briefly describing each of these cases).

“soft” government speech—and even then, not all of it¹³⁴—from consistency with the First Amendment. After all, any reasonable conception of government speech must include the law—any law about any subject matter.

This conclusion works its way into our jurisprudence from multiple angles, including the holdings of the Court itself.¹³⁵ For example, in the context of copyright law, the Court has created the “government edicts doctrine,” which establishes that “officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.”¹³⁶ An edict is simply a decree or authoritative order¹³⁷—an important communication from the government to its people. Indeed, the rationale behind the government edicts doctrine is that “no one can own the law” because “[e]very citizen is presumed to know the law,’ and ‘it needs no argument to show . . . that all should have free access’ to its contents.”¹³⁸ In other words, the law is an especially important message from the government that we expect citizens to receive and understand. It is the quintessential form of governmental communication; if burden exemption applies to government speech, it must attach to the law as well. No apparent principled distinction neutralizes that threat. If anything, a principled approach to the category of government speech expands the doctrine beyond what the Court has allowed through its ad hoc limitations.

IV. REPLACING THE GOVERNMENT-SPEECH DOCTRINE

Process of elimination compels us to consider the viability of locating a replacement for the government-speech doctrine. If we can

¹³⁴ See *Garcetti*, 547 U.S. at 425.

¹³⁵ It is also a popular observation among theorists. For instance, one influential account asserts that the law is simply a sovereign command. For a famous discussion of this view, which is often attributed to Austin and Bentham, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 600–06 (1958), reprinted in READINGS IN THE PHILOSOPHY OF LAW 84, 89–92 (Keith C. Culver & Michael Giudice eds., 3d ed. 2017).

¹³⁶ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020). At minimum, this doctrine includes both judges and legislators—and it holds “regardless of whether a given material carries the force of law,” *id.* at 1506—though one imagines it should extend to executive officers as well.

¹³⁷ See *Edict*, BLACK’S LAW DICTIONARY (4th ed. 1968) (defining “edict” as “[a] formal decree, demand, or proclamation issued by the sovereign of a country”); *Edict*, DICTIONARY.COM, <https://www.dictionary.com/browse/edict> [<https://perma.cc/GVY9-46M6>] (defining “edict” as “a decree issued by a sovereign or other authority,” or as “any authoritative proclamation or command”).

¹³⁸ *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507 (quoting *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886)).

find no workable replacement, we might have to stay the course. But this Part argues that there is a path forward that is practically and theoretically superior. To find that path, we should revisit the argument for the government-speech doctrine, now with a firm grasp on the problems with burden exemption.

A. *Revisiting the Argument for the Government-Speech Doctrine*

Part I of this Article presents three premises that seem to lead to the government-speech doctrine:

- (1) Necessity: Governance is impossible without allowances for government speech.
- (2) Exclusivity: In any given instance, we can classify speech as emanating either from the government or from private parties.
- (3) Exemption: The Free Speech Clause of the First Amendment does not apply to government speech.

The foregoing analysis does nothing to weaken necessity, which forces us to accommodate government communication in our First Amendment jurisprudence. Additionally, even if we quibble with exclusivity, the weaker version discussed in Part I remains: at minimum, some communications emanate exclusively from a governmental source.¹³⁹ But now it should be clear that “exemption” must mean benefit exemption rather than burden exemption. Burden exemption is both inherently unconstitutional and far too powerful. Unfortunately, benefit exemption does little to resolve the Court’s original government-speech conundrum, even as it reminds us of an important truth: whatever solution we locate must be compliant with the First Amendment.

Recall the puzzle before the Court: how to accommodate the fact that the government does, and must, endorse various propositions,¹⁴⁰ often by clearing the field for its message and channeling that message through private citizens or private media.¹⁴¹ In other words, the Court needed a

¹³⁹ I am inclined to reject the strong form of exclusivity the Court has adopted, but that inclination is not consequential for present purposes. *See supra* notes 43–46 and accompanying text (discussing two interpretations of “exclusivity” in some detail).

¹⁴⁰ *See supra* notes 33–35 and accompanying text (discussing the Court’s perception of the necessity behind the government-speech doctrine); *see also* Blocher, *supra* note 23, at 707 (arguing that “government speech often is [just] a limitation (even if not a total ban) on private expression”).

¹⁴¹ *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1600 (2022) (Alito, J., concurring) (identifying “two ways in which a government can speak using private assistance”: “enlist[ing] private entities to convey its own message” and “adop[ting] a medium of expression created by a private party and us[ing] it to express a government message” (first quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); and then quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 473–74 (2009))).

way to account for the inevitable failure of the government always and forever to remain viewpoint neutral in how its conduct affects private speech. That is a First Amendment problem in the sense that the Court has made viewpoint neutrality an important concept in First Amendment jurisprudence,¹⁴² but it is not a First Amendment problem per se: there is nothing in the First Amendment that demands the government itself remain viewpoint neutral always, everywhere, come what may.¹⁴³ We need not actually exempt the government from First Amendment scrutiny when it speaks.¹⁴⁴ We only need to mold First Amendment jurisprudence around the communicative demands of governance. More specifically, we need to relax the Court's historic insistence that restrictions on private expression remain viewpoint neutral, but only in contexts where such restrictions follow directly from the government's own (appropriate) expressive activity.

The better way forward has been in front of us from the start. Viewpoint neutrality operates in the background of forum analysis—common-law restrictions on when the government can favor certain private speakers over others.¹⁴⁵ Recall that the limitations of forum analysis generated the pressure behind the government-speech doctrine in the first place.¹⁴⁶ The best way of accommodating governmental communicative prerogatives is to develop a new sort of forum for situations where the government holds forth.¹⁴⁷ For one, as I argue below, subsuming governmental communication within forum analysis should provide clearer results and guidelines than burden exemption, which (as we saw above) is necessarily riddled with numerous, unpredictable, ad hoc exceptions. Second, conceptualizing government communication within the context of a new forum will also be less threatening to First

¹⁴² See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). For a history of the development of the concepts of content and viewpoint neutrality in First Amendment jurisprudence, see generally Jud Campbell, *The Emergence of Neutrality*, 131 *YALE L.J.* 861 (2022).

¹⁴³ See U.S. CONST. amend. I.

¹⁴⁴ See Bezanson & Buss, *supra* note 23, at 1384 (arguing that “there is no basis or need for any special form of privilege or immunity for government speech”).

¹⁴⁵ See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (summarizing these rules).

¹⁴⁶ Bezanson, *supra* note 2, at 810.

¹⁴⁷ Some scholars associate the government-speech doctrine with forum analysis. See *supra* note 30; see also Lidsky, *supra* note 1, at 1980–94 (listing “government speech” alongside other forum categories when “examining modern public forum doctrine”). Although the Court does not characterize the government-speech doctrine as a species of forum analysis, see *supra* note 30, there is substantial merit in reconceiving a replacement for the government-speech doctrine as a type of forum. See *infra* Section IV.C (exploring the advantages of extending forum analysis).

Amendment rights.¹⁴⁸ And third, extending forum analysis to cover governmental communication stands to harmonize the Court's recent jurisprudence in the area; it is simpler, more intuitive, and more elegant.¹⁴⁹

A forum framing is therefore surprisingly helpful. I suggest two steps in operationalizing it. First, we need to create some distance between private speech and government speech as a constitutional, jurisprudential matter. That is, we need to get rid of the idea that government speech resembles private speech sufficiently to invite anything approaching analogous treatment for constitutional purposes.¹⁵⁰ Second, we should start to sketch out the rules that govern the new type of forum. I address each step below.

B. *Eliminating the Fiction of "Government Speech"*

By reproducing the structure of the government-speech doctrine, the government-arms doctrine and the government-privacy doctrine proposed above¹⁵¹ highlight a critical misstep. All three doctrines characterize certain government action—communicating, wielding firearms, or protecting sensitive information—as meaningfully comparable to constitutionally protected private conduct. That characterization opens the door to mistakenly accepting burden exemption: the Constitution applies when private citizens do these things, but it lapses into silence when the government does them. I have argued above that the government-speech doctrine is both inherently unconstitutional and wildly excessive. But there is a third basis for rejecting it: state action is qualitatively different from private action. In other words, the government does not speak at all.¹⁵²

Traditional scholarly engagements miss what is distinctive about government "speech," and, in doing so, they facilitate acceptance of the

¹⁴⁸ We must pick new rules to govern First Amendment compliance in our new forum, and a lot turns on which rules we pick. See *infra* Section IV.C (describing various ways of configuring the rules). In theory, we could pick rules that significantly limit the First Amendment in the new forum, but we need not do so, and we will at minimum leave burden exemption behind, which puts us on firmer footing to enforce First Amendment rights within the forum.

¹⁴⁹ Government-speech cases routinely display an awkward tension with forum analysis, which we can resolve by harmonizing the two.

¹⁵⁰ Treating government communication as reflective of a special kind of forum also helps to reinforce this message by underscoring the asymmetry between private speakers and governmental actors.

¹⁵¹ See *supra* Section II.B (defining these variations on the government-speech doctrine).

¹⁵² More specifically, although some governmental communication meets a generic dictionary definition of the word "speech," expressive conduct by the state is never appropriately regarded as speech for constitutional or jurisprudential purposes.

government-speech doctrine. More specifically, scholars recognize that government speech can be dangerous,¹⁵³ but many see it as similar in kind to private speech, albeit more powerful.¹⁵⁴ Some see nothing special about it at all.¹⁵⁵ Yet, although some governmental communication takes the form of oral or written expression emanating from a specific person, it is just as artificial to label such state action “speech” as it is to speak of the government’s rights to bear arms or to protect its own privacy. Government communication fundamentally differs from private speech, even when those communications take the form of writings or utterances of individual governmental representatives.

One essential difference between governmental and private communication concerns their respective functions. The law widely protects private speech interests—not just through the U.S. Constitution¹⁵⁶ and various state constitutions,¹⁵⁷ but also through international human rights instruments.¹⁵⁸ Although scholars disagree on precisely why we value freedom of expression,¹⁵⁹ they often associate it strongly with individual welfare,¹⁶⁰ self-realization,¹⁶¹ and human

¹⁵³ See NORTON, *supra* note 33, at 2 (noting that “sometimes the government’s speech . . . wreaks grave harm,” including when the government lies “to resist legal and political accountability” and “to enable the exercise of its powers to imprison or to deploy lethal force”; when used to “silence dissent”; and when used to “exclude and divide—and worse”).

¹⁵⁴ See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 16 (1983) (noting the narrow view legal scholars have tended to take toward governmental communications, which focuses on media not exclusively within governmental control); Blocher, *supra* note 23, at 698 (summarizing the state of the literature on government speech as “generally suppos[ing] that government speech is dangerous because it threatens to drown out or distort private discourse due to the government’s limitless resources and powerful platforms for communication,” and citing numerous examples).

¹⁵⁵ See Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 379–83 (1983) (book review) (questioning whether government speech creates any special problems or justifies any special concern).

¹⁵⁶ See U.S. CONST. amend. I.

¹⁵⁷ See, e.g., N.Y. CONST. art. I, § 8 (protecting freedom of expression); TEX. CONST. art. I, § 8 (same); CAL. CONST. art. I, § 2 (same).

¹⁵⁸ See, e.g., G.A. Res. 217 (III), art. 19, Universal Declaration of Human Rights (Dec. 10, 1948) (“Everyone has the right to freedom of opinion and expression . . .”); International Covenant on Civil and Political Rights, art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171 (“Everyone shall have the right to freedom of expression . . .”); American Convention on Human Rights: “Pact of San José, Costa Rica”, art. 13(1), Nov. 22, 1969, 1144 U.N.T.S. 123 (“Everyone has the right to freedom of thought and expression.”).

¹⁵⁹ See Blocher, *supra* note 23, at 702 n.37 (canvassing divergent theories “about the core ‘purpose’ of the First Amendment”).

¹⁶⁰ See L.W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 24–35 (2004) (describing John Stuart Mill’s utilitarian framework for evaluating freedom of expression, under which that freedom bears “almost . . . as much importance as the liberty of thought itself”).

¹⁶¹ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

agency,¹⁶² in addition to recognizing its importance for exerting influence over the government itself.¹⁶³ By contrast, the values served by governmental communication are specifically parasitic on the interests of the government's citizens. The fundamental purpose of governmental communication in a representative system—to govern better or more effectively—is about the wellbeing of those it governs.¹⁶⁴ Whatever one's view of the role of the government, empowering governments to communicate is not a matter of recognizing governmental dignity.¹⁶⁵

Additionally, whereas a key basis for protecting private speech is that it allows individuals an important sphere for self-expression, government speech does not link substantially to any sentient entity, which seriously undermines the notion that the government “speaks” in a meaningful sense. In some cases, the government will communicate content “facelessly” (such as when the IRS issues regulations),¹⁶⁶ or vicariously (such as when a federal department adopts certain ad campaigns).¹⁶⁷ In those cases, the content communicated is functionally untethered from the perspective of any governmental agent.¹⁶⁸ Even when a specific official

¹⁶² See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 215 (1972) (anchoring a theory of freedom of expression, in part, in the limitations on state power compatible with citizens “regarding themselves as equal, autonomous, rational agents”).

¹⁶³ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

¹⁶⁴ See, e.g., Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863) (endorsing “government of the people, by the people, for the people”).

¹⁶⁵ For a detailed discussion of the concept of governmental or sovereign “dignity,” see generally Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003). Resnik and Chi-hye Suk distinguish human and institutional dignity in exactly this way. See *id.* at 1927 (“[W]e speak of the dignity accorded to nonhumans as *role-dignity*, by which we mean that respect is accorded to an entity in order to enable that entity to produce something of value to persons or groups. In contrast, the dignity of people can have instrumental utility but is not justified solely in reference to what other goods it produces but rather as something that inheres in personhood.”).

¹⁶⁶ See, e.g., *Get Ready for Taxes: Here's What's New and What to Consider When Filing in 2022*, INTERNAL REVENUE SERV. (Dec. 16, 2021), <https://www.irs.gov/newsroom/get-ready-for-taxes-heres-whats-new-and-what-to-consider-when-filing-in-2022> [https://perma.cc/NY6Y-G8AE] (listing new IRS regulations for 2022).

¹⁶⁷ See, e.g., *COVID-19 Survivor Story—Kayleigh, WE CAN DO THIS*, <https://wecandothis.hhs.gov/campaign-ad/covid-19-survivor-story-kayleigh> [https://perma.cc/AA5V-DJAC] (designating an Internet ad for COVID-19 vaccines as “Paid for by the U.S. Department of Health and Human Services”).

¹⁶⁸ When the government identifies itself as behind the ads, the audience can presume certain government officials endorse the ads' content, but it is often unclear which officials, or for what precise purpose, or over which objections, or even for how long it will be so endorsed. See Annie Karni, *Biden Administration Announces Ad Campaign to Combat Vaccine Hesitancy*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/01/us/politics/coronavirus-vaccine-hesitancy.html> (last visited Mar. 9, 2023) (detailing the origins of the Biden Administration's ad campaign against COVID-19 vaccine skepticism). In this case, the purpose behind the ads is relatively clear, but a lot of other details—including whether there is internal disagreement about some of the content or how long the government will endorse these ads—remain obscure.

is associated with government expression, it is not always clear if that person truly agrees with the content advanced, or how many others in government share the view.¹⁶⁹

Thus, while honest statements from private speakers possess some stability because they spring from a web of interacting beliefs, government communication generally lacks such stability. Indeed, there are serious complications in attributing any specific viewpoint to the government in a number of important contexts, including the purpose of its laws and regulations.¹⁷⁰ A substantial subset of governmental communication reflects the siloed, often-fleeting judgment of some official or group of officials about a specific subject of governance.¹⁷¹ Those decisions—about how to handle the taxation of some form of income, or the conditions under which one should get vaccinated against COVID-19—are subject to change not merely because the “speaker” changed her mind, but also quite frequently because another official, committed to another sort of policy, has rotated through the relevant chair in the relevant office. Even to the extent a government speaker speaks earnestly, reflecting her own views, the government’s commitment to that statement is subject to change for a broader set of reasons—not just if the official changes her mind, but also if she is replaced or otherwise ordered to change the policy.¹⁷²

¹⁶⁹ By and large, the face of the federal government’s COVID-19 response has been Dr. Anthony Fauci, but there have been questions at times about how freely he was able to speak his mind on behalf of the government. See Sarah Oweremohle, *Emails Show HHS Official Trying to Muzzle Fauci*, POLITICO (Sept. 9, 2020, 2:07 PM), <https://www.politico.com/news/2020/09/09/emails-show-hhs-muzzle-fauci-410861> [<https://perma.cc/AJN8-CF3N>] (detailing political pressure on Fauci to change his message). Dr. Deborah Birx, who served as the government’s COVID-19 response coordinator during the Trump administration, rather notoriously struggled to balance political considerations with conveying her own views about COVID-19 to the public. See Tucker Doherty, *Birx: Trump’s Disinfectant Comments Were a ‘Tragedy on Many Levels,’* POLITICO (Apr. 26, 2022, 11:18 AM), <https://www.politico.com/news/2022/04/26/birx-trump-disinfectant-coronavirus-00027776> [<https://perma.cc/LUY4-VF29>] (reporting on Dr. Birx’s “regret” for not pushing back immediately when President Trump suggested at a press conference that “injecting disinfectants” into the body might serve as an effective treatment for COVID-19). A separate subject that may warrant its own dedicated treatment is the “private” speech of public officials—especially on matters of public interest—which can be particularly difficult for the audience to parse.

¹⁷⁰ See Blocher, *supra* note 23, at 700 (“[M]any scholars, judges, and justices have argued persuasively that it is impossible, as both a practical and theoretical matter, to speak of a law or constitutional provision as having a single coherent ‘purpose.’ And if it is impossible for the government to have a single purpose when enacting a law, it seems equally impossible for it to have a particular viewpoint or message embodied in that law” (footnote omitted)).

¹⁷¹ Even where the government’s endorsement of some proposition proves stable over time, prospective personnel changes still threaten that stability.

¹⁷² In fact, the Court sees this instability as an essential check on government speech. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (describing the power of the public to exert electoral pressure on the government as the “first and foremost” limitation on government speech).

Additionally, unlike private speech, government communications draw on the sovereign power of the state and therefore take on a distinctive character.¹⁷³ Governments can create juridical and even empirical facts simply by stating them, in part because the government's position on a matter is often itself what is legally or empirically significant.¹⁷⁴ Not only do governmental pronouncements restrict their subjects through the creation of laws and regulations—a power by and large unavailable to private citizens absent special circumstances, such as ballot initiatives¹⁷⁵—but they also purport to restrict themselves through dictates both public¹⁷⁶ and hidden.¹⁷⁷

The government also possesses a distinctive power not to speak—or to stop others from speaking—which is especially pronounced in the domain of national security. The federal government, for example, holds

¹⁷³ For a general discussion of competing conceptions of sovereignty—especially British monarchical sovereignty versus American popular sovereignty—see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

¹⁷⁴ This claim may evoke prominent concepts from the philosophy of language, such as “speech acts” or “performative utterances.” For some background, see generally Mitchell Green, *Speech Acts*, STAN. ENCYC. OF PHIL. (Sept. 24, 2020), <https://plato.stanford.edu/entries/speech-acts/#Int> [<https://perma.cc/TXV2-EWLX>]. Some legal scholars have invoked the concept of speech acts in the context of government speech. See Frederick Schauer, *The State's Speech and Other Acts*, BALKINIZATION (Mar. 11, 2020), <https://balkin.blogspot.com/2020/03/the-states-speech-and-other-acts.html> [<https://perma.cc/G85E-NH7J>]. Although I do not have a fully formed view on the matter, I am inclined to resist the unqualified extension of the term “speech acts” to governmental communications that, at least for constitutional purposes, should not be regarded as speech at all. Minimally, the qualitative differences between private and governmental communication give us some preliminary basis for assuming that governmental “speech acts” (if there are such things) would be distinctive. In any event, these theoretical questions are peripheral to the subject at hand.

¹⁷⁵ Even ballot initiatives are vulnerable to functional legislative override. See Sean Morales-Doyle, *Voter Restoration as a Blueprint for Fighting Disenfranchisement*, BRENNAN CTR. FOR JUST. (Apr. 18, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/voter-restoration-blueprint-fighting-disenfranchisement> [<https://perma.cc/J9Q4-6LMQ>] (detailing how, months after voters approved ending Florida's lifetime ban on voting for people convicted of felonies, “the Florida Legislature passed a law that severely limited [the ballot initiative's] impact by requiring people with convictions to pay off in full their fines, fees, and restitution before they can vote[, disenfranchising] [m]ore than 770,000 voters”).

¹⁷⁶ Constitutional and statutory text—both at the federal and state level—are generally public.

¹⁷⁷ Some important legal guidelines and interpretations remain secret. These include certain opinions of the Foreign Intelligence Surveillance Court (FISC), see Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/YJ7R-T3BR>] (detailing a leaked opinion of the FISC that permitted the massive, warrantless collection of Americans' phone records), and executive branch interpretations of governmental legal obligations. See Jameel Jaffer, *The Office of Legal Counsel and Secret Law*, JUST SEC. (July 18, 2017), <https://www.justsecurity.org/43253/office-legal-counsel-secret-law> [<https://perma.cc/N7XV-LX89>] (describing a FOIA lawsuit aimed at uncovering the “secret law” contained in nonpublic memos written by the Office of Legal Counsel within the Department of Justice).

unique power to classify (or over-classify¹⁷⁸) information of public significance,¹⁷⁹ to kill off lawsuits by invoking the state secrets privilege,¹⁸⁰ to designate even public information as secret in certain contexts,¹⁸¹ and otherwise to restrict information that undermines its preferred messaging.¹⁸² Whether through affirmative statements or through withholding of information (or both at once), the government creates a reality that binds the rest of us. Citizens are constrained by governmental policies based on false factual predicates, even when citizens recognize that the predicates are false.¹⁸³ Further, nontrivial segments of the population will often simply accept whatever representation the government makes, even if those representations are implausible or widely contradicted and debunked.¹⁸⁴ This largely reflects the power of sovereign expression.

Because governments lack continuity across time and across personnel, the government can also contradict itself internally (whether through inter-branch disputes, like lawsuits, or intra-branch disputes,

¹⁷⁸ For a sophisticated description of the history of U.S. information classification practices and the extent of its over-classification problem, see generally Oona A. Hathaway, *Secrecy's End*, 106 MINN. L. REV. 691 (2021).

¹⁷⁹ See *supra* note 87.

¹⁸⁰ See, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (affirming a district court's dismissal of a suit alleging the brutal mistreatment of the plaintiff by the CIA because the court found the subject matter of the dispute a state secret).

¹⁸¹ See, e.g., Carol Rosenberg & Julian E. Barnes, *Gina Haspel Observed Waterboarding at C.I.A. Black Site, Psychologist Testifies*, N.Y. TIMES (June 3, 2022), <https://www.nytimes.com/2022/06/03/us/politics/cia-gina-haspel-black-site.html> (last visited Mar. 9, 2023) (describing rules governing the military commissions at Guantánamo Bay that require witnesses to use code names to describe certain CIA officials even when their identities are already known publicly).

¹⁸² This is precisely what happened in *Rust*. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (permitting the government to require “a doctor’s silence with regard to abortion” under “the general rule that the Government may choose not to subsidize speech”).

¹⁸³ See, e.g., *Padilla v. Yoo*, 678 F.3d 748, 750 (9th Cir. 2012) (granting qualified immunity to a government official whose legal guidance led to the torture of an American citizen because, in part, “although it has been clearly established for decades that torture of an American citizen violates the Constitution, . . . that such treatment was torture was not clearly established in 2001–03”). Early in the War on Terror (including during 2001 to 2003), the U.S. government mischaracterized its treatment of detainees with the effect of positively shaping public and judicial perceptions of its conduct. See G. Alex Sinha, *Euphemism & Jus Cogens*, 19 NW. J. HUM. RTS. 1, 22–24 (2021) (describing the role of governmental euphemism in distorting debate about War-on-Terror interrogations). It took years for the press, public, and courts to overcome these mischaracterizations and form the consensus that the U.S. government engaged in torture. See *id.* at 6 & n.19 (describing the formation of this consensus).

¹⁸⁴ See, e.g., Lane Cuthbert & Alexander Theodoridis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests That They Do.*, WASH. POST (Jan. 7, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump> [<https://perma.cc/UJ9F-RF3A>] (reporting on polling showing that about 80% of Republicans—millions of Americans—have accepted President Trump’s false claims about defeating President Biden in the 2020 election).

such as legislative divides) or change its positions (such as when one administration takes over for another, or one official replaces another) without serious damage to its credibility.¹⁸⁵ Some scholars have concluded that this “balkanization” of government communications undermines the power of the government to engage in coordinated, mass media campaigns.¹⁸⁶ But this flexibility is actually a great source of power. The government can tailor its message to its audience, even if the message is contradicted by other arms of the government, or by the same arm of the government operating in a different venue. That gives it remarkable potential to mold public opinion. The president can represent to his supporters that the 2020 election was stolen through widespread voter fraud while omitting that claim before the courts.¹⁸⁷ Millions of supporters will still accept his statements as true.¹⁸⁸ And millions more will be compelled, effectively, to engage with his views even knowing them to be false.¹⁸⁹ In short, some of the very qualities that stand to

¹⁸⁵ We would not typically parse the fact that different branches of government can take divergent positions—even suing one another over the disagreement—as some deep inconsistency that undermines the credibility of the government as a whole. *See, e.g., Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (offering a recent example of a Supreme Court decision concerning an interbranch dispute between the President and Congress).

¹⁸⁶ YUDOF, *supra* note 154, at 115.

¹⁸⁷ *See* Tessa Berenson, *Donald Trump and His Lawyers Are Making Sweeping Allegations of Voter Fraud in Public. In Court, They Say No Such Thing*, TIME (Nov. 20, 2020, 3:13 PM), <https://time.com/5914377/donald-trump-no-evidence-fraud> [<https://perma.cc/W4RS-BPY4>] (analyzing the substantive discrepancy between President Trump’s public statements and his legal filings). *Compare* Jane C. Timm, *Trump Versus the Truth: The Most Outrageous Falsehoods of His Presidency*, NBC NEWS (Dec. 31, 2020, 4:30 AM), <https://www.nbcnews.com/politics/donald-trump/trump-versus-truth-most-outrageous-falsehoods-his-presidency-n1252580> [<https://perma.cc/DSD2-NX4G>] (documenting numerous, sweeping false claims about voter fraud and American elections offered to the public by President Trump), *with* Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump’s Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> (last visited Mar. 9, 2023) (reporting that most of President Trump’s lawsuits aimed at overturning the results of the election did not allege fraud at all, but “argu[ed] instead that local officials deviated from election codes, failed to administer elections properly or that the rules in place on Election Day were themselves illegal”).

¹⁸⁸ *See* Cuthbert & Theodoridis, *supra* note 184.

¹⁸⁹ Many prominent news outlets ran stories debunking President Trump’s claims. *See, e.g.,* Aaron Blake, *The Most Brutal Debunking of Trump’s Fraud Claims Yet—from Republicans*, WASH. POST (June 24, 2021, 11:38 AM), <https://www.washingtonpost.com/politics/2021/06/24/most-brutal-debunking-trumps-fraud-claims-yet-republicans/> [<https://perma.cc/2L3T-22S2>]; Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 6, 2021), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html> (last visited Mar. 9, 2023); Daniel Funke, *Fact Check: No Evidence of 8 Million ‘Excess’ Biden Votes from 2020 Election*, USA TODAY (Aug. 10, 2021, 7:33 PM), <https://www.usatoday.com/story/news/factcheck/2021/08/10/fact-check-8-million-excess-biden-votes-werent-counted-2020/5512962001> [<https://perma.cc/LEK6-W2D3>]; Fergal Gallagher,

weaken private speech—especially falsity and inconsistency, which we routinely treat as liabilities for witnesses in legal proceedings¹⁹⁰—in fact heighten the power of governmental communication.

For these and additional practical reasons, governments require much less protection than private citizens to make themselves heard.¹⁹¹ Governments possess unique—and uniquely powerful—means of communicating. They tend to have far more money than individuals or private entities. They can create their own media outlets,¹⁹² and they collect and maintain massive amounts of proprietary information.¹⁹³ They conduct wide-ranging assessments about the state of the world and its people, some of which they publish¹⁹⁴ and some of which they keep hidden.¹⁹⁵ They also have an unusual capacity to mask their role in conveying certain messages. For example, they selectively leak information to the press to channel preferred messages through independent news outlets.¹⁹⁶ Some surreptitious communications efforts

Catherine Sanz & Lena Camilletti, *Election 2020: Debunking False and Misleading Videos Claiming to Show Voter Fraud*, ABC NEWS (Nov. 13, 2020, 4:01 AM), <https://abcnews.go.com/Politics/election-2020-debunking-false-misleading-videos-claiming-show/story?id=74148233> [<https://perma.cc/WD3N-ZHH3>].

¹⁹⁰ See FED. R. EVID. 608 (addressing a witness's "character for truthfulness or untruthfulness"); FED. R. EVID. 613 (governing the impeachment of witness credibility through the use of "[e]xtrinsic evidence of a witness's prior inconsistent statement").

¹⁹¹ The advantages that automatically attend governmental communication only reinforce the absurdity of granting the government burden exemption through the government-speech doctrine.

¹⁹² Government-controlled media outlets in the United States tend to be directed toward external audiences, in part due to historic fears of the government manipulating its own citizens. See G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1056–60 (2020) (recounting some of the relevant history of American regulation of propaganda). But other states allow government-controlled media to target domestic audiences. See YUDOF, *supra* note 154, at 125–26.

¹⁹³ See YUDOF, *supra* note 154, at 9–10 ("Governments have an almost unique capacity to acquire and disseminate information in the modern state. This stems in part simply from superior resources But this unique capacity also stems from the broad reach of the modern welfare state.").

¹⁹⁴ See *e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-518, FACIAL RECOGNITION TECHNOLOGY: FEDERAL LAW ENFORCEMENT AGENCIES SHOULD BETTER ASSESS PRIVACY AND OTHER RISKS (2021).

¹⁹⁵ See G. Alex Sinha, *NSA Surveillance Since 9/11 and the Human Right to Privacy*, 59 LOY. L. REV. 861, 868–99 (2013) (offering a brief history of some of the government's more secretive recent efforts at data collection). The government also collects a great deal more information openly, such as through the census.

¹⁹⁶ See Hathaway, *supra* note 178, at 753–54 (noting both the illegality of selective leaking and its propensity to manipulate the press and the public). See generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515, 559–62 (2013) (describing the complex norms governing the leaking of information from within the federal government).

even garner protection under the government-speech doctrine.¹⁹⁷ And, precisely because of their governing role—because the positions of various branches of the state set the terms by which their subjects live—officials’ pronouncements are also much more likely than typical private speech to be important and newsworthy. As a result, officials associated with the government can easily command the attention of independent press to amplify their messages.

Despite the typical scholarly perspective and the Court’s jurisprudence on government speech, there is also some independent intuitive appeal to the notion that government communication is *sui generis*. For example, that assumption would help to explain the historic association of governmental communication—much more so than private speech—with the concept of propaganda.¹⁹⁸ Nevertheless, the extent of the power differential between governmental expressive conduct and private expressive conduct is often misunderstood as a matter of degree rather than a difference in kind. Although it can be difficult to ascertain the efficacy of any specific governmental informational campaign,¹⁹⁹ governmental communication is simply a different kind of activity altogether from personal, private expression.²⁰⁰ It operates on a different plane and for different purposes, and different rules dictate its success. There is no good reason to maintain the fiction that the government “speaks,” especially knowing that the concept sets the stage for jurisprudential errors such as the embrace of burden exemption.

C. *Introducing the Sovereign Forum*

Let us therefore set aside the government-speech doctrine and the very notion of government speech. As we noted above,²⁰¹ before the birth of the doctrine, the Court relied on forum analysis to establish rules about

¹⁹⁷ See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–67 (2005) (permitting the invocation of the government-speech doctrine for advertising approved by the government but not explicitly attributed to the government).

¹⁹⁸ See *Sinha*, *supra* note 192, at 1049–55, 1085–86 (noting that international and domestic regulations of propaganda generally target governmental communications and offering an explanation for this association).

¹⁹⁹ YUDOF, *supra* note 154, at 72.

²⁰⁰ The contrast might be sharpest when comparing governmental communication with the private speech of a single person or a small group of people, though the power of sovereignty distinguishes governmental communication from corporate communication as well.

²⁰¹ See *supra* Introduction.

the restriction of private expression within governmental domains.²⁰² When the government allegedly favored one private viewpoint over another or otherwise burdened the private rights of expression in some governmental space, the Court inquired into the nature of the venue where the state action in question took place.²⁰³ Was it in a traditional public forum, like a public park; a limited public forum, like a municipal theater; or a nonpublic forum, like a polling place on election day?²⁰⁴ The Court affixed different rules for compliance with the First Amendment to each of these categories,²⁰⁵ based partly on the historical significance of that sort of venue for private expressive activity,²⁰⁶ and it began to categorize various locales to resolve First Amendment questions that arose there.²⁰⁷ In each of these forums—even in nonpublic forums, which feature the most government-friendly rules²⁰⁸—the Court disfavors burdens on private expression that discriminate based on viewpoint. Restrictions may be struck down if they are not appropriately tailored to a sufficiently important interest.²⁰⁹

Although forum analysis and the government-speech doctrine frequently flirt with one another in the same opinions,²¹⁰ and despite

²⁰² See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (describing the Court’s “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property” (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992))).

²⁰³ See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

²⁰⁴ See *supra* notes 4–6 and accompanying text (sourcing the classification of these three locations).

²⁰⁵ For a succinct summary, see Lidsky, *supra* note 1, at 1980–92.

²⁰⁶ See *Perry*, 460 U.S. at 45–46 (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.”).

²⁰⁷ See, e.g., *Jamison v. Texas*, 318 U.S. 413 (1943) (holding that a public street is a traditional public forum); *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (stating that a state university’s funding program was considered a limited public forum); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985) (stating that government offices are considered nonpublic forums).

²⁰⁸ See *Perry*, 460 U.S. at 46 (“Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’” (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981))).

²⁰⁹ See *id.* (summarizing nonpublic forum rules as permitting “time, place, and manner regulations [on private expression, as well as the reservation of] the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”).

²¹⁰ See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 234 (2015) (Alito, J., dissenting) (rejecting the majority’s application of the government-speech doctrine to specialty license plates because “[w]hat Texas has done by selling space on its license plates is to create what we have called a limited public forum”); *Rosenberger v. Rector & Visitors of the Univ.*

some scholarly interest viewing the doctrine as creating a forum,²¹¹ the Court does not regard the government-speech doctrine as an extension of forum analysis. I have found no instances of the Court characterizing the government-speech doctrine as a mechanism for identifying a new forum, and the Court has declined to name a new forum for which the doctrine would serve as a gateway.²¹² In fact, the Court has confronted—and rejected—golden opportunities to link these two jurisprudential mechanisms, so its decision not to make the connection appears deliberate. For instance, when ruling that specialty license plates are government speech, the Court canvassed the forum categories it has historically deployed and rejected them all in favor of invoking the government-speech doctrine—without characterizing the government-speech doctrine as a new element of forum analysis.²¹³

The reason for keeping the doctrine distinct from forum analysis is burden exemption. Forum analysis involves subjecting state action to some measure of First Amendment scrutiny, which is precisely what the government-speech doctrine was intended to avoid.²¹⁴ Having jettisoned burden exemption, however, we are free to harmonize forum analysis with the government's communicative prerogatives. Of course, a full assessment of something as complex as a new forum warrants its own dedicated treatment, but it is possible to provide some surprisingly clear and helpful guidelines here—enough to show the solution is not just workable, but also superior to the government-speech doctrine.

Although we have some flexibility to define a new forum for governmental communication, its fundamental purpose is fixed: It is the domain within which the government may abandon viewpoint neutrality for the purposes of endorsing various propositions itself, potentially implicating private expression.²¹⁵ It encompasses governmental property

of Va., 515 U.S. 819, 829, 841 (1995) (finding that the University of Virginia created a limited public forum in funding student publications rather than engaging in government speech).

²¹¹ See discussion and sources cited *supra* note 147 (identifying one scholar who overtly associates the government-speech doctrine with forum analysis and another who implicitly does so).

²¹² See generally Bezanson, *supra* note 2 (arguing that we should interpret the doctrine as creating a new kind of forum but providing no case law to support the conclusion that the Court shares this view).

²¹³ See *supra* note 30 and accompanying discussion.

²¹⁴ That result puts a great deal of pressure on the concept of exclusivity. See *supra* Section I.A. The outcome of cases that straddle government speech and forum analysis turns primarily on whether we find private or governmental communications. See *supra* note 210 (discussing two such cases, *Walker* and *Rosenberger*). See generally *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (holding that a monument displayed in a public park was government speech and not subject to forum analysis).

²¹⁵ See Blocher, *supra* note 23, at 707–08 (arguing that “government speech often is a limitation (even if not a total ban) on private expression”).

and assets—including locales that have been designated traditional, limited, and nonpublic forums—and it extends (in limited fashion) to private resources.²¹⁶ Crucially, it need not be a First Amendment-free zone: the government cannot use this forum to engage in speech that itself violates the First Amendment, such as endorsing specific religious views or enacting statutes that unduly burden private expressive rights.²¹⁷ In a nod to the government’s distinctive communicative power, we can call this domain the “sovereign forum.”

One of the most interesting features of the sovereign forum is that we have always operated as if it exists even without formally recognizing or naming it. There is no history of legal controversy over whether the First Amendment prohibits elected representatives from espousing substantive views; impedes the enactment of statutes in principle because they codify an exclusively governmental message; or provides a remedy because the Federal Register gives voice to the federal government but not private citizens.²¹⁸ Such incidents of governance are so manifestly necessary that nobody could reasonably hold them to violate private rights. For this reason, the substantial majority of instances in which the government invokes the sovereign forum to communicate are unlikely to invite any litigation or scrutiny whatsoever.

Where the invocation of the sovereign forum generates controversy, however, is when it entails the regulation of a private expression in a manner that is not evenhanded, or involves the compulsion of private actors, or otherwise violates the expectations of civilians about their own rights to private expression. This is precisely why, even though the Court’s test for government speech has nothing to do with private expressive rights, government-speech doctrine cases typically arise when a private citizen has some colorable First Amendment claim.²¹⁹ Nobody

²¹⁶ I say more about the scope of the forum below, *see infra* text accompanying note 228, but note that the government-speech doctrine has been especially important to empower the government to “speak using private assistance”—either by “enlis[ting] private entities to convey its own message” or by “adop[ting] a medium of expression created by a private party.” *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1600 (2022) (Alito, J., concurring) (first quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); and then quoting *Sumnum*, 555 U.S. at 473–74).

²¹⁷ *See supra* notes 75–77.

²¹⁸ *See generally* FED. REG., <https://www.federalregister.gov> [<https://perma.cc/P439-XHX5>] (describing the Federal Register as “The Daily Journal of the United States Government”); *Government Policy and OFR Procedures*, FED. REG., <https://www.federalregister.gov/reader-aids/government-policy-and-ofr-procedures/about-this-site> [<https://perma.cc/59ML-S9UP>] (identifying the governmental offices that maintain the website and noting that there are no copyright restrictions on any material it publishes).

²¹⁹ *See supra* Section II.B (discussing the disconnect between the test for government speech and the contexts—exclusively in the realm of the First Amendment—where the government invokes the doctrine).

seriously objects to the power of the government to communicate unless that communication interferes somehow with their own power to do the same. This framing also reveals why forum analysis frequently circles overhead when the Court invokes the government-speech doctrine: within the sovereign forum, some of the places where private citizens have the strongest expectation of being able to communicate are the areas designated as traditional and limited public forums.²²⁰ Challengers to state action in those contexts naturally rely on forum analysis to frame their cases.

1. A Three-Factor Sovereign Forum Analysis

I suggest three primary, interrelated factors guiding sovereign forum analysis—factors the government must satisfy to defeat a First Amendment claim challenging its exercise of a communicative prerogative. I sketch out each factor here and briefly demonstrate how well they fit our government-speech cases before concluding. Notably, these factors can easily incorporate large chunks of the Court's extant First Amendment jurisprudence,²²¹ creating only modest jurisprudential disruption while also accounting for concerns that scholars have persistently raised about the government-speech doctrine. Although there will still be close cases, I argue that the factor-analysis recommended here is clearly superior to the government-speech doctrine because it centers the proper considerations, and it fits better with our standing First Amendment caselaw. Additionally, these factors leave space for differential interpretation, giving the Court some flexibility in how to apply them; they do not inexorably lead to decisions I favor in contested cases.

The first factor concerns the government's invocation of the sovereign forum. Because private citizens have recognized First Amendment rights in certain governmental spaces, and more generally because we are designing special rules specifically to facilitate the government's power to communicate, the government must do something to make clear it is abandoning viewpoint neutrality to communicate its own message rather than to favor a private message. At the same time, given the necessity driving our recognition of the

²²⁰ See *supra* note 204 and accompanying text.

²²¹ Although I have argued at length that it is necessary, see *supra* Section IV.A, reconceiving a doctrine the Court has relied on for decades is a relatively radical suggestion. To minimize disruption, there is some reason to hold steady as much adjacent jurisprudence as possible when setting the rules for the new forum.

sovereign forum,²²² it should not be especially burdensome for the government to invoke this power. A natural standard presents itself, at least provisionally: the Court's basic test for government speech. We can say that when the state controls a message intended to be governmental, and its message is likely to be received as such, it is attempting to exercise its communicative prerogative.²²³ That includes abandoning viewpoint neutrality for the purposes of endorsing propositions, and it may also entail the exclusion of competing, private voices—subject to other considerations addressed below. This factor guards against worries of governmental “ventriloquism,”²²⁴ and its adoption would affect cases such as *Rust* and *Johanns*.²²⁵

The second factor is whether the government's mode of communication appropriately falls within the scope of the sovereign forum.²²⁶ We have some freedom to define the scope of the forum. As a rule of thumb, the question should be whether the government is using an appropriate resource to spread its message—a resource it is entitled to use—rather than inappropriately hijacking a private asset, for example.²²⁷ As I noted above, the Court has interpreted the government-speech doctrine to extend to its use of “private assistance” to spread its message.²²⁸ The Court therefore appears open to extending the sovereign forum not just to governmental property but also at times to private

²²² See *supra* Section IV.A (noting that abandoning burden exemption does not entail abandoning a recognition of the government's need to communicate).

²²³ That is not to say the government does not communicate in other situations as well—for example, unintentionally through the collective but uncoordinated judgments and decisions of numerous officials. See generally G. Alex Sinha, *The Thin Blue Line Between Virtue and Vice: Confronting the Moral Harms of Policing*, 84 U. PITT. L. REV. 1 (2022) (summarizing literature on the expressive power of the law and attributing significance to the collective expressive implications of a widespread culture of abusive policing). The benefits of the sovereign forum, however, can be extended more narrowly to intentional and effective governmental communication.

²²⁴ See Greene, *supra* note 23, at 844–48 (expressing concern about governmental ventriloquism); Norton & Citron, *supra* note 12, at 909 (endorsing the idea that the government should identify itself as the source of communications if it seeks to invoke the government-speech doctrine).

²²⁵ See *infra* Section IV.C.2 (applying the factors to these cases).

²²⁶ This is a crucial question the Court has never fully been forced to address directly because it has focused instead on the source of the message.

²²⁷ Some disputes about government speech center around a controversially capacious understanding of the sovereign forum—such as whether a federal funding program can convert the private medical consultation into part of the sovereign forum. This is how I would read *Rust*. Note also that, despite my generic use of the word government, see *supra* note 3, in many instances there are overlapping federal, state, and local governments, and each will have a sovereign forum of its own scope.

²²⁸ See discussion *supra* note 216; see also *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1600 (2022) (Alito, J., concurring).

assets.²²⁹ The more broadly the Court draws the lines in that regard, the more tension²³⁰ there will be between the sovereign forum and compelled speech.²³¹ Accounting for the compelled, private amplification of government speech allows us to address another standing concern critics have raised about the government-speech doctrine.²³²

Wherever we draw the lines for this factor, we should note that the boundaries of the sovereign forum are not plausibly defined entirely in physical terms. For example, in addition to real property owned by the government, the forum may include certain forms of media, like publications issued by the government, television ads, websites, and so forth. It may also encompass communications arising in certain social contexts, such as the utterances or writings of government employees in their official capacities, regardless of physical location.²³³ This conclusion should not seriously disrupt the Court's jurisprudence. Although the Court often designates traditional, limited, and nonpublic forums by physical location, it has also recognized certain forums that qualify "more in a metaphysical than in a spatial or geographic sense."²³⁴

The third and final factor comprises two related inquiries: whether the content of the communication itself directly infringes a protected First Amendment interest, or whether the government unreasonably restricts private speech to communicate that content.²³⁵ Once more, this

²²⁹ The concern here is about the government *compelling* private citizens to amplify its message, a problem that dissipates when citizens voluntarily *elect* to amplify the government.

²³⁰ At the same time, by radically reducing the possibility of misattribution, the first factor helps to offset the problem of compelling private parties to spread a governmental message.

²³¹ The Court generally disfavors compelled speech outside the context of government speech. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down a state statute requiring public school students to salute the American flag and observing that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"); see also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (distinguishing three types of compelled-speech cases: "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government," "'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity," and "government-compelled subsid[ies] of the government's own speech").

²³² See *Blocher*, *supra* note 23, at 698 (observing that, "in many cases [the government-speech doctrine] directly *regulates* individual private speakers [by] . . . compelling them to express viewpoints they do not support").

²³³ *Garcetti v. Ceballos*, 547 U.S. 410, 420–21 (2006).

²³⁴ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

²³⁵ I treat these as two parts of the same inquiry because they can be difficult to disentangle. *Summum* provides a good example: the government's speech took the form, jointly, of installing a privately owned statue donated to the government as well as refusing a second statue from a different group of private citizens. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

criterion gets at broad concerns about the government-speech doctrine.²³⁶ Despite its duality, this is a relatively straightforward inquiry because we have generations of decisions that help point the way. The first prong is important because, contra the government-speech doctrine, the First Amendment must remain in effect when the government communicates. More specifically, we know that the government cannot use its communicative power to implement rules or regulations that directly burden protected expressive rights—rules that prohibit the criticism of public officials, for example,²³⁷ or compel citizens to attend church.²³⁸

We also have some natural guidelines for considering whether the government unreasonably suppresses private speech to communicate its message: forum analysis. The government is entitled to communicate in traditional, limited, and nonpublic forums because those are all governmental venues. They fall comfortably within any plausible definition of the scope of the sovereign forum. But the government's latitude to suppress competing private speech differs across those three contexts because each offers a different gradation of free-speech rights to private speakers.²³⁹ The traditional, limited, and nonpublic forum rules thus provide a baseline for understanding what should happen when the government's quest to communicate interferes with private expression in one of those locales. Sometimes suppressing competing private speech will be inappropriate because the public has an expectation that it can use a venue relatively freely for its own expressive purposes. And even where that is not the case, the government's suppression of counter-speech—that is, its prevention of counter-messaging from private citizens—must

²³⁶ See Blocher, *supra* note 23, at 696 (“As the [government speech] doctrine grows, the constitutional exemption it receives is increasingly bumping into another apparently absolute First Amendment principle—the requirement that the government be viewpoint neutral when it restricts private speech. . . . Indeed, one way for the government to prevail in a government speech case is to show that a private speaker's message is contrary to, and interfering with, its own.”).

²³⁷ See *Bridges v. California*, 314 U.S. 252, 258, 270 (1941) (reversing contempt-of-court convictions for petitioners for “comments pertaining to pending litigation” because “it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions”).

²³⁸ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022) (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). *Kennedy* came down during the drafting of this Article, so it is too early to know exactly what it will mean for the Court's Establishment Clause jurisprudence, but it certainly promises significant changes. See *id.* at 2427–28 (replacing the *Lemon* test the Court had previously used in many Establishment Clause cases—a test that considered a challenged law's “purposes, effects, and potential for entanglement with religion”—with the interpretation of the Establishment Clause “by ‘reference to historical practices and understandings’” (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014))).

²³⁹ If we want, the analysis of this factor could turn on sophisticated assessments about how best to characterize the government's actions, such as those discussed at length by Robert Post. See generally Post, *supra* note 122.

be even-handed across viewpoints.²⁴⁰ The government's power to restrict competing messages from private citizens should plausibly be at its highest ebb in government venues that are not traditional, limited, or nonpublic forums,²⁴¹ and at its lowest ebb when it seeks to deploy its message in privately owned spaces.²⁴²

In short, the proposed test requires the government to invoke the sovereign forum (1) clearly and (2) appropriately, and (3) to use the forum in a way that respects First Amendment rights as strictly as possible. Although questions can arise at any of these levels,²⁴³ most governmental communications should easily survive the inquiry recommended here. Consider the enactment of law, for example. Statutes, rules, and judicial decisions are quintessential governmental communication,²⁴⁴ intentionally and effectively communicating a governmental message, and their distinctive function plainly satisfies the first criterion. Governments also tend to use a combination of governmental publications²⁴⁵ and voluntary publication by private entities²⁴⁶ to memorialize rules and regulations,²⁴⁷ thereby staying plausibly within the boundaries of the forum. Third, governmental rules

²⁴⁰ See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) (describing these categories) (“In addition to time, place, and manner regulations, the state may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.”).

²⁴¹ Joshua D. Rosenberg & Joshua P. Davis, *From Four Part Tests to First Principles: Putting Free Speech Jurisprudence into Perspective*, 86 ST. JOHN'S L. REV. 833, 843, 846–49 (2012) (describing courtrooms, state visits, and the inside of police vehicles as government domains that are “not a forum at all”).

²⁴² I incline toward the view that the government should be presumptively barred from—or at least face an extremely heavy burden in—preventing counter-messaging from private citizens on private property, even when it is justified in demanding that its own message be transmitted. This rule would have potentially significant implications for *Rust*. See *infra* Section IV.C.2 (discussing how the sovereign forum factors might apply to *Rust*, among other cases).

²⁴³ See *infra* Section IV.C.2 (applying the factors to several government speech fact patterns).

²⁴⁴ See *supra* Section III.B (arguing extensively for this proposition).

²⁴⁵ See *How to Find Laws, Acts, or Statutes*, U.S. SENATE, https://www.senate.gov/legislative/HowTo/how_to_laws.htm [<https://perma.cc/34XJ-8F7J>] (“At the end of each session of Congress, public laws are published in annual volumes called the *United States Statutes at Large*, which are published by the Government Publishing Office.”); see also sources cited *supra* note 218 (providing information on the Federal Register, which publishes agency rules and other governmental notices).

²⁴⁶ The Federal Reporter, a prominent publication of various decisions by federal courts, is published by West, a private company. See *W. Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1221–22 (8th Cir. 1986) (“For more than a century, West has been compiling . . . opinions of state and federal courts. . . . West then assigns its report of each opinion to one of the individual series in the National Reporter System, such as *Federal Reporter* . . .”).

²⁴⁷ Recall that, under the government edicts doctrine, the law is not copyrightable, so private citizens may freely gather and publish it. See *supra* notes 136–38 and accompanying text (discussing the government edicts doctrine).

and regulations often focus on quotidian matters of governance like procedural rules, or vehicular speed limits, or how to dispose of household recycling, rather than areas sheltered by the First Amendment. Nor will their publication generally involve indirect suppression of private expression, given that private entities can republish the law and add their own commentary as they choose.²⁴⁸ These criteria appropriately approve of the means and mechanisms governments typically use to disseminate the law.

This is a preliminary sketch of the key factors, so it naturally leaves some questions unanswered. For instance, we might assess each of these factors on a binary basis and insist that “passing” on all the factors is a necessary condition for the government to defeat a First Amendment challenge. But we could also evaluate some of the factors on a spectrum; perhaps we care how clearly the government has invoked its communicative prerogative, or how firmly the government’s mode of communication falls within the sovereign forum, and we give it only partial credit on either factor in marginal cases. Similarly, we could give weight to countervailing factors. Perhaps we care not just whether the government has invoked its communicative prerogative, but also whether a private citizen is also clearly attempting (and succeeding) to convey a message at the same time and through the same mode of communication.²⁴⁹ Such a move could empower us to account for “mixed speech” without relying on the Court’s formal acceptance of that category.

2. Test-Driving the Factors

My own view is that we should draw the boundaries of the sovereign forum narrowly and take seriously competing claims of private expression. The government owns a lot of tangible property and communications infrastructure outright, in addition to possessing unique power to spread its message.²⁵⁰ I am skeptical of its need for a tailwind where its communicative activities begin to clash with private speech interests. Regardless, it is worth highlighting the new light this framework casts on contested government speech cases. Consider three examples.

²⁴⁸ See *supra* text accompanying notes 135–38.

²⁴⁹ See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 221–23 (2015) (Alito, J., dissenting) (emphasizing the private expressive dimension of specialty license plates).

²⁵⁰ See *supra* Section IV.B (detailing the government’s distinctive communicative powers); YUDOF, *supra* note 154, at 16–17 (identifying some underappreciated modes of governmental communication).

The Court's decision in *Rust* has been controversial partly because it focuses almost exclusively on the government's communicative interests in silencing medical providers who might otherwise discuss abortion with patients.²⁵¹ The facts raise difficult questions under the proposed sovereign forum analysis: With respect to the first factor, it is unlikely that the audience in question—the patients—would interpret silence by their doctors as a government message against abortion.²⁵² More generally, the transparency required by the first factor is difficult to meet when the government enforces silence rather than issuing an affirmative message, or even a disclaimer. Further, under the second factor, a private medical consultation is not obviously an appropriate part of the sovereign forum; although the Court has effectively suggested it may be,²⁵³ that result is neither obviously correct nor compelled by the analysis proposed here. And even if the Court were to find in favor of the government on both fronts,²⁵⁴ the third factor still looms. The entire premise of the program is to amplify the government's message by suppressing contrary private speech—in a “private” zone where governmental power to discriminate on viewpoint should be especially weak. *Rust* may therefore be difficult to save under the proposed framework.

Johanns raises different kinds of difficult questions under proposed factors. Recall the key facts: The government compelled beef producers to pay a “checkoff” to the government, a portion of which was used to air television ads that some of the beef producers disagreed with—ads that neither identified the government as their source, nor captured the views of some beef producers that their own products were superior to the

²⁵¹ See *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991) (epitomizing this approach).

²⁵² The regulation probably resulted in recipients of care remaining uninformed of their options rather than realizing that the government was trying to dissuade them from considering abortion. Even if a patient specifically requested information on abortion, the regulation in *Rust* noted that “[o]ne permissible response . . . [would have been that] ‘the [Title X] project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.’” *Id.* at 180 (quoting 42 C.F.R. § 59.8(b)(5) (1989)). No reasonable patient would interpret such a statement to mean that the government has imposed a view on the doctor as a condition of securing a grant. See *Gey*, *supra* note 24, at 1272 (“If the government [in *Rust*] wanted to communicate its real message[—namely that abortion is immoral—]then simply ordering the silence of healthcare workers dealing with patients would not be sufficient to communicate that message.”).

²⁵³ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When 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.”).

²⁵⁴ The Court has a better answer to concerns about the second criterion than the first: perhaps, consistent with *Rust*, the doctors *opted into* part of the sovereign forum by accepting a certain grant, and thus they were rewarded for conveying the government's message rather than being punished for failing to do so.

products of other producers also taxed to fund the ads.²⁵⁵ Because the government did not clearly identify the message of the ads as emanating from the government, it failed on the first factor (invoking the sovereign forum). Additionally, although a television ad could plausibly be part of the sovereign forum if paid for by government funds (the second factor), a nuanced analysis of the third factor might also account for the compelled-speech dimension, where some of the funds behind the ad come from private parties who reject its content and are therefore forced to subsidize and be associated with a message they reject.²⁵⁶ Thus, *Johanns* should also come out the other way under the new framework.

Consider one more case for good measure: *Summum* highlighted the deficiencies of the government-speech doctrine in a unique and powerful way because the setting for the case was a traditional public forum: a public park.²⁵⁷ Remember that, in *Summum*, a municipality successfully fended off a First Amendment challenge after it denied the request of a small religious group to install a statue in the park—despite having installed a statue donated by a different religious group in the very same park.²⁵⁸ It is plausible that a permanent statue installed in a public park meets the first factor,²⁵⁹ clearly conveying some sort of governmental message.²⁶⁰ It is also plausible that such a statue falls comfortably within the sovereign forum, the second factor, because it is a governmental installation on governmental land. But the facts raise a problem under the third factor. Even leaving aside the possibility of a direct First Amendment problem caused by the content of the message—namely, the possibility of trouble under the Establishment Clause²⁶¹—the entire fact

²⁵⁵ See generally *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

²⁵⁶ Compelled subsidies for governmental communication raise especially sharp questions given the myriad other tools governments have for spreading their messages. See *supra* Section IV.B.

²⁵⁷ See generally *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

²⁵⁸ See generally *id.*

²⁵⁹ Note that a more nuanced interpretation of this factor might give serious weight to the private speech in the picture here as well—the fact that the statue was donated by a private group. See *supra* text accompanying note 249 (elaborating on this possibility).

²⁶⁰ It is much less clear that the government communicates *one specific* message by installing such a statue, but that is not necessarily problematic in this context. In fact, the Court has made its peace with the ambiguity of certain forms of government speech, such as monuments. See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2082 (2019) (noting the difficulties in “identifying the[] original purpose or purposes” of “monuments, symbols, or practices that were first established long ago”).

²⁶¹ Even though it acknowledged that “government speech must comport with the Establishment Clause,” *Summum*, 555 U.S. at 468, the Court did not dwell extensively on the possibility that installing a religious statue in the park violated the Establishment Clause. Perhaps that is because “Establishment Clause issues [were] neither raised nor briefed” in the case. *Id.* at 485 (Souter, J., concurring). One reason the parties may not have raised the Establishment Clause issue

pattern centers around the municipality's favoritism toward certain private speech in a governmental forum where private expressive rights are especially robust.²⁶²

The *Summum* Court permitted the municipality to launder its viewpoint discrimination by converting the statue into government speech.²⁶³ Additionally, because the government-speech doctrine sits uncomfortably alongside traditional forum analysis, the Court rejected the latter despite the obvious classification of the venue as a traditional public forum.²⁶⁴ By contrast, under the factor analysis proposed here, there is a legitimate question about whether the municipal government's communication in this traditional public forum unreasonably suppressed private expression because the government did not communicate *sua sponte* but rather on the prompting of a private party.²⁶⁵ Its rejection of the statue certainly was not viewpoint neutral, and it therefore chose not just to convey its own message but also to amplify one group's speech and not another's—in a part of the sovereign forum where it has historically faced the highest hurdles to restricting private speech, no less.²⁶⁶ Accordingly, under the factor analysis, the better holding would acknowledge the impracticality of demanding that municipalities accept all statues for installation in public parks, but hold instead that municipalities should reject all private submissions.

Different Justices could well apply the factors identified above somewhat differently—proof the factors are not rigged—but note two

is that the Court has upheld the constitutionality of certain public monuments with undeniable religious content. *See Am. Legion*, 139 S. Ct. at 2074, 2090 (holding that the Bladensburg Peace Cross, a World War I memorial taking the form of a giant cross, does not violate the Establishment Clause).

²⁶² *Summum*, 555 U.S. at 478–79.

²⁶³ The Court decided viewpoint discrimination no longer mattered once the statue became governmental. *See id.* at 473–74 (finding that, upon taking ownership of the statue, “[a]ll rights previously possessed by the monument’s donor have been relinquished. . . ., unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf”).

²⁶⁴ More specifically, the Court noted that “[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program.” *Id.* at 478. But because “public parks can accommodate only a limited number of permanent monuments,” *id.*, “the application of forum analysis would lead almost inexorably to closing of the forum, [so] it is obvious that forum analysis is out of place.” *Id.* at 480.

²⁶⁵ It would be a different matter if the government had chosen a statue on its own, rather than accepting submissions from private parties. The Court might lament the introduction of this distinction. *See id.* at 471 (“By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.”). Nevertheless, it strikes a better balance between the practical limitations attending statue installation and the viewpoint neutrality demanded in traditional public forums to bar governmental acceptance of private statues for installation in those forums.

²⁶⁶ *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

important points. First, despite some latitude for interpretation, the factors count against some of the key holdings the Court has reached under the government-speech doctrine.²⁶⁷ Second, even for those who might use the factors to affirm *Rust*, *Johanns*, *Summum*, or other questionable government-speech cases, the reasoning for sustaining those holdings is much more nuanced and compatible with traditional First Amendment analysis. I would argue that many government-speech cases are wrongly decided, but even if they are not, their reasoning—based on combining burden exemption with a binary classification of communications as either private or governmental—is erroneous. Instead, we now have the outlines of a framework for analyzing governmental communication that centers the First Amendment, conforms with forum analysis, and rejects burden exemption.

CONCLUSION

This Article urges the complete eradication and replacement of the government-speech doctrine. Although it is only thirty years old, the doctrine already features in dozens of federal and state decisions. Each passing year, its roots grow deeper, despite its reliance on the dangerous and unconstitutional notion of burden exemption and its advancement of the confused concept of “government speech.” This Article argues that we can abandon both these ideas and replace them with an upgraded forum analysis—a sovereign forum that allows the government to exercise its necessary communicative prerogatives while honoring the First Amendment and accommodating decades of precedent on governmental forums.

²⁶⁷ See *supra* text accompanying notes 251–66.