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Neutrality Fatality as Between Government Speech and Religion and Nonreligion: How the Government Speech Doctrine Provides a Solution

I. INTRODUCTION

The Free Speech Clause of the First Amendment protects the right to speak for all individuals and entities, including the government, but the Establishment Clause requires the government to maintain neutrality regarding religious speech and action. So what happens when these two constitutional rights collide? This Comment argues that because the Establishment Clause mandates neutrality only between religions and not as between religion and nonreligion (absolute neutrality), the government should be able to speak and endorse religion in general under the government speech doctrine.

One might argue that this is not a common collision because the Establishment Clause applies only to government. But this conflict arises whenever the government adopts as its own any religious speech. Under the relatively new government speech doctrine, the government has the constitutional power to “speak for itself.” In other words, just as every U.S. citizen is entitled to speak freely, the U.S. government is entitled to have and express its own opinions. Of course, this doctrine is subject to some limitations, notably the Establishment Clause.

1. The Court has certainly not applied a bright-line test to Establishment Clause cases, see infra Part II.B, but the scope of this Comment is limited to the baseline requirement of governmental neutrality. See Mitchell v. Helms, 530 U.S. 793, 839 (2000) (citations omitted) (“As I have previously explained, neutrality is important, but it is by no means the only ‘axiom in the history and precedent of the Establishment Clause.’”); see also Christopher C. Lund, Legislative Prayer and the Secret Costs of Religious Endorsements, 94 MINN. L. REV. 972, 973 (2010) (“The Establishment Clause cannot be reduced to a single principle. But if it could—if there is a single premise that has animated the Supreme Court’s approach over the past fifty years—it would be the neutrality principle.”).


4. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (differentiating private religious speech, which is protected under the Free Exercise clause, from government speech endorsing religion, which is prohibited under the Establishment Clause); see also Summum, 555 U.S. 460.
The Court has been unclear about how it would handle a collision between the government speech doctrine and Establishment Clause neutrality. Even in cases that appear to have implicated both, the Court has not addressed the potential conflict. While scholars have discussed government speech and viewpoint neutrality in general, the legal literature has likewise sidestepped the more narrow discussion of how the government speech doctrine can provide a solution to the neutrality mandate. Scholars who discuss the government speech doctrine merely mention the Establishment Clause in passing, but they do not explore whether or how the clause limits government speech. Similarly, articles that focus on Establishment Clause neutrality note the government speech cases, but skirt the central issue of how the two concepts relate. The few articles that do discuss the interplay between the

5. C.f. Rust v. Sullivan, 500 U.S. 173 (1991) (ruling that the government has a right to place conditions that discourage abortion on grants of government stipends without mentioning the fact that abortion can be considered a general religious topic); see also Summum, 555 U.S. at 467 (holding a Ten Commandments monument placed in a public park to be government speech without even addressing the potential Establishment Clause issues typically associated with Ten Commandments displays).


neutrality doctrine and the Establishment Clause have either maintained a much narrower focus (e.g., by focusing on how the doctrines affect public schools), 9 or explored the two doctrines to illustrate a separate and distinct argument regarding their relationship.10

This Comment first proposes that Establishment Clause neutrality should not apply to governmental endorsements of religion in general, meaning it does not mandate absolute neutrality. This approach would be almost impossible for the government to maintain for various reasons explained below,11 and the government should be held to a more manageable standard, which would require it not to prefer specific religious sects over one another. Where a governmental message endorses belief generally but not a particular religion, the Establishment Clause is not violated.


10. Dolan, supra note 7, at 8 (mentioning both doctrines to maintain a different side-argument that government speech "with arguably religious themes should be prohibited, unless the government can show that any religious content is negligible compared to a clear secular meaning"); Scott W. Gaylord, Licensing Facially Religious Government Speech: Summum's Impact on the Free Speech and Establishment Clauses, 8 FIRST AMEND. L. REV. 315, 322 (2010) [hereinafter Licensing Facially Religious Government Speech] (exploring the effect of recent government speech cases on the Establishment Clause and arguing that "the central Establishment Clause inquiry with respect to facially religious government speech is whether the government has a primarily religious purpose"—maintaining a focus on specialty license plate laws); Scott W. Gaylord, When the Exception Becomes the Rule: Marsh and Sectarian Legislative Prayer Post-Summum, 79 U. CIN. L. REV. 1017, 1019 (2011) [hereinafter When the Exception Becomes the Rule] (explaining how the government speech doctrine affects the constitutional exception of sectarian legislative prayer); James J. Knelsey & John W. Whitehead, In God We Trust: The Judicial Establishment of American Civil Religion, 43 J. MARSHALL L. REV. 869, 875 (2010) ("[G]reater scrutiny is needed for application of the government speech doctrine in order to avoid the diminution of precious First Amendment liberties while at the same time arguing that the judiciary should permit individually expressed sectarian sentiments at public events in the interests of accommodation, tolerance and religious diversity, and as a means of avoiding the establishment of a monopolistic American Civil Religion."); L. Darnell Weeden, A First Amendment Establishment Clause Analysis of Permanent Displays on Public Property As Government Speech, 35 T. MARSHALL L. REV. 217, 219, 238 (2010) (focuses on "[g]overnment speech consisting of permanent religious monuments residing in public" places and argues that these should not violate the Establishment Clause "when they possess historical significance"). But see Bruce Ledewitz, Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?, 41 ST. MARY'S L.J. 41, 92 (2009) (taking a similar stance that the government speech doctrine may resolve the Establishment Clause crisis by permitting the government to publicly endorse a higher law). Of these scholarly works, the Ledewitz article comes the closest to my argument. But while Ledewitz reaches the same conclusion, he does so with exclusive use of the government speech doctrine, which forms only half of my analysis—the other half concerning the neutrality distinction between (1) religion and religion and (2) religion and nonreligion.

11. See infra Part II.C.
The Court has interpreted the Establishment Clause to prohibit the government's favoring any particular religion over others, which is largely undisputed. But the Court has also stated that favoring religion over nonreligion is prohibited, an assertion which is less certain. Although the Court has frequently repeated this apparent rule of neutrality between "religion and nonreligion," it has never actually applied it in a real case, which makes the repetition of this phrase seem hollow. Therefore, this Comment concludes that while the government cannot show preference for one religion over another, the purported requirement of absolute neutrality is not part of Establishment Clause doctrine.

If the purported requirement of absolute neutrality does not exist and the Establishment Clause does not actually prohibit the government from endorsing religion in general, it follows that the government may take a stance on general moral and religious

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12. This first part of the principle is undisputed because it is obvious that the government cannot praise Hinduism over Catholicism or vice versa. See Epperson v. Arkansas, 393 U.S. 97 (1968) (determining that state statutes forbidding the teaching of evolution in public schools were contrary to the freedom of religion mandate in the First Amendment because they showed a governmental preference for the Biblical account of Creationism to the scientific, evolution theory).


14. See, e.g., Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) ("[G]overnment must . . . 'effect no favoritism among sects or between religion and nonreligion.'" (citations omitted)); McCreary Cnty., 545 U.S. at 860 (quoting Epperson, 393 U.S. at 104); Allegheny v. ACLU, Greater Pittsburg Chapter, 492 U.S. 573, 605 (1989) ("[W]e have held it to mean no official preference even for religion over nonreligion.").

15. See McCreary Cnty., 545 U.S. at 860 (stating the principle of neutrality between religion and nonreligion, but seemingly bases its holding on the first Epperson principle regarding neutrality between religion and religion); Bd. of Educ. of Kiryas Joel Vlll. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (holding that because "the benefit [of an exemption] flows only to a single sect," Satmar Hasidim (a strict form of Judaism), distinguishing this sole school district violated the Establishment Clause—also stating that "aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole," but this statement is mere dicta because it is not necessary to the holding); Lee v. Weisman, 505 U.S. 577, 597 (1992) (concluding that a particular religious exercise, "nonsectarian" ceremonial prayer, conducted at a graduation ceremony is unconstitutional because it exhibited preferential treatment of a "Judeo–Christian tradition" at the expense of students retaining differing beliefs); Larson v. Valente, 456 U.S. 228, 246 (1982) (exclusively citing the first Epperson principle of neutrality between religion and religion in saying that "[t]he government must be neutral when it comes to competition between sects" (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952))); Epperson, 393 U.S. at 104 (stating the principle that governmental neutrality is mandated between religion and nonreligion without either explaining what this means or including this principle in its holding).
principles under the government speech doctrine—another argument
mentioned by several works in different contexts but not yet fully
developed.\textsuperscript{16} Thus, the government speech doctrine allows
the government to speak out on one side of moral questions and
controversies without violating the neutrality requirements of the
Establishment Clause, so long as the principles it endorses are not
specific to any particular religion.

Part II provides an outline of both the government speech
document and Establishment Clause neutrality, and discusses why the
Court's apparent absolute neutrality mandate is problematic.\textsuperscript{17} Part
III argues that this oft-quoted neutrality mandate between religion
and nonreligion is actually only repeated dictum that is not a
doctrinal requirement.\textsuperscript{18} Accordingly, Part IV contends that under
the government speech doctrine, the government may properly take
a stance on religion in general and nonsectarian, moral, and religious
principles without violating the Establishment Clause.\textsuperscript{19} Part V
concludes.\textsuperscript{20}

\textbf{II. GOVERNMENT SPEECH AND ESTABLISHMENT CLAUSE NEUTRALITY:}
\textbf{THE INEVITABLE CONFLICT}

To communicate the tension between Establishment Clause
neutrality and the government speech doctrine, this Part first
provides a brief background discussion of both topics. It then
describes the problem created by the supposed absolute neutrality
mandate: the neutrality mandate is virtually impossible to
implement.

\textit{A. Description of the Government Speech Doctrine}

The government speech doctrine is a relatively new principle\textsuperscript{21}
that has its roots in a common sense idea: that the government has a
right to take a stance on matters relevant to law and policy. In \textit{Rust v.
Sullivan}, for example, the Court stated that "[t]he Government can,
without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”22 From its small beginning in Rust, the government speech doctrine has developed into a much broader principle.23

While the First Amendment restricts governmental regulation of private speech, “it does not regulate government speech.”24 The government, as an independent entity, has just as much right to “speak for itself”25 as a U.S. citizen under the First Amendment—subject to the Establishment Clause and other constitutional restrictions.26

The U.S. Supreme Court has attempted to draw a clear line distinguishing government speech from government endorsement of private speech,27 but this line can be difficult to discern.28 Because

22. 500 U.S. 173, 193 (1991). In Rust, the Court determined that “the government may make a value judgment favoring childbirth over abortion, and... implement that judgment by the allocation of public funds.” Id. at 192-93 (citations omitted). The Court thereby introduced the government speech doctrine by recognizing that “[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” Id. at 193 (citations omitted) (internal quotation marks omitted).


24. 555 U.S. at 467.

25. Southworth, 529 U.S. at 229.

26. See Finley, 524 U.S. at 598 (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view.”); Children First Found., Inc. v. Martinez, 631 F. Supp. 2d 159, 172 (N.D.N.Y. 2007) (“As a general rule, government has the undeniable right to speak for itself and to advocate and defend its own policies subject only to the review of the electoral and political processes. ... This liberty to chose [sic] its message sanctions a government’s viewpoint based restriction.”).

27. Johanns, 544 U.S. at 559 (endorsing the principle that “[c]ompelled support of a private association is fundamentally different from compelled support of government” (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n. 13 (1977) (Powell, J., concurring)) (internal quotation marks omitted)).

28. See Lund, supra note 1, at 1016 (“The line between governmental speech and private speech is often thin and hard to discern.”); e.g., Sons of Confederate Veterans, Inc. v. Comm’r of
“some government agencies involve, or entirely consist of, advocating a position,” such as the FDA or the EPA, the power of the government speech doctrine is vital to many central functions of the government, and so long as the government is not endorsing private speech, its speech can be classified as “government speech,” which means that it is not subject to First Amendment limitations on government.

The Supreme Court has stated that government speech occurs when “the government sets the overall message to be communicated and approves every word that is disseminated.” Thus, for speech to qualify as government speech and be exempt from First Amendment scrutiny, the message must be “effectively controlled by the Federal Government itself.” This means that the “government exclusively crafts and controls its own speech, from ‘beginning to end.’” The Court held that the government had shown this level of control over the speech involved in Johanns v. Livestock Marketing Association. In Johanns, Congress directed and coordinated a program to promote beef products. Even though the government outsourced some of this promotional work to outside, independent organizations, “the Secretary exercise[d] final approval authority over every word used

the Va. Dept. of Motor Vehicles, 305 F.3d 241, 251 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc) (“What is, and what is not, ‘government speech’ is a nebulous concept, to say the least.”); Caroline Mala Corbin, Mixed Speech: When Speech is Both Private and Governmental, 83 N.Y.U. L. REV. 605, 612 (2008) (“While the existence of the government speech doctrine is now firmly established, its contours are not.”); id. at 607 (“The trouble with this dichotomy is that not all speech is purely private or purely governmental. In fact, much speech is the joint production of both government and private speakers and exists somewhere along a continuum, with pure private speech and pure government speech at each end.”).

34. Id. at 560.
37. Id. at 561.
in every promotional campaign,” and Department officials reviewed “[a]ll proposed promotional messages . . . both for substance and for wording.”38 Thus, a key element of the government speech doctrine is the “degree of governmental control over the message.”39

Conversely, “when the government is not trying to send a message of its own, but is instead trying to create a place for individuals to speak, the resulting speech is considered private.”40 Speech cannot be government speech when the government is merely providing a forum for private speakers. For example, in Rosenberger v. Rector & Visitors of the University of Virginia, the Court dealt with a situation where a public university denied school funding to a particular student publication based on that publication’s religious character.41 “The Court explained that this publication was not government speech because the university was not ‘speak[ing] or subsidiz[ing] transmittal of a message it favors.’”42

While there have been several cases affirming the existence of the government speech doctrine in recent years, the most recent being Pleasant Grove City, Utah v. Summum,43 some academics and judges are still skeptical of its application.44 In Summum, the Court held that the government’s decision to “accept certain privately donated monuments while rejecting [Summum’s] is best viewed as a form of government speech,” which meant it was “not subject to the Free Speech Clause.”45

38. Id.
39. See id.
40. Lund, supra note 1, at 1016 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995)).
42. Lund, supra note 1, at 1016 (citing Rosenberger, 515 U.S. at 834); see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (affirming the grant of an injunction to the Ku Klux Klan to display a white cross in the capitol square because the speech was “purely private” and it occurred in a “designated public forum, publicly announced and open to all on equal terms”).
44. Id. at 481 (Stevens, J., concurring) (“To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.”); Steven H. Goldberg, The Government-Speech Doctrine: “Recently Minted;” but Counterfeit, 49 U. LOUISVILLE L. REV. 21, 23 (2010) (arguing that the Court’s “newly minted government-speech doctrine is counterfeit” and that it has great potential to “further debase First Amendment jurisprudence”).
45. Summum, 555 U.S. at 481.
The fact that the Free Speech Clause does not restrict government speech does not mean that the doctrine is completely unrestrained. For instance, "a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'" In fact, the political process is the strongest and most far-reaching check on government speech. More to the point, while government speech is not limited by the Free Speech Clause (a clause that protects people's speech from being infringed but in no way hinders the government's own speech), it is still constitutionally limited by the Establishment Clause (a clause created to limit governmental action and endorsement).

The First Amendment mandates, at a minimum, government neutrality. When the government acts to advance sectarian religions, "it violates that central Establishment Clause value of official religious neutrality," because neutrality ceases to exist when the government takes sides, whether it is acting overtly or clandestinely.

To be clear, the Establishment Clause does not wholly preclude the government from "referencing religion." The Court has stated that the First Amendment requires "governmental neutrality between religion and religion, and between religion and nonreligion." But in actuality, the Establishment Clause in practice seems only to mandate neutrality among religions, which would not

46. Id. at 468.
47. Id. (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).
48. Children First Found., Inc. v. Martinez, 631 F. Supp. 2d 159, 172 (N.D.N.Y. 2007) ("As a general rule, government has the undeniable right to speak for itself and to advocate and defend its own policies subject only to the review of the electoral and political processes.").
49. Summum, 555 U.S. at 468 ("The involvement of public officials in advocacy may be limited by law, regulation, or practice.").
50. See infra Part II.B.
51. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005); see also Martinez, 631 F. Supp. 2d at 181 (holding that a nonprofit organization's "Choose Life" motto, which it desired to place on New York license plates, implicated a religious message, so it was subject to the Establishment Clause neutrality defense).
52. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 971 (9th Cir. 2011), cert. denied, 132 S. Ct. 1807 (2012); see also Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.").
53. McCreary Cnty., 545 U.S. at 860 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
prohibit the government from speaking about religion in general or nonsectarian religious morals and principles.

B. Establishment Clause Neutrality: Religion v. Nonreligion

What does the Establishment Clause mandate? The First Amendment’s prohibition on religious establishment “covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to [governmental] comment on religious questions.” Despite this wide breadth of application, Establishment Clause jurisprudence remains unclear because the Court continues to use several different approaches instead of implementing a single, bright-line rule.

This Comment focuses on the baseline neutrality requirement that “the government may not favor one religion over another, or

54. Some scholars take the majority viewpoint undermining the Religion Clauses and argue that these clauses exist to protect nonreligion just as vigorously as religions. See, e.g., Kathleen M. Sullivan & Gerald Gunther, First Amendment Law 518–19 (4th ed. 2010); Elizabeth A. Murphy, Note, Courts Mistakenly Cross-Out Memorials: Why the Establishment Clause Is Not Violated by Roadside Crosses, 39 Hofstra L. Rev. 723, 727 (2011) (“[T]he establishment clause [sic] existed to create a secular state and that under the First Amendment nonreligion was just as important as religion.” (quoting Patrick M. Garry, Wrestling with God: The Courts’ Tortuous Treatment of Religion 52 (2006)) (internal quotation marks omitted)). Conversely, some take a minority view of the Religion Clauses, labeled non-preferentialism, and maintain that the Establishment Clause is meant only to prohibit a national religion and that the “government might support religion in general so long as it does not prefer one religion over another.” Id. at 519–20.

55. McCreary Cnty., 545 U.S. at 875.

56. See Ledewitz, supra note 10, at 45 (“In over a half century since Everson first introduced the norms of government neutrality and separation from religion, there is still no broad consensus among the American people concerning the proper role of religion in the public square. Nor is there basic agreement among the Justices on the United States Supreme Court as to this matter.”). Some of the main Establishment Clause theories that the Court has used in various circumstances include the “purpose test” (also known as the Lemon test), the “Endorsement / Disapproval test,” and the general “neutrality test”—which provides the focus of this Comment’s Establishment Clause analysis. See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (outlining the “purpose test” by stating: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;[;] finally, the statute must not foster ‘an excessive government entanglement with religion’” (citations omitted)); Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (illustrating Justice O’Connor’s “Endorsement / Disapproval test,” which was intended to ensure that the government does not endorse any religious practice that would make “nonadherents [feel] that they are outsiders” or less than “full members of the political community”); Erwin Chemerinsky, Constitutional Law: Principles and Policies 1193 (3d ed. 2006) (explaining that the neutrality test precludes the government from “favor[ing] religion over secularism or one religion over others”).
religion over [non]religion," but even this neutrality mandate is not clear.

Since Everson v. Board of Education in 1947, the Court purports to have consistently enforced the baseline neutrality rule between religious sects as well as religion and nonreligion. The first principle is certainly true; the government cannot favor one religious sect over another (e.g., endorsing Baptists with a tax exemption but not Methodists), nor can the government show a preference for a specific religion at the expense of others (e.g., creating a law against animal sacrifices targeting a minority religion, while exempting a Judeo-Christian religion). Despite the frequent repetition of the second principle, that the First Amendment mandates absolute neutrality, the Court has yet to apply this portion of the neutrality mandate. Part III identifies

57. McCreary Cnty., 545 U.S. at 875–76.
58. See id. at 876 (citing Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' ... is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.").
60. Id. at 18 ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."). While the Court stated these principles in this case, the major holding concerned the Free Exercise Clause, not the Establishment Clause. Id. at 15–16.
62. See Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (determining that state statutes forbidding the teaching of evolution in public schools were contrary to the freedom of religion mandate in the First Amendment because they showed a governmental preference for the Biblical account of Creationism to the scientific, evolution theory).
63. See, e.g., McCreary Cnty., 545 U.S. at 860 (quoting Epperson, 393 U.S. at 104); Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989) ("[W]e have held it to mean no official preference even for religion over nonreligion."); Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) ("[G]overnment must . . . 'effect no favoritism among sects or between religion and nonreligion.'" (citations omitted)).
64. See Epperson, 393 U.S. at 104 (stating the principle that governmental neutrality is mandated between religion and nonreligion without either explaining what this means or including this principle in its holding); McCreary Cnty., 545 U.S. at 860 (stating the principle of neutrality between religion and nonreligion, but seeming to base its holding on the first Epperson principle regarding neutrality between religion and religion); Lee v. Weisman, 505 U.S. 577, 597 (1992) (concluding that a particular religious exercise, "nonsectarian" ceremonial prayer, conducted at a graduation ceremony is unconstitutional because it exhibited preferential treatment of a "Judeo–Christian tradition" at the expense of students retaining differing beliefs); Larson v. Valente, 456 U.S. 228, 246 (1982) (citing exclusively the first Epperson principle of neutrality between religion and religion in saying that "[t]he government must be neutral when
cases that used similar neutrality language and shows the lack of its application.65

C. The Impossible Mandate of Neutrality Between Religion and Nonreligion

A neutrality mandate as between religion and nonreligion would arguably be an impossible task for the Court to enforce in the government speech context. For instance, in Pleasant Grove City, Utah v. Summum, the Supreme Court considered whether the government was bound to accept the donation of a religious monument "contain[ing] 'the Seven Aphorisms of SUMMUM,'" a minority religion, after accepting a Ten Commandments monument donated by a charitable organization—the Fraternal Order of Eagles—in 1971.66 In a unanimous ruling, the Court held that "[p]ermanent monuments displayed on public property typically represent government speech."67 Thus, the government is within its rights to be selective about the monuments it chooses to accept and display.68

This case involved a monument depicting the Ten Commandments, yet, for strategic litigation purposes, the Establishment Clause was not at issue because it was not raised and preserved in the trial court.69 But had it been preserved, would the Court have struck down the Ten Commandments monument because it violated the Establishment Clause, as it has done in cases where the Ten Commandments are independently and publicly displayed?70 Possibly, but in cases like Summum, it is not practically possible for the Court to take such drastic steps.71

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65. See infra Part III.
67. Id. at 470.
68. Id. at 471–72.
70. See, e.g., McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (holding that a display of the Ten Commandments violated the First Amendment because the County manifested its intent, through this monument, to emphasize the Judeo-Christian religious message of the Ten Commandments). But see Van Orden v. Perry, 545 U.S. 677, 681 (2005) (holding that a Ten Commandments display did not violate the First Amendment because it represented only a historical and traditional display, with no religious meaning).
In these situations, the government is stuck between the proverbial "rock and a hard place" as it faces the alleged mandate of neutrality between religion and nonreligion. The government can choose to either: (1) pretend that such symbols are not religious at all, or (2) strip government property of all religious symbols. Neither of these routes seems acceptable—especially given America's founding, which relied heavily on religious values and freedoms, and the contemporary value placed on such displays by political majorities. Additionally, as a practical matter, this requirement of neutrality between the existence of religion and the lack of religion is at least arguably nonsensical: "it makes utterly no sense to talk about neutrality between religion and nonreligion, or no-religion, irreligion, or any other means of expressing the opposite of 'religion.'" Further, the differential treatment of religion and nonreligion displayed in free exercise jurisprudence exemplifies the difficulty, and perhaps even the impossibility, of affording both identical treatment.

These cases that represent potential or occurring collisions of Establishment Clause neutrality between religion and nonreligion, and the government speech doctrine, force the Court to pretend that this nation is not connected to religion at all or that these symbols and words embedded in American history bear no traces to religion—if they do, they would necessarily be deemed unconstitutional. For example, must the cases contesting the inclusion of the phrase "under God" in the Pledge of Allegiance result in its deletion from the Pledge? Must this country's coinage...
bearing the words of the national motto "in God we Trust" have a meaning reduced to nothing divine? These social movements are not likely to occur in America because "[w]e are a religious people whose institutions presuppose a Supreme Being."  

Even if Summum had involved an Establishment Clause challenge, the result would likely have been the same. The government speech doctrine would still allow the government to be selective in the monuments it chooses to display even if these monuments have general religious context because the Establishment Clause does not mandate an absolute neutrality between religion and nonreligion. The government speech doctrine provides the solution to the convoluted Establishment Clause assumptions that this kind of neutrality is required: under the government speech doctrine, the government can take a stance on religion in general and general religious views, so long as the stance is not specific to any particular religion or religious sect.

III. RELIGION IN GENERAL: NO NEUTRALITY MANDATE BETWEEN RELIGION AND NON-RELIGION

Suppose a national crisis occurs, similar in magnitude to September 11, 2001. Would it be unconstitutional for Congress or the President to issue a press release that ends with a sentence like: "No matter what you believe or what Divine authority you believe in, pray, plead, or meditate for your country; it needs your help." Would this be protected under the government speech doctrine, or prohibited by the Establishment Clause?  


78. Zorach v. Clauson, 343 U.S. 306, 313 (1952); see also McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (using the "nonreligion" language only to show that the government can still recognize the historical connection between religion and this nation and that there is not a rigid, no-aid requirement that prevents the government from even glancing in the direction of religious principles).
79. See William P. Marshall, The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 NOTRE DAME L. REV. 11, 14 (2002) (arguing that "the state [can] endorse undeniably religious activities that affirm our Nation's religiosity without violating constitutional prescriptions" in limited circumstances involving national emergencies, such as 9/11).
appealing to religion in general, not to a particular religion or religious sect. Thus, the Establishment Clause should not be interpreted as mandating absolute neutrality between religion and nonreligion because the government’s power to speak on religion in general is rooted in the government speech doctrine.

At first, the government speech argument against this absolute neutrality may seem like a losing battle to wage due to the Court’s oft quoted phrase that the “First Amendment mandates governmental neutrality between . . . religion and nonreligion.” But in virtually all Supreme Court cases where this language is used, it is not actually applied. Furthermore, because there are many Establishment Clause cases that have not used this or similar neutrality language, it has been argued that the idea of acting impartially toward all religions is inconsistently applied and that it is not the actual state of the law.

This Part discusses Establishment Clause cases in which the Court has used absolute neutrality language—such as “religion in general” or as between “religion and nonreligion” and “belief and nonbelief”—by first addressing the more common appearances of this language in unrelated contexts or in concurring or dissenting opinions. Then it addresses the more difficult cases, which facially

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80. See Justice Scalia’s similar but non-fictional example that he uses to begin his dissent. McCreary Cnty., 545 U.S. at 885.

81. Id. at 860 (majority opinion) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

82. See supra note 15.

83. See McCreary Cnty., 545 U.S. at 891 (Scalia, J., dissenting) (“[S]ometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not. . . . Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice—but we have approved it.”). But see Cmty. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973) (“It is now firmly established that a law may be one ‘respecting an establishment of religion’ even though its consequence is not to promote a ‘state religion,’ and even though it does not aid one religion more than another but merely benefits all religions alike.” (citations omitted)). Although this clear statement is included in the majority opinion in Community for Public Education & Religious Liberty v. Nyquist, this is not a case that shows an invalidation for governmental speech regarding “religion in general.” This case concerned tax grants to religious, nonpublic schools. By striking these state statutes, the Court was actually affirming its Establishment Clause jurisprudence mandating neutrality between religion and religion—these specific religious sects were receiving benefits while other religious believers were receiving none because they had no religious sectarian schools.
seem to apply the absolute neutrality language but, upon closer inspection, actually apply other justifications to reach their holdings. Thus, these oft-repeated invocations of absolute neutrality are not actually applied. Instead, the Court uses other Establishment Clause justifications for its actions, not the idea of absolute neutrality with respect to general religious principles.84

Sometimes, the Court uses the absolute neutrality language to illustrate different Establishment Clause concepts,85 or it uses the same words in completely different contexts.86 Furthermore, there is at least one example of a case citing the religion/nonreligion language that has been subsequently overruled, which absolves it of its precedential authority.87

The greatest use of these absolute neutrality statements occurs in dissenting or concurring opinions.88 In Van Orden v. Perry, for

84. With most Establishment Clause cases, it seems the Court is mainly concerned with the government favoring particular religions or religious sects over others. The Court is at least more lenient the more general and nonsectarian the governmental practice is. See Mike Schaps, Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right, 94 CALIF. L. REV. 1243, 1244 (2006) ("One may sketch the standard as follows: Government cannot favor one religion over another, or act to benefit religion over nonreligion, unless a government practice promotes nonsectarian religion only slightly and is so deeply woven into our national traditions that enjoining it would be highly divisive.").


86. Stein v. New York, 346 U.S. 156, 184 (1953) (using "belief or unbelief" language in the majority opinion but in a completely different context—discussing criminal law, not the Establishment Clause).


example, the Court upheld the placement of a Ten Commandments monument that the government placed among several other monuments for the purpose of memorializing Texas history. Only Justice Breyer’s concurring opinion mentions absolute neutrality language. The use of that language seems to support the argument that the government can speak in favor of religion generally because immediately following its recitation, Justice Breyer emphasizes that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.” He notes that this absolutist approach is “inconsistent with our national traditions” and that it would “tend to promote the kind of social conflict the Establishment Clause seeks to avoid.”

Even though most absolute neutrality language is mentioned only by concurring and dissenting Justices, there are three cases that must be addressed separately because they use this language and seem to apply it in the majority opinions: County of Allegheny v. ACLU, Lee v. Weisman, and McCreary County, Kentucky v. ACLU of Kentucky. But while these cases may appear to apply the absolute neutrality principle, this principle does not provide the basis for any of the holdings, as explained in the following paragraphs. Therefore, despite the appearance of an absolute neutrality mandate, the government speech doctrine should apply to allow the government to speak on religion in general.

90. "The Court has made clear, as Justices Goldberg and Harlan noted, that the realization of these goals means that government must 'neither engage in nor compel religious practices,' that it must 'effect no favoritism among sects or between religion and nonreligion,' and that it must 'work deterrence of no religious belief.' The government must avoid excessive interference with, or promotion of, religion." Id. at 698–99 (Breyer, J., concurring) (citations omitted).
91. Id. at 699.
92. Id.
In *County of Allegheny v. ACLU*, the Court uses "nonreligion" language in the majority, and concurring opinions, but absolute neutrality played no part in the Court's final decision. The holding in this case was based on the Establishment Clause's prohibition of governmental preference between particular religions—not between religion and nonreligion generally. In fact, the absolute neutrality language used in the majority opinion is only used to emphasize the Establishment Clause's mandate of neutrality between various religions. Thus, the Court held that a nativity crèche donated by a Christian church and displayed in the main governmental section violates the Establishment Clause only because it favors one set of religious beliefs among all others.

*Lee v. Weisman* is a more difficult case because the controversy involved "public prayers at nonsectarian civic ceremonies." This case seems to undermine the position that the Establishment Clause prohibits only sectarian government endorsements. Indeed, the majority opinion could be read as invalidating ceremonial

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93. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) ("Thus, it has been noted that the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment))); id. at 605 ("Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion) it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed." (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989))).

94. Id. at 635 (O'Connor, J., concurring) ("Just as government may not favor particular religious beliefs over others, 'government may not favor religious belief over disbelief.'" (quoting *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in judgment))); id. at 644 (Brennan, J., concurring) ("We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion.").

95. Id. at 598 (majority opinion) ("'Glory to God in the Highest!' says the angel in the crèche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service." (emphasis added)).

96. Id. at 605.

97. Id. at 593-94 ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"); see id. at 605 ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (citations omitted)).

preferential treatment of the "Judeo-Christian tradition" at the expense of students retaining differing beliefs.\textsuperscript{99} The better and more common reading of the decision, however, rests on the Captive Audience Doctrine,\textsuperscript{100} established under the Free Speech Clause, not the Establishment Clause's mandate for absolute neutrality. The Court invalidated the practice of public prayers to prevent the impermissible coercion of participation in a religious ritual.\textsuperscript{101}

\textit{McCreary County, Kentucky v. ACLU of Kentucky} is the only Supreme Court case that seems to firmly hold that neutrality is mandated between religion and nonreligion. However, simultaneously, this case hints that the majority of the Court would not deem it unconstitutional for the government to speak out on religion in general. The Court quoted the neutrality language "between religion and religion, and between religion and nonreligion" as the "touchstone for [its] analysis."\textsuperscript{102}

But after examining the facts and the holding in \textit{McCreary County}, it seems that the Court actually based its holding on neutrality "between religion and religion."\textsuperscript{103} The Court, and the lower courts,

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\textsuperscript{99} The Court only mentions "nonreligion" language in Justice Souter's concurrence. \textit{Id.} at 611 (Souter, J., concurring). Similar language concerning "religion in general" is only mentioned in the majority when it is discussing the district court's reasoning—not its own. \textit{Id.} at 585 (majority opinion) ("The [district] court determined that the practice of including invocations and benedictions, even so-called nonsectarian ones, in public school graduations creates an identification of governmental power with religious practice, endorses religion, and violates the Establishment Clause.").

\textsuperscript{100} The captive audience doctrine was created to protect unwilling listeners who are "there as a matter of necessity, not of choice" from having speech thrust upon their unwilling eyes or ears. \textit{Lehman v. City of Shaker Heights}, 418 U.S. 298, 302 (1974) (quoting \textit{Public Utilities Comm'n v. Pollak}, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)); \textit{Snyder v. Phelps}, 131 S. Ct. 1207, 1220 (2011) ("declin[ing] to expand the captive audience doctrine" to a demonstration at a public funeral where the demonstrators were far enough away from the mourners that they could simply avert their eyes).

\textsuperscript{101} \textit{See Cynthia V. Ward, Coercion and Choice Under the Establishment Clause}, 39 U.C. DAVIS L. REV. 1621, 1624 (2006) ("Thus, in the 1992 case of \textit{Lee v. Weisman}, the Court held that a nondenominational prayer at a public school graduation ceremony 'coerced' religious dissenters into participating and that such coercion violates the Establishment Clause."). \textit{But see Lee}, 505 U.S. at 610 (Souter, J., concurring) (arguing that the Court has "consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others"). To make his point, Justice Souter quotes much of the Court's language that has been used as dicta in these cases, and while this is certainly persuasive and one of the major Establishment Clause theories, his concurrence is not the governing reasoning in this case, as the majority did not adopt it.

\textsuperscript{102} \textit{McCreary Cnty, Ky. v. ACLU of Ky.}, 545 U.S. 844, 860 (2005) (quoting \textit{Epperson v. Arkansas}, 393 U.S. 97, 104 (1968)).

\textsuperscript{103} \textit{Id.}
found that the government had shown an endorsement of Christianity by displaying the Ten Commandments on government property. 104 The Court did not seem to strike the display as unconstitutional because it represented general religious principles, but rather because the government’s intent behind the display was to endorse particular beliefs of particular religions—the belief in the divine inspiration of the Ten Commandments. 105

Furthermore, it seems that the Court’s main holding in this case was to uphold the “purpose” test outlined in Lemon v. Kurtzman. This implies that when the Court struck the Ten Commandments display, it did so because of the underlying governmental endorsement of religion. The Court was not clear as to whether the particular endorsement in this case was struck because it favored either religion over religion or religion over nonreligion. 106

But if McCreary County is a victory in the battle over religion and nonreligion, there is a good argument that this case did not end the war. 107 Citing to historic religious tributes made by the Founding Fathers 108 and current national customs involving religion, 109 Justice

104. See id. at 869–70.
105. The court even cites to a central, historical reason for the Establishment Clause: “to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists).” Id. at 876.
106. Id. at 860 (stating that it is unconstitutional to advance “religion generally” but quoting language from an earlier case that merely prohibits the government from “acting with the intent of promoting a particular point of view in religious matters” (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987)) (internal quotation marks omitted)).
107. This is an especially valid contention given the change in Supreme Court Justices since this case. See Christopher B. Harwood, Evaluating the Supreme Court’s Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU of Ky., 71 Mo. L. REV. 317, 348 (2006) (“The appointment of Chief Justice Roberts and Justice Alito to fill the vacancies left by Chief Justice Rehnquist and Justice O’Connor likely will alter the Court’s Establishment Clause jurisprudence and produce decisions” that will move away from the strict neutrality approach.). Some scholars recognize this contention as a potential development, but argue that this would be a dangerous road to go down. See Goldberg, supra note 44, at 49–50 (“The great danger from [the] government-speech doctrine, allowing government to express a private viewpoint without adopting its meaning, is that it will facilitate Justice Scalia’s view of the Establishment Clause. . . . Bad news for the one in five of our population that does not believe in any religion and for those religionists who believe their God created humankind with a reasoning capacity so it could take care of itself, allowing the deity to be ‘unconcerned’ about the vagaries of human existence . . . .”).
108. Justice Scalia’s opinion includes several historical citations to justify his Establishment Clause interpretation:
Scalia's dissent argues that nothing in the Constitution mandates absolute neutrality. Religion, he argues, is the keystone of this nation's foundation, and while the Establishment Clause certainly prohibits the government from endorsing or establishing particular religions at the exclusion of others, it does not prevent the government from speaking about religion in general. General George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words "so help me God." The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favours of Almighty God." President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789, on behalf of the American people "to the service of that great and glorious Being who is the beneficient author of all the good that was, that is, or that will be," thus beginning a tradition of offering gratitude to God that continues today. 

McCreary Cnty., 545 U.S. at 886–87 (Scalia, J., dissenting) (citations omitted) (internal quotation marks omitted).

109. Justice Scalia also recognizes current practices that are both religious and governmental:

Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto, "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God."

Id. at 888–89.

110. "We are a religious people whose institutions presuppose a Supreme Being." Id. at 889 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

111. Id. at 885–87; see also Caroline Mala Corbin, Ceremonial Deism and the Reasonable Religious Outsider, 57 UCLA L. REV. 1545, 1550 n.24 (2010) ("Several justices believe favoring religion over nonreligion is compatible with the First Amendment."). But see Thomas B. Colby, A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause, 100 NW. U. L. REV. 1097, 1099 (2006) (arguing that the government "must be neutral in matters of religious theory, doctrine, and practice" between religion and nonreligion (quoting Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968))). Colby presents several hypothetical situations that he believes the traditional Establishment Clause neutrality theory would surely invalidate: "the first promotes traditional Western religions; the second promotes certain traditional Eastern religions; and the third promotes nonreligion." Id. However, these are still not examples of governmental speech centering on religion in general, as each promotes certain religious beliefs particular to specific religions. As long as the government is only speaking out on religion in general, this practice is constitutional.
speech about religion, without favoring particular sects or religions over one another, would not fuel a national division—a fear that many Justices and scholars have expressed as justification for implementing a strict neutrality interpretation of the Establishment Clause.112

Based on the use of the absolute neutrality language in primarily concurring or dissenting opinions and the three cases that use such language in the majority opinions but base their holdings on other areas of law, it seems that the alleged Establishment Clause requirement for neutrality between "religion and nonreligion" and "belief and unbelief" is nothing more than dicta that, while frequently cited, is never actually applied. Therefore, the government speech doctrine should allow the government to speak about religion in general.

IV. GOVERNMENT SPEECH ON GENERAL RELIGIOUS AND MORAL PRINCIPLES

The government regularly speaks about subjects containing traces of religious belief such as abortion, gay marriage, parenting, Sunday closing laws, alcohol consumption, drugs, and Christmas or other religious holidays. Should the Establishment Clause require complete government neutrality with regard to these matters?113 Such broad neutrality is not mandated by the Establishment Clause, and, to go one step further, the Religion Clauses actually seem inconsistent with the idea of enforcing absolute neutrality because they couch an inherent textual and historical bias toward religion in general.114 The government should have a right to "say what it wishes"115 to say on these general matters, and the government speech doctrine seems to provide the authority to do so. Using the

112. Richard W. Garnett, Religion, Division, and the First Amendment, 94 Geo. L.J. 1667, 1669 (2006) ("It appears that the political-divisiveness argument is and will for some time remain at the heart of our discussions about religious freedom and the First Amendment.").

113. One position on this question is that of course the government can endorse higher law principles and even exercise content and viewpoint discrimination on this matter, but "[t]here are disputes and different approaches as to what the higher law doctrine actually encompasses." Ledewitz, supra note 8.

114. John H. Garvey, What Are Freedoms For? 43 (1996) ("The free exercise clause by its terms seems inconsistent with the idea of autonomy. It seems to favor choices for religion over choices against religion.").

doctrine to speak on religion generally would still protect Establishment Clause neutrality, but it would not force a purely secular public realm on the American people.\footnote{See Ledewitz, supra note 8, at 42 ("The government speech doctrine would redeem Everson’s promise of neutrality without imposing a purely secular public realm on an American people unwilling to accept that kind of public life. Government may endorse the concept of higher law, and may do so using certain religious symbols, images, and language, without establishing religion.")} \footnote{Dolan, supra note 7, at 7.}

It is well established that the government speech doctrine is still trumped by the Establishment Clause, but how far-reaching is this “trump”? In other words, what does this limitation actually mean? It means that the government cannot endorse a particular religion—not that the government is prohibited from speaking on general moral and religious principles. Under the government speech doctrine, the government should be able to take a stance on moral principles that may be religious in general without being subject to the Establishment Clause limitation.

First, this Part discusses several Supreme Court cases that suggest that government speech directed at religion in general can be constitutional, so long as it does not discriminate between religions such that it does not favor one particular religion or religious sect over another. Second, it summarizes scholarly authority that touches on this idea to determine what the general academic view is on the subject and to predict what direction the Court will take when this situation arises.

\textit{A. The Court Hints at the Constitutionality of Government Speech Regarding Religion in General}

Although the Court has not explicitly held this principle to be true, Justices on the Court have hinted on several occasions that the government may be able to speak regarding religion in \textit{general} without violating the Establishment Clause. In fact, there are several cases addressing Establishment Clause neutrality that suggest the Court would allow a “non-preferentialism” approach, which would allow the government “to prefer religion over non-religion, so long as it is neutral among different religions and sects.”\footnote{Dolan, supra note 7, at 7.}

In some cases, the Court identifies that the central purpose of the Establishment Clause is to ensure that history does not repeat itself.
The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. 118

This purpose of ensuring that the government is not endorsing a particular religious belief is served by mandating governmental neutrality between religion and religion—not by mandating neutrality between religion and nonreligion. 119

Other Court opinions even quote the neutrality between "religion and nonreligion" language, but still suggest that this supposed mandate is not a governing principle. 120 For example, in Van Orden v. Perry, Justice Breyer's concurrence noted that "the

119. See Engel v. Vitale, 370 U.S. 421, 431 (1962) (striking sectarian prayer at a public school district, the Court stated, "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.") Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203, 209-10 (1948) (using the "belief or unbelief" language, but holding that the government cannot utilize "the tax-established and tax-supported public school system to aid religious groups to spread their faith" because it is unconstitutional to favor sectarian religions).

120. For example, the mandates of the Establishment Clause—that the "government must neither engage in nor compel religious practices," that it must "effect no favoritism among sects or between religion and nonreligion," and that it must "work deterrence of no religious belief"—can all be achieved with a neutrality mandate only as between religion and religion. See Van Orden v. Perry, 545 U.S. 677, 698-99 (2005) (Breyer, J., concurring) (citations omitted); see also Lee v. Weisman, 505 U.S. 577, 597 (1992) ("[The Court] do[es] not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."); McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (Brennan, J., concurring) ("[W]e have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no-aid' theory ... . Such rigid conceptions of neutrality have been tempered by constructions upholding religious classifications where necessary to avoid ['a] manifestation of ... hostility [toward religion] at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." (citations omitted)).
Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious" because "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."121

Additionally, the Court has stated that one of the major reasons as to why it has not adopted a single, bright-line rule to Establishment Clause cases is to avoid "mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general."122 This policy underlying all Establishment Clause jurisprudence implies that the Court would not invalidate government speech regarding religion in general, so long as the particular speech was not establishing an "orthodox" or "correct" religion by applying to only specific sects or religions.

These cases show that even though the Court continues to quote the absolute neutrality language on the face of their opinions, it does not actually apply this as a rule to decide cases. Even when the Court uses this language, it simultaneously hints at an opposite policy: government can endorse religion in general; the only real Establishment Clause neutrality mandate is as between "religion and religion."

**B. Moving Forward: Government Speech and Religion in General**

The Court is not the only entity to recognize the change that the government speech doctrine has brought to the table of Establishment Clause issues. Commentators are collectively optimistic, concerned, and downright confused about the intermingled future of these two doctrines. This section illustrates the general perception among scholars about doctrinal development in this area, possible approaches to reconcile these two bodies of law, and major concerns that will likely arise with the growth of the government speech doctrine.

121. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (citations omitted).
122. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). The Court in *Lynch* further stated that in order to avoid mechanical invalidation of all religious traces in public contexts, "the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.*
1. Proposed approaches to establishment clause neutrality and government speech doctrine

One approach as to how the two doctrines should be handled argues that “the Establishment Clause should not be interpreted to prohibit ‘nonpreferential’ establishments of religion.” Any approach that uses more restrictive neutrality “ignores the historically close relationship between church and state, overlooks the tradition of governmental endorsement of generic religion, and reads too much significance into Jefferson’s ‘misleading metaphor’ regarding the wall of separation between church and state.”

Scholars have recognized the potential for particular Justices on the Court to adopt this view regarding government speech directed at religion in general. But there is certainly still a lively debate among courts and commentators over the question of whether the “government may endorse religion in general as against nonreligion.”

Further, even prior to the recent government speech cases, some scholars saw through the Court’s “nonreligion” dicta, and began to hypothesize that neutrality was not required regarding religion in general. This recognition will continue to grow as the government


124. Gey, supra note 123, at 754 (citations omitted).

125. See James A. Campbell, Newdow Calls for A New Day in Establishment Clause Jurisprudence: Justice Thomas’s “Actual Legal Coercion” Standard Provides the Necessary Renovation, 39 AKRON L. REV. 541, 569 n. 185 (2006) (“[Justice] Thomas seems to leave open the question of whether support for religion generally through taxation violates the Establishment Clause. There is an argument that the Founders would have found no Establishment Clause violation if the government taxes its citizens to support religion in general, as long as the government does not prefer one religion over another when distributing the funds.” (citations omitted)); Gey, supra note 123, at 754 (discussing Justices Roberts’s and Rehnquist’s positive views concerning the absence of a neutrality mandate between religion and nonreligion).


127. Dhananjai Shivakumar, Neutrality and the Religion Clauses, 33 HARV. C.R.-C.L. L. REV. 505, 530 (1998) (“Given the extreme diversity of religions, benefits flowing to religion in general do not endorse a particular metaphysical view as true, and therefore do not threaten the same kind of deep alienation worthy of special constitutional solicitude.”). But see Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 72 (1997) (arguing that even under the government speech doctrine, the “government should neither praise nor condemn religion in general or any religion in particular”).
speech doctrine develops over time.\footnote{128} As a result of this expanded government speech doctrine and its effect on religion, post-\textit{Summum} scholars have also cautioned that the “Court’s expansion of ‘government speech’ as a Free Speech Clause defense should heighten the Court’s scrutiny of government’s religious speech.”\footnote{129}

Also, some have taken the view that with the new government speech doctrine, the Court’s holding in \textit{Marsh v. Chambers}\footnote{130}—that the Nebraska Legislature’s chaplaincy practice does not violate the Establishment Clause for historical and originalism reasons—is no longer an exception.\footnote{131} Accordingly, “the government is also free to adopt other ‘policies of accommodation, acknowledgment, and support for religion’ that are ‘deeply embedded in the history and tradition of this country’ without violating the Establishment Clause.”\footnote{132} This also supports the idea represented in this Comment that the government speech doctrine could allow for government speech regarding religion in general.

Finally, some scholars have moved forward with little or no eye for the government speech doctrine at all. These scholars contend that there are still adequate Establishment Clause approaches to take

\footnote{128. Steven D. Smith, \textit{The Establishment Clause and the “Problem of the Church,”} in CHALLENGES TO RELIGIOUS FREEDOM IN THE TWENTY-FIRST CENTURY 13–14 (Gerard V. Bradley ed., 2012) (Univ. of San Diego Sch. of Law, Legal Studies Research Paper Series, Research Paper No. 09-024, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444606 (arguing that because government speech has historically acknowledged God and endorsed religion in general, the government can act favorably with respect to religion in general, so long as it does not do so with specific religious sects). But see Patrick M. Garry, Pleasant Grove City v. \textit{Summum}: The Supreme Court Finds a Public Display of the Ten Commandments to Be Permissible Government Speech, 2009 CATO SUR. CT. REV. 271, 292 (“The \textit{Summum} Court arguably used the government speech doctrine to sanction treating different religions differently. And if the government is allowed to engage in such religious discrimination when it comes to monuments, it could cause a backlash against future governmental acknowledgment or support of religion in general.”).}

\footnote{129. Dolan, \textit{Government Identity Speech and Religion: Establishment Clause Limits After Summum}, supra note 7, at 4; see also Licensing Factually Religious Government Speech, supra note 10, at 322 (agreeing that \textit{Summum} expanded the government speech doctrine and determining that the central question moving forward is “whether the government has a primarily religious purpose,” which means the specialty license plates implicating a religious message—the major focus of this article—are likely to be deemed constitutional “under both the Free Speech and Establishment Clauses of the First Amendment”).}

\footnote{130. \textit{Marsh v. Chambers}, 463 U.S. 783 (1983).}

\footnote{131. \textit{When the Exception Becomes the Rule}, supra note 10, at 1075.}

\footnote{132. \textit{Id.} But see Lund, supra note 1, at 980 (concluding that although legislative nonsectarian prayer is deeply rooted in our country’s history, the cost of maintaining it is too high as it causes many hidden “perils of apparently benign religious endorsements”).}
care of the difficult cases that fall in the cracks between Establishment Clause neutrality and the government speech doctrine, such as the reasonable observer approach. This test, for instance, "would ask 'whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.'"  

2. Major remaining concerns post-Summum

Justices and scholars alike have recognized concerns with these two doctrines moving forward. The primary concern, acknowledged by Justice Alito in his majority opinion in Summum, is "that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." Many scholars agree that this favoritism concern is a real, potential threat. Specifically, an overarching concern related to governmental favoritism is the worry that the government will favor the majority religion over the many minority religions because of the ease of doing so, and this would be at the expense of many Americans who belong to these minorities and choose to live in this country because of the religious rights guaranteed in the First Amendment. Several scholars have even illustrated hypothetical situations to illustrate the significance of this concern.


134. Id. (arguing that this test "would provide coherence with Establishment Clause law" because "it recognizes that there are at least some monuments on public land that display religious symbolism and clearly do not express a government's chosen view").


136. See Knicely & Whitehead, supra note 10, at 903; Goldberg, supra note 44, at 43 ("There is no better argument for the danger of a government-speech doctrine than a judge's failure to see that allowing one religion's privately contributed monument in a public park, but denying another religion's privately contributed monument, does not present a situation in which a government entity is providing a forum for private speech."); Cambron-McCabe, supra note 7 (recognizing the problem that some Justices foresaw with the government speech doctrine: favoritism of certain religions over others).

137. Frederick Mark Gedicks, Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance, 46 WILLAMETTE L. REV. 691, 702–03 (2010) (warning that the government speech doctrine has the potential to allow the government to favor religious preferences of the majority viewpoint); see also Bernstein, supra note 133, at 92–93.

While the favoritism of the more popular religions is an important concern, this problem would not surface if the Establishment Clause mandated neutrality only as between religious sects. Of course, it would be unconstitutional to use the government speech doctrine as a sword to promote certain religions at the expense of other minority religions, and as Justice Alito recognized in Summum, this is an area in which the government should be even more cautious to ensure it does not overstep those boundaries.\(^{139}\) But under this Comment’s interpretation of the neutrality mandated by the Establishment Clause, this kind of government speech would remain unconstitutional. A mandate on nondiscrimination as between different religions would absolve this concern regarding government speech, and it would be a more clear and accurate interpretation of the Establishment Clause. Thus, because the Establishment Clause mandates neutrality between religious sects, the government speech doctrine should allow the government to “speak for itself”\(^{140}\) about religion in general, without creating a problem of government favoritism among majority religions at the expense of minority beliefs.

V. CONCLUSION

The idea that the Establishment Clause and the government speech doctrine are two areas of law that are in dire need of clarity is not novel, but it is certainly accurate. While the Court cannot be expected to establish a bright line rule for each of these highly complex, First Amendment doctrines, it can and should present a clearer depiction of “what the law is” in these areas.\(^{141}\) One way to do this is to decide once and for all whether the Establishment Clause mandates neutrality between religion and nonreligion or merely neutrality between different religions and religious sects.

Seven Aphorisms monument (or a monument from some other minority religion) and then the Fraternal Order of Eagles offered to donate a Ten Commandments monument, would the Court allow the city to reject the Ten Commandments monument because of the government speech doctrine? Or would the Court conclude that a park was a public forum and that rejecting the Ten Commandments monument amounted to unconstitutional content or viewpoint discrimination? \(^{139}\) Summum, 555 U.S. at 473.


\(^{141}\) Marbury v. Madison, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
When that decision is made, it should be determined that the Establishment Clause—according to its original foundation and the intent of the Founding Fathers—does not mandate absolute neutrality, and furthermore that the government speech doctrine grants the government authority to speak about nonspecific moral principles and religion in general, so long as such speech does not discriminate between religions or religious sects.

Several recent Establishment Clause cases involving government speech among the several circuit courts have either been denied certiorari (with no explanations) or dismissed on standing grounds. These cases have presented opportunities for more clarity in these complicated areas of law that the Court has simply denied to take. Understandably, “[k]eeping within the bounds of our constitutional authority often comes at a cost” of not being able to rule on a case when jurisdictional elements are lacking, but when these jurisdictional issues do not stand in its way, the Court should grant certiorari whenever possible to provide guidance for the important questions of law these cases present.142

The central purpose of this Comment is to urge the Court to provide more clarity in these areas and, in so doing, to abstain from stripping the public domain from all traces of religion. The mere idea that promoting religion in general or principles that are taught in various religions would offend those who prefer nonreligion is not a sufficient justification for prohibiting this type of speech under the Establishment Clause. Nor would the original meaning of the Establishment Clause prohibit such government speech. This nation was founded on general religious principles, and the Constitution that outlines this founding would not silence government endorsement of its own cornerstones of belief, so long as it concerns nonspecific, general ideas.

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142. Salazar v. Buono, 130 S. Ct. 1803, 1828 (2010) (“Federal courts have no warrant to revisit that decision—and to risk replacing the people's judgment with their own—unless and until a proper case has been brought before them. This is not it.”).

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