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### The Measure of Government Speech: Identifying Expression's Source

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## ARTICLES

### THE MEASURE OF GOVERNMENT SPEECH: IDENTIFYING EXPRESSION'S SOURCE

HELEN NORTON\*

INTRODUCTION .....	588
I. GOVERNMENT'S INTEREST IN PROTECTING ITS EXPRESSION FROM MISAPPROPRIATION: HOW A MESSAGE'S PERCEIVED SOURCE SHAPES ITS EFFECTIVENESS .....	592
II. ASSESSING A MESSAGE'S SOURCE AS PRIVATE OR GOVERNMENTAL .....	597
A. <i>Establishing Expression's Governmental Source as a Formal             Matter</i> .....	601
B. <i>Establishing Expression's Governmental Source as a             Functional Matter</i> .....	603
1. Express Cues .....	604
2. Lessons from Endorsement Analysis .....	606
a. <i>The Message's Location as a Cue to Its Source</i> .....	607
b. <i>Past Practice as a Cue to a Message's Source</i> .....	610
3. Lessons from Trademark Law .....	611
a. <i>Evidence of Onlookers' Actual Confusion About a                     Message's Source</i> .....	612
b. <i>Evidence of a Speaker's Intent to Confuse Onlookers                     About a Message's Source</i> .....	613
4. Other Possible Source Cues: Lessons from Lower Courts' Government Speech Decisions .....	614
a. <i>Multiple Messages as Obscuring a Single                     Governmental Source</i> .....	615
b. <i>Private Parties' Input as Obscuring a Message's                     Governmental Source</i> .....	616
III. APPLYING THEORY TO PRACTICE: SOME RECURRING CHALLENGES ..	618
A. <i>Joint Governmental and Private Speech: Specialty License             Plates</i> .....	618
B. <i>Framing Challenges: Government Thanks or Private             Advertising?</i> .....	622

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C. <i>Failing Functional Analysis: Unidentified Government Agents and Unattributed Government Advertising</i> .....	628
CONCLUSION.....	631

*States and other governmental bodies increasingly invoke the government speech defense to First Amendment challenges by private parties who seek to alter or join what the government contends is its own expression. These disputes involve competing claims to the same speech: a private party maintains that a certain means of expression reflects (or should be allowed to reflect) her own views, while a public entity claims that same speech as its own, along with the ability to control its content.*

*In suggesting a framework for approaching these problems, this Article starts by examining the theoretical and practical justifications for insulating government speech from First Amendment scrutiny. It addresses the benefits of government speech in facilitating self-governance so long as such speech remains subject to political accountability checks like petitioning and voting. It also explores the body of social science research that describes how a message's source shapes its effectiveness, with special attention to the government's role as the source – or perceived source – of a particular view.*

*Emphasizing that government speech is most valuable and least dangerous when its governmental source is apparent, the Article then proposes that a public entity seeking to claim the government speech defense must establish that the contested expression is governmental in origin both formally (i.e., that the government expressly claimed the speech as its own when it authorized the communication) and functionally (i.e., that onlookers understand the speech to be the government's at the time of its delivery). This dual requirement maximizes prospects for meaningful credibility assessment and political accountability by identifying two junctures at which government must expose its expressive choices to the public: when it decides to express a certain idea and when it actually communicates that idea.*

*The Article then draws from relevant experience in other areas to examine a variety of characteristics – or “source cues” – that may signal a message's genesis as governmental or private. These include not only express indications of a message's origin, but also less direct signals like a message's physical location or onlookers' expectations based on past practice. The Article goes on to apply this framework to several recurring challenges, exploring specific features in a range of contexts that may obscure or reveal a message's governmental source.*

## INTRODUCTION

A growing body of First Amendment litigation involves private parties who seek to alter or join what the government contends is its own expression. These disputes involve competing claims to the same speech: a private speaker maintains that a communication reflects (or should be allowed to reflect) her own views, while a governmental body characterizes that expression as its

own, along with the ability to control its content. Examples include Tennessee's decision to issue a "Choose Life" specialty license plate while rejecting the ACLU's proposed "Pro-Choice" plate,<sup>1</sup> Missouri's refusal to acknowledge the Ku Klux Klan on state Adopt-a-Highway signs,<sup>2</sup> and a public school district's rejection of advocates' requests to post pro-voucher materials on the district's webpage conveying the school board's opposition to voucher legislation.<sup>3</sup>

These clashes raise challenging issues because they involve elements of both private and governmental expression when First Amendment analysis generally demands a choice between the two. Indeed, the constitutional standards for evaluating the government's own speech differ dramatically from those that apply to the government's regulation of private expression. On the one hand, of course, the First Amendment forbids government from regulating private speech – including private speech in a government-created forum<sup>4</sup> – on the basis of viewpoint.<sup>5</sup> The First Amendment also bars the government from forcing unwilling private speakers to affirm its views.<sup>6</sup>

On the other hand, the Supreme Court has shielded the government's expression from Free Speech Clause scrutiny, identifying political accountability measures like voting and petitioning – rather than First Amendment litigation – as the appropriate recourse for those displeased with their government's message.<sup>7</sup> Government speech merits this insulation because it is both inevitable and valuable.<sup>8</sup> In particular, government speech facilitates significant First Amendment interests in sharing knowledge and discovering truth by informing the public on a wide range of topics. These

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<sup>1</sup> See *ACLU v. Bredeisen*, 441 F.3d 370, 372 (6th Cir. 2006), *cert. denied sub nom.*, *Hill v. Dixon*, 548 U.S. 906 (2006).

<sup>2</sup> See *Robb v. Hungerbeeler*, 370 F.3d 735, 737-38 (8th Cir. 2004), *cert. denied*, *Rahn v. Robb*, 543 U.S. 1054 (2005).

<sup>3</sup> See *Page v. Lexington County Sch. Dist. One*, No. 3:06-249-CMC, 2007 WL 2123784, at \*2-5 (D.S.C. July 20, 2007). In the interest of full disclosure, I note that I served pro bono as counsel of record in filing an amicus brief in support of respondent school board in this case upon appeal. See Brief of Amici Nat'l Sch. Bds. Ass'n et al. in Support of Affirmance, *Page v. Lexington County Sch. Dist One*, No. 07-1697 (4th Cir. Oct. 25, 2007).

<sup>4</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985).

<sup>5</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992).

<sup>6</sup> *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>7</sup> See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

<sup>8</sup> See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 992 (2005); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 569 (1980).

topics, for example, include the dangers of tobacco,<sup>9</sup> the increased risk of Sudden Infant Death Syndrome associated with infants sleeping prone,<sup>10</sup> and the benefits of exercise and regular health screenings.<sup>11</sup> Government speech also furthers citizens' capacities to participate in democratic self-governance by enabling them to identify their government's priorities and by providing them with the opportunity to learn and evaluate the views of their elected representatives.<sup>12</sup>

But distinguishing between private and governmental speech is not always easy. Courts often struggle with the challenge of parsing government expression from private expression in the growing number of cases in which public entities invoke the government speech defense to First Amendment claims. For example, circuits have split in their characterizations of specialty license plates as governmental or private speech. The Sixth Circuit concluded that Tennessee's issuance of a "Choose Life" license plate reflected the legislature's own pro-life views and thus constituted government speech within the state's power to control.<sup>13</sup> In contrast, the Fourth Circuit characterized the same plates as predominantly private expression, upholding Planned Parenthood's free speech challenge to South Carolina's decision to issue a "Choose Life" – and not a "Pro-Choice" – plate.<sup>14</sup> The Ninth Circuit did the same in upholding the Arizona Life Coalition's challenge to Arizona's denial of its proposed "Choose Life" plate.<sup>15</sup>

As another example of courts' struggles to characterize speech as private or governmental, the Eighth Circuit reached varying conclusions when considering government efforts to avoid acknowledging the Klan's monetary contributions or volunteer labor. One panel held that the University of Missouri's public radio station did not violate the First Amendment when it refused to accept, and thus acknowledge on-air, financial support from the Klan.<sup>16</sup> A different panel later held that Missouri ran afoul of the First

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<sup>9</sup> See, e.g., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 31-40 (1964).

<sup>10</sup> See Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 378-80 (2006) (describing governmental public education campaign urging new parents to place infants on their sides or backs to prevent SIDS).

<sup>11</sup> See Proclamation No. 8003, 71 Fed. Reg. 20,863 (Apr. 24, 2006) (issuing President George W. Bush's call upon Americans "to make daily exercise a priority").

<sup>12</sup> Shiffrin, *supra* note 8, at 604.

<sup>13</sup> ACLU v. Bredesen, 441 F.3d 370, 375-77 (6th Cir. 2006), *cert. denied sub nom.*, Hill v. Dixon, 548 U.S. 906 (2006).

<sup>14</sup> Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004).

<sup>15</sup> Ariz. Life Coal., Inc. v. Stanton, No. 05-16971, 2008 WL 217012, at \*12 (9th Cir. Jan. 28, 2008).

<sup>16</sup> Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1091-96 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000).

Amendment when it rejected the Klan's application to participate in a roadside clean-up program that would require its recognition on a state Adopt-a-Highway sign.<sup>17</sup> In both cases, Missouri argued that it sought simply to ensure that its own expression was not misunderstood as endorsing the Klan, while the Klan maintained that its private views had been targeted for discrimination in violation of the First Amendment.

Conflicts like these illustrate the need for a coherent government speech doctrine that parses the government's impermissible censorship of private speech from its own legitimate expressive interests.<sup>18</sup> To this end, Part I examines the theoretical and practical justifications for insulating government speech from First Amendment challenge. In particular, it explores the body of social science research that describes how a message's source shapes its effectiveness: in some contexts, expression that is attributed to the government is more persuasive than speech attributed solely to private actors.<sup>19</sup> Misattributing private views to the government can thus skew public debate and frustrate First Amendment values by misleading onlookers into evaluating ideas differently than they would if those views were accurately assigned to a private party. For these reasons, the government has a legitimate interest in shielding its own expression from private speakers' efforts to join, alter, or misappropriate it.

Those unhappy with the government's views, of course, remain free to try to change them through political accountability measures like lobbying and voting. But because the public can take such action only when it actually understands the contested expression as the government's, Part II proposes that the government speech defense insulates from First Amendment challenge

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<sup>17</sup> *Robb v. Hungerbeeler*, 370 F.3d 735, 744-45 (8th Cir. 2004), *cert. denied sub nom.*, *Rahn v. Robb*, 543 U.S. 1054 (2005); *see also Cuffley v. Mickes*, 208 F.3d 702, 708-09 (8th Cir. 2000), *cert. denied sub nom.*, *Yarnell v. Cuffley*, 532 U.S. 903 (2001),

<sup>18</sup> As Robert Post observes, "[w]hat we have a right to expect from doctrine is that it force[s] us to confront and clarify the constitutional values that matter to us." Robert Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 195 (1996).

<sup>19</sup> I first explored these problems in an earlier essay, where I argued that the government should have considerable latitude to protect its speech from misappropriation by private parties when it can demonstrate that it is literally speaking in a given context and that, absent preventive action, reasonable onlookers would mistakenly perceive the government as endorsing what are really the views of others. *See Helen Norton, Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 *U.C. DAVIS L. REV.* 1317, 1349-50 (2004). This Article expands and improves on that work in several ways. First, it engages social science insights about how a message's perceived source as governmental alters its effectiveness, thus identifying additional support for the government's interest in preserving the integrity of its own expression. Second, this Article more precisely articulates a framework for determining a message's private or governmental source, emphasizing the importance of establishing a message as governmental both formally and functionally, and drawing from relevant experience in other areas to learn how onlookers assess a message's source.

only expression that is governmental in origin both *formally* (where the government claims the speech as its own when it authorizes the communication) and *functionally* (where onlookers understand the speech to be the government's at the time of its delivery). Drawing from relevant experience in other areas, Part II then examines a variety of characteristics – or “source cues” – that may signal a message's genesis as governmental or private. These include not only express indications of a message's origin, but also less direct signals like a message's physical location or onlookers' expectations based on past practice.

Part III then applies this framework to several recurring challenges, exploring specific features in a range of contexts that may obscure or reveal the government as a message's source. The Article concludes by urging that this inquiry remain focused on whether we have enough information about a message's source to identify it as the government's in a way that enables members of the public to evaluate the message's credibility more accurately and to engage in political accountability measures if they desire.

#### I. GOVERNMENT'S INTEREST IN PROTECTING ITS EXPRESSION FROM MISAPPROPRIATION: HOW A MESSAGE'S PERCEIVED SOURCE SHAPES ITS EFFECTIVENESS

Government expression contributes to important free speech values by disseminating knowledge and informing citizens of their government's priorities. But views mistakenly perceived as the government's potentially undermine those interests in several ways. Not only does such misattribution mislead the public about its government's actual values, but those views may carry greater persuasive force than they would otherwise enjoy because a message's source can – and often does – change its reception. This dynamic threatens to skew the public debate and inhibit informed self-governance by misleading onlookers into evaluating ideas differently than they would if those views were accurately assigned to a private party.

Indeed, evidence from cognitive psychology and related fields reveals that individuals often use a message's source as a mental shortcut, or heuristic, for evaluating its quality. Studies confirm that the more credible a speaker, the more likely her message will be effective, regardless of its content.<sup>20</sup> Because speakers perceived as unpopular and/or unreliable will have more difficulty

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<sup>20</sup> E.g., Shelly Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 460, 470 (1994); Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635, 650 (Winter 1951-52); Richard E. Petty et al., *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135, 143 (1983); Elaine Walster et al., *On Increasing the Persuasiveness of a Low Prestige Communicator*, 2 J. EXPERIMENTAL SOC. PSYCHOL. 325, 325-26 (1966).



persuading listeners,<sup>21</sup> they may be wise to seek the imprimatur of more trustworthy sources, which may include the government. Moreover, the perception that a message is endorsed by such sources can help dispel onlookers' suspicion of perspectives understood to be in the speaker's own interest. Social science researchers have concluded that "any communicator, regardless of his prestige, will be more effective and will be seen as more credible when he is arguing for a position *opposed* to his own best interest, than when arguing for changes obviously in his own best interest."<sup>22</sup> Consider, for example, the differing impact of the statement that "The Klan is a civic-minded organization" when delivered by the government rather than by the Klan itself.

Some onlookers also rely on the public's reaction to a message as a shortcut for evaluating its content, using widespread acceptance or audience enthusiasm to gauge a message's quality.<sup>23</sup> Thus, to the extent that a government's views are seen as a proxy for the opinion of the public that elected it, the government's perceived endorsement may further improve a message's effectiveness.

A message's perceived source as governmental thus plays a role in shaping its effectiveness apart from its substantive content.<sup>24</sup> This is particularly true of political issues, as individuals strapped for time often rely on cognitive

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<sup>21</sup> See June Fessenden-Raden et al., *Providing Risk Information in Communities: Factors Influencing What Is Heard and Accepted*, 12 SCI., TECH., & HUM. VALUES 94, 100 (1987); Bradley S. Greenberg & Gerald R. Miller, *The Effects of Low-Credible Sources on Message Acceptance*, 33 SPEECH MONOGRAPHS 127, 135 (1966); Homer H. Johnson & Richard R. Izzett, *The Effects of Source Identification on Attitude Change as a Function of the Type of Communication*, 86 J. SOC. PSYCHOL. 81, 85-87 (1972) (concluding that high-credibility sources were more likely to influence attitude change than low-credibility sources).

<sup>22</sup> Walster et al., *supra* note 20, at 325; see also Alice H. Eagly et al., *Causal Inferences About Communicators and Their Effect on Opinion Change*, 36 J. PERSONALITY & SOC. PSYCHOL. 424, 432 (1978); Roobina Ohanian, *The Impact of Celebrity Spokespersons' Perceived Image on Consumers' Intention to Purchase*, J. ADVERTISING RES., Feb.-Mar. 1991, at 46, 46-47 (describing objectivity as a measure of a source's credibility, along with expertise, knowledge, and attractiveness).

<sup>23</sup> See Danny Axsom et al., *Audience Response as a Heuristic Cue in Persuasion*, 53 J. PERSONALITY & SOC. PSYCHOL. 30, 36-37 (1987); Chaiken & Maheswaran, *supra* note 20, at 461; Diana C. Mutz, *Impersonal Influence: Effects of Representations of Public Opinion on Political Attitudes*, 14 POL. BEHAV. 89, 96-100, 111 (1992) (describing studies concluding that, for some onlookers, "public opinion simply serves as a cue indicating the most intelligent choice to make").

<sup>24</sup> Reliance on such heuristics is not, however, inevitable. Onlookers with the motivation and the ability to expend the necessary cognitive resources on a particular matter are less likely to rely on source cues or other mental shortcuts and more likely to evaluate a message's substantive content for themselves. Jeffery J. Mondak, *Source Cues and Policy Approval: The Cognitive Dynamics of Public Support for the Reagan Agenda*, 37 AM. J. POL. SCI. 186, 188 (1993) [hereinafter Mondak, *Source Cues*].

shortcuts to inform their judgments about a variety of complicated matters. As Dan Kahan and Donald Braman have observed:

[C]itizens *aren't* in a position to figure out through personal investigation whether the death penalty deters, gun control undermines public safety, commerce threatens the environment, et cetera. They have to take the word of those whom they trust on issues of what sorts of empirical claims, and what sorts of data supporting such claims, are credible. The people they trust, naturally, are the ones who share their values – and who as a result of this same dynamic and others are predisposed to a particular view.<sup>25</sup>

For these reasons, where the government seems an expert, objective, or otherwise trustworthy source, its endorsement gives the ideas it trumpets (or is perceived as trumpeting) more acceptance than they would otherwise enjoy. Consider, for example, the compelling effects on public opinion of charges in 2003 by Secretary of State Colin Powell and President Bush that Iraq possessed weapons of mass destruction: half of Americans continued to believe those assertions in 2004 even after experts and policymakers alike had concluded that no such weapons existed.<sup>26</sup>

Furthermore, the license plates, highway signs, websites, and other communicative means often at the heart of government speech disputes are especially powerful because of the extensive audience they reach as forms of mass media.<sup>27</sup> Moreover, at least some of them additionally carry the potential for multiple views by the same onlooker, with this additional exposure further enhancing their effectiveness. Indeed, the more an individual encounters the same message, the more persuasive that idea may become by virtue of repeated exposure.<sup>28</sup> Behavioral research indicates that mass media can also be

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<sup>25</sup> Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151 (2006); see also Jeffery J. Mondak, *Public Opinion and Heuristic Processing of Source Cues*, 15 POL. BEHAV. 167, 170 (1993) [hereinafter Mondak, *Public Opinion*]; John Gastil et al., *Ending Polarization: The Good News About the Culture Wars*, BOSTON REV., Mar.-Apr. 2006, at 19 ("Unable to work through the details of a complex issue (such as global warming), most citizens can easily figure out where they should stand by referencing cultural authorities – Ted Kennedy or Rush Limbaugh, *The New York Times* or Fox News – and aligning themselves accordingly.").

<sup>26</sup> See Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 649-51 (2006).

<sup>27</sup> See Thomas D. Elias, *Adopt-a-Highway Project Cleans Up*, HOUS. CHRON., Mar. 1, 1992, at A8 ("The manager of a Los Angeles McDonald's whose golden arches adorn a sign along a nearby freeway says, 'You can't beat the advertising. There must be 120,000 cars a day going by that sign.'").

<sup>28</sup> See KATHLEEN KELLEY REARDON, PERSUASION IN PRACTICE 106 (1991). But see Carolyn Tripp et al., *The Effects of Multiple Product Endorsements by Celebrities in Consumers' Attitudes and Intentions*, 20 J. CONSUMER RES. 535, 536, 544-45 (1994) (commenting that while increased exposure may initially result in a more favorable

especially persuasive because they do not often require onlookers to engage, rebut, and thus formulate the sorts of counter-arguments that can undermine a message's effectiveness.<sup>29</sup> Together, these dynamics underscore not only the power of mass media, but also the government's legitimate interest in protecting its expression in these contexts from misappropriation.

Of course, a message's source can have positive *or* negative effects on its persuasiveness, depending on observers' assessments of the source's credibility and/or popularity.<sup>30</sup> And because public attitudes towards government vary widely – depending on the government, the audience, and the issue – assessments of government credibility differ too.<sup>31</sup> As Gia Lee and Lawrence Lessig separately point out, purposefully masking a message's governmental source may improve its reception in certain circumstances.<sup>32</sup> Lessig, for example, explains that the government may sometimes seek to change social meaning by finding more credible conduits for its speech.<sup>33</sup> According to Lessig, people react strongly to efforts by the government and other powerful groups to manipulate social meaning; therefore, such efforts are less effective than communication which does not appear to be influenced by the government or another powerful source – what he calls the “Orwell effect.”<sup>34</sup> Consequently, the government will seek to minimize the extent to which the public attributes messages to it and instead will tie its messages to authorities perceived as more independent, like doctors or scientists.<sup>35</sup>

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response, higher numbers of exposure may eventually trigger negative responses, perhaps due to tedium).

<sup>29</sup> See REARDON, *supra* note 28, at 169 (“[W]hen people are opposed to a certain perspective and realize that they may be required to make some statement, they will create counterarguments. What of media participants, who know that they will not be required to respond in any overt manner? They are uncritical participants. Thus they are vulnerable to persuasion.”).

<sup>30</sup> Mondak, *Source Cues*, *supra* note 24, at 193.

<sup>31</sup> See Fessenden-Raden et al., *supra* note 21, at 96 (finding that the trust people have in political institutions varies, as does their trust in the information provided by such governments); Mondak, *Public Opinion*, *supra* note 25, at 171 (“The direction and magnitude of influence source cues exert on an individual's judgments should vary as a function of the citizen's opinion regarding the expertise or credibility of the political leader in question. . . . Therefore, a source effect can be either positive or negative, with the effect's magnitude dependent on the strength of that approval or disapproval.”).

<sup>32</sup> Lee, *supra* note 8, at 1009; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1017 (1995).

<sup>33</sup> Lessig, *supra* note 32, at 1017-18.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; see also Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 932-33 (2007), stating:

Because a naming gesture imputes social meaning to the physical public domain, acts of visible branding can infuse a public facility with strong associative values that affect public perceptions and permeate the collective public conscience. For example, both residents and outsiders are likely to view a community in which a public school is

Lessig thoughtfully describes the various techniques for changing a message's meaning that might be employed by private as well as government speakers. "Tying," for example, involves "attempts to transform the social meaning of one act by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have. The tied text thereby gains some of the associated meaning of the tied-to text."<sup>36</sup> Common examples of "tying" include celebrity endorsements, but, as Lessig observes, "[t]he link can transfer negative as well as positive value. A candidate for Congress ties her opponent to the President, hoping that negative views about the President will transfer to the opponent."<sup>37</sup>

Lee is especially concerned that the government may manipulate the public's attitudes towards its views by deliberately obscuring its identity as a message's source.<sup>38</sup> She focuses on government speakers who seek to shape public opinion by attributing government views to private actors perceived as less self-interested or otherwise more credible – citing, for example, government-produced video news segments distributed to and aired by the media without attribution to the government.<sup>39</sup> Governmental manipulation of this sort is dangerous, Lee observes, because "non-transparent communications undermine mechanisms of political accountability, both by precluding individuals from knowing when, and to what extent, the government is responsible for specific speech and by enabling the government to skew individuals' perceptions of the actual support for its ideas."<sup>40</sup>

Given that free speech doctrine generally leaves individuals to their own devices to guard against deception and trusts that truth will eventually triumph over falsity,<sup>41</sup> some might condemn such concerns about misattribution as paternalistic. But like many market theories, the traditional "marketplace of ideas" metaphor relies on assumptions that are not always empirically supported – e.g., that individuals consistently act rationally based on complete

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named for Robert E. Lee very differently from a community in which a public school is named for Martin Luther King, Jr.

<sup>36</sup> Lessig, *supra* note 32, at 1009.

<sup>37</sup> *Id.*

<sup>38</sup> Lee, *supra* note 8, at 985-89.

<sup>39</sup> *Id.* at 990 ("The government, in other words, may make its views appear to be held by more esteemed or authoritative sources than they necessarily are, and more widely accepted than they really are.").

<sup>40</sup> *Id.* at 1039.

<sup>41</sup> See Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 6 (2003); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) ("In many circumstances the First Amendment is no bar to government measures condemning deceptions by statement or concealment, whether government or private parties are the deceivers or the deceived.").

information.<sup>42</sup> Indeed, the Supreme Court already recognizes the possibility of such market failures with its refusal to protect misleading commercial speech in order to safeguard listeners from deception.<sup>43</sup> For similar reasons, government speech doctrine should acknowledge that time-strapped onlookers employ often-inaccurate cognitive shortcuts like relying on a message's source as a proxy for its quality.

While Lee accurately identifies the significant dangers that emerge when government masks its role as a message's source, parallel concerns arise when private speakers seek the government's perceived imprimatur to manipulate onlookers' common – indeed, sometimes automatic – reliance on an idea's source as the measure of its value. Either way, misidentifying a message's author can change its reception and thus skew the surrounding public debate.<sup>44</sup> Consider, for example, the differing effects of the following statements: “The Confederate flag is a symbol of heritage not hate,” when delivered by the State of Virginia as opposed to the private organization Sons of Confederate Veterans; “Choose Life,” when communicated by the state of Illinois as opposed to the National Right to Life Coalition; or “Human behavior does not contribute significantly to climate change” when uttered by the U.S. Secretary of Energy as opposed to an oil company executive.<sup>45</sup>

Government speech is thus most valuable and least dangerous when its governmental source is apparent, enabling the public to more accurately assess the message's credibility and to take accountability measures as appropriate. The remainder of this Article explores in more detail the exercise of assessing the governmental or private source of contested expression.

## II. ASSESSING A MESSAGE'S SOURCE AS PRIVATE OR GOVERNMENTAL

While no consensus approach to these disputes has yet emerged – indeed, “[t]he Supreme Court has provided very little guidance as to what constitutes government speech”<sup>46</sup> – a number of lower courts have synthesized various appellate decisions to create a four-factor test for characterizing speech as private or governmental by examining:

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<sup>42</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting). For these reasons, a number of commentators thus urge that we discard a libertarian approach to First Amendment interpretation. See Bambauer, *supra* note 26, at 696-703; Horwitz, *supra* note 41, at 6.

<sup>43</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64.

<sup>44</sup> Note that such misperceptions not only skew public debate but may also frustrate individual autonomy interests. See Varat, *supra* note 41, at 1110.

<sup>45</sup> See, e.g., Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. (forthcoming 2008) (manuscript at 14-16, available at <http://ssrn.com/abstract=1031733>) (describing efforts of tobacco companies, Wal-Mart, and other commercial entities to build support for their products by manufacturing perceived third-party endorsements).

<sup>46</sup> *Wells v. City & County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001).

(1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal” speaker; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech . . . .<sup>47</sup>

And while expressing some uncertainty as to whether the Supreme Court’s decision in *Johanns v. Livestock Marketing. Ass’n*<sup>48</sup> delivered a definitive test for identifying government speech,<sup>49</sup> some lower courts have also emphasized two factors highlighted in that case: (1) whether the government established the overall message to be communicated and (2) whether the government approved “every word” of the message ultimately disseminated.<sup>50</sup>

While courts applying any or all of these factors have yet to identify their underlying theoretical justification,<sup>51</sup> these considerations appear to reflect courts’ intuitive yet not-fully-articulated sense of the need to insist on a clearly governmental source to ensure that government can be held accountable for the speech it claims as its own. For example, a government program’s communicative “purpose” – e.g., a public school’s educational objective or a public broadcaster’s journalistic mission – may bolster the government’s claim that it intends to speak in a particular setting.<sup>52</sup> A government that establishes an overall message and approves its every word may be understood as claiming authorship of that expression, as might a public entity that maintains “editorial control” over a message’s content. Onlookers generally identify “the literal speaker” of a message as its source, absent some disclaimer or clarification, and “ultimate responsibility” is largely synonymous with accountability. Courts’ use of these factors, however, would be significantly more defensible from both a theoretical and a practical standpoint if they explained *why* they chose to rely on them – for example, by showing how each factor furthers or frustrates a finding of a message’s governmental source, with attendant implications for accountability and credibility assessment.

A number of thoughtful scholars have proposed approaches to assessing government speech claims that attend more directly to ensuring a message’s

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<sup>47</sup> *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002); *see also Wells*, 257 F.3d at 1140-41. Not all lower courts apply the four-factor test. *See, e.g., Chiras v. Miller*, 432 F.3d 606, 618 (5th Cir. 2005).

<sup>48</sup> 544 U.S. 550 (2005).

<sup>49</sup> *See Ariz. Life Coal. v. Stanton*, No. 05-16971, 2008 WL 217012, at \*4-5 (9th Cir. Jan. 28, 2008); *ACLU v. Bredesen*, 441 F.3d 370, 375, 380 (6th Cir. 2006); *Page v. Lexington County Sch. Dist. One*, No. 3:06-249-CMC, 2007 WL 162178, at \*23 n.23 (D.S.C. Jan. 17, 2007).

<sup>50</sup> *Johanns*, 544 U.S. at 562.

<sup>51</sup> *See, e.g., Sons of Confederate Veterans*, 288 F.3d at 618, *en banc reh’g denied*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*).

<sup>52</sup> *See Frederick Schauer, Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 120 (1998).

governmental origin, although they couch their preferred frameworks in somewhat different terms. Professors Bezanson and Buss, for example, would define government speech in terms of intent and effect: “purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government’s message.”<sup>53</sup> Professor Gielow Jacobs’ requirements of both general and specific accountability<sup>54</sup> similarly foreshadow in part the principles of formal and functional authorship upon which I rely in assessing government speech. And Professor Lee identifies transparency as the key to government speech, defining transparency to mean that “a reasonable recipient understands that the government bears responsibility for a communication.”<sup>55</sup> While sharing these writers’ focus on meaningful accountability as a key measure of government speech, this Article grapples more specifically with what this theoretical foundation actually demands in practice.

Building on these efforts, this Part examines in more detail the exercise of determining a message’s source, consistent with the theoretical demands of meaningful accountability. It proposes that the government can establish its entitlement to the government speech defense only when it establishes itself as the source of that expression both as a *formal* and as a *functional* matter. In other words, government must expressly claim the speech as its own when it authorizes or creates a communication *and* onlookers must understand the message to be the government’s at the time of its delivery. If the government can satisfy both of these elements, thus establishing the speech as its own, then it is free to control its message without Free Speech Clause scrutiny. By identifying two junctures at which the government must expose its expressive choices to the public, this approach maximizes opportunities for undeceived credibility assessments and meaningful political accountability.<sup>56</sup> If, however, political accountability is not available as a check on the government because

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<sup>53</sup> Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001).

<sup>54</sup> Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 57, 61 (2002). In addition to accountability measures, Professor Jacobs’s proposed framework also includes attention to whether the government delivers an “identifiable and constitutionally valid message” with “non-speech-suppressing impact.” *Id.* at 113.

<sup>55</sup> Lee, *supra* note 8, at 1052.

<sup>56</sup> For an example of expression that may satisfy the requirement of formal, but not functional, government authorship, see *infra* notes 66, 145, 215 and accompanying text (discussing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005)). For an example of expression that may satisfy the requirement of functional, but not formal, government authorship, see *infra* note 110 (discussing *Brown v. Cal. Dep’t. of Transp.*, 321 F.3d 1217 (9th Cir. 2003)).

the governmental source is obscured, then the safeguards of traditional First Amendment analysis should apply.<sup>57</sup>

Before turning to these twin requirements of formal and functional government ownership in more detail, two caveats are in order. First, note that legal constraints other than the First Amendment's Free Speech Clause may still limit governmental speech. Expression that is governmental in source both formally and functionally may still, for example, contravene the Constitution's Establishment or Equal Protection Clauses if it endorses religion or furthers racial discrimination.<sup>58</sup> Government speech of a partisan nature, moreover, may in some settings violate constitutional constraints like the Guarantee Clause or statutory limitations like state and federal laws prohibiting the use of government resources for campaign speech.<sup>59</sup>

Second, while contending that the government does not violate private parties' First Amendment rights when it prevents them from joining or altering what is really the government's own speech, I do not claim that government generally has First Amendment rights of its own.<sup>60</sup> Laws limiting government

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<sup>57</sup> Note, too, that speech that satisfies this test will almost certainly satisfy lower courts' four-factor test, which attempts less directly – and in a way less clearly grounded in the theoretical foundations of government speech – to capture some of the same concerns. Similarly, although the Supreme Court has yet to articulate a definitive test for government speech, expression that satisfies my proposed requirements of formal and functional transparency more than satisfies the Court's *Johanns* factors – which, as described in more detail below, do not require any showing of functional transparency. See *infra* notes 212-16 and accompanying text.

<sup>58</sup> See, e.g., Greene, *supra* note 8, at 37-38.

<sup>59</sup> See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 n.3 (1997) (Scalia, J., concurring); *Greer v. Spock*, 424 U.S. 828, 845-47 (1975) (Powell, J., concurring) (suggesting that the military's actual or perceived endorsement of political candidates would offend Article II, Section 2 and its guarantee of civilian control of the military); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 170, 302 (1983); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 586-98, 605 n.169 (1980).

<sup>60</sup> See YUDOF, *supra* note 59, at 44 (arguing that government does not possess First Amendment free speech rights); Bezanson & Buss, *supra* note 53, at 1501-08 (same). For an argument that state governments may be First Amendment rights-holders, see David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1638-47 (2006). Note also the Court has suggested that certain institutions with unique communicative functions – such as universities or broadcasters – may have First Amendment interests regardless of their public or private character. See, e.g., *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998). But see *United States v. Am. Library Ass'n*, 539 U.S. 194, 210-11 (2003) (declining to decide whether government entities have First Amendment rights).



expression – such as statutes regulating certain partisan speech by government actors<sup>61</sup> – thus face no free speech clause constraint.<sup>62</sup>

#### A. *Establishing Expression's Governmental Source as a Formal Matter*

Establishing formal government authorship demands that the government make clear its intent to communicate its own views at the time it creates or authorizes the expression.<sup>63</sup> As Mark Fenster observes, the government's public justifications for its choices “promote rational, critical public debate and unrestricted communication in order to enable development of a functional, democratic public sphere. In short, liberal democratic theory requires the state to give an account of itself to its public and to justify its actions to the individual and community.”<sup>64</sup> Requiring that the government identify itself as the source of a message as a formal matter forces the government to articulate,

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<sup>61</sup> See, e.g., 5 U.S.C. §§ 7323-7324 (2000) (prohibiting use of official authority to affect election results and barring use of government property or facilities for partisan activities); ARK. CODE ANN. § 12-8-205(b)(2) (2003) (prohibiting state police from displaying political banners, posters, or literature on state government offices, facilities, or other buildings); ARK. CODE ANN. § 12-8-205(b)(3) (2003) (prohibiting state police vehicles from displaying any political bumper stickers or decals and prohibiting their use to promote or assist any political campaign).

<sup>62</sup> My contention that government should remain free to deny private speakers the opportunity to speak in a setting that mistakenly conveys the government's endorsement may also be unattractive to those who ascribe to “the more speech, the better” approach – i.e., those who identify the First Amendment's fundamental value as fostering private speakers' individual autonomy and maximizing opportunities for self-expression. See, e.g., John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 51-52 (1996).

But scholars have long disagreed over whether any single core value animates the First Amendment. See, e.g., Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1411 (1987) (“Most theoretical writings have suggested variants of four different values as critical to speech protection: individual development, democratic government, social stability, and truth.” (citations omitted)); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980).

I join those who contend that the First Amendment principally furthers the collective instrumental value of facilitating democratic self-governance through public debate. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 39 (2005); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256; Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 213; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263 (1992).

<sup>63</sup> The “ultimate responsibility,” “program purpose,” and “editorial control” elements of the four-factor test – along with the considerations mentioned in *Johanns* – for identifying government speech might be seen as courts' attempts to capture this notion of government's affirmative claim of ownership of a particular communication. See *supra* note 50 and accompanying text.

<sup>64</sup> Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897 (2006).

and thus think carefully about, its expressive decisions. It also prevents after-the-fact manufacture of a government speech defense as an opportunistic reaction to thwart those challenging the government's regulation of what is really private speech.<sup>65</sup> In this manner, the government pays for its ability to invoke the government speech defense by articulating its intent to take political responsibility for its expressive choices.

For an example of speech that satisfies the requirement of formal government authorship, consider the beef promotion campaign at issue in *Johanns v. Livestock Marketing Ass'n*.<sup>66</sup> As the Supreme Court emphasized, Congress determined the campaign's overarching message at the time of its authorization, making clear its intent to express a federal policy "of promoting the marketing and consumption of 'beef and beef products,' using funds raised by an assessment on cattle sales and importation."<sup>67</sup>

Other examples of expression that satisfy the requirement of formal government origin include a school board's resolution authorizing the district's celebration of Gay and Lesbian Awareness Month and approving the posting of supportive materials on school bulletin boards,<sup>68</sup> as well as a school board's resolution authorizing public communication of its opposition to proposed voucher legislation.<sup>69</sup> In these cases, transparent deliberations by a public entity about whether to authorize such expression provide the public with valuable information about their government's priorities, as well as meaningful opportunities to engage in political accountability measures.

On the other hand, the government can decline to claim certain speech as its own as a formal matter.<sup>70</sup> Examples include a public school that cedes to students the power to name school buildings,<sup>71</sup> a city or county that sells the

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<sup>65</sup> See Bezanson & Buss, *supra* note 53, at 1510.

<sup>66</sup> 544 U.S. 550, 562 (2005).

<sup>67</sup> *Id.* at 553.

<sup>68</sup> See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1005 (9th Cir. 2000).

<sup>69</sup> See *Page v. Lexington County Sch. Dist. One*, No. 3:06-249-CMC, 2007 WL 2123784, at \*1 (D.S.C. July 20, 2007).

<sup>70</sup> Mark Yudof describes one such situation:

For example, there is nothing constitutionally amiss about a university placing the editorial functions of a college newspaper entirely in the hands of the faculty or the central administration. The university could reserve editorial control over the editorial page but not over the news columns. Or it might delegate all editorial functions – over news, advertising, and the editorial page itself – to a student board of editors.

YUDOF, *supra* note 59, at 243.

<sup>71</sup> See, e.g., Mike Jaccarino & Karen Angel, 'Terrorist' Lauded at CUNY, N.Y. DAILY NEWS, Dec. 12, 2006, at 5 (describing a university's unwillingness to force students to change the controversial name of the building). But see Editorial, CUNY Expels Killers, N.Y. DAILY NEWS, Dec. 13, 2006, at 39 (describing the university's later change in position, stating: "Only the CUNY board of trustees has the authority to name or rename school facilities").

rights to name its stadiums or other facilities to private parties,<sup>72</sup> or “vanity stamp” and “vanity license plate” programs, where the government sells advertising space on public property rather than claim that same space for its own expressive purposes.<sup>73</sup> Government regulation of what then must be private expression – because the government has declined to claim it as its own – of course falls under the constraints of traditional First Amendment analysis, including its prohibition on viewpoint-based regulation.

*B. Establishing Expression’s Governmental Source as a Functional Matter*

Even if government expressly announces its intent to claim authorship of certain communication at the time of its creation, much of the public may remain unaware of this decision until that message is ultimately delivered. Absent an understanding of the message’s governmental source, onlookers cannot fully evaluate the message’s credibility, nor will they realize the possibility of holding the government accountable as the source of messages they find objectionable. Challenges thus remain in determining whether onlookers will perceive that expression to be governmental when the message is received.<sup>74</sup>

Some commentators remain concerned about the practical demands of such an inquiry. Professors Bezanson and Buss, for example, emphasize the difficulties in determining onlooker perception:

Attribution, in short, is a difficult, subtle, fact-intensive, and circumstance-specific question. A standard based on reasonableness of third parties’ perceptions, even relatively informed third parties, is pretty loose sand on which to build the foundation of a test intended to safeguard the First Amendment interests of competing private speech claimants.<sup>75</sup>

But such difficulties are not insurmountable. Assessing reasonable individuals’ perceptions remains a commonplace inquiry in many areas of the

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<sup>72</sup> For example, Denver’s Metropolitan Football Stadium District, a public entity overseeing construction of the new Denver Broncos’ stadium, sold twenty-year naming rights to Invesco Funds Group, Inc. in 2001. See Cindy Brovsky, *Out With the New Stadium Name, In With the Old*, DENVER POST, Aug. 8, 2001, at B1; see also Joseph Blocher, *School Naming Rights and the First Amendment’s Perfect Storm*, 96 GEO. L.J. 1, 1 (2007); Robert H. Thornburg, Note, *Stadium Naming Rights: An Assessment of the Contract and Trademark Issues Inherent to Both Professional and Collegiate Stadiums*, 2 VA. SPORTS & ENT. L.J. 328, 333 (2003). Indeed, the lease agreements for most stadiums grant the lessee (i.e., a professional sports team) naming rights for the lease term. See, e.g., Larry Fish, *Stadium Approved*, PHILADELPHIA INQUIRER, May 28, 2000, at A3.

<sup>73</sup> See *infra* Part III.A.

<sup>74</sup> The “literal speaker” and “ultimate responsibility” elements of lower courts’ four-factor test for identifying government speech, described *supra* at note 47 and accompanying text, might be seen as courts’ attempts to capture this notion of functional transparency.

<sup>75</sup> Bezanson & Buss, *supra* note 53, at 1482-83.

law, and one that judges and juries are frequently called upon to perform when evaluating constitutional, statutory, and common law claims in both civil and criminal contexts.<sup>76</sup> Indeed, a number of doctrines – such as the endorsement test for Establishment Clause claims and the test for trademark infringement – specifically require courts to evaluate onlookers' perceptions of a message's source.<sup>77</sup> Furthermore, while often "fact-intensive[] and circumstance-specific,"<sup>78</sup> a functional analysis of a message's source may be guided by attention to specific triggers, or source cues,<sup>79</sup> upon which individuals frequently rely in determining a message's origins. The remainder of this Part considers several possible cues to a message's governmental source, evaluating their strengths and limitations in facilitating meaningful credibility assessment and political accountability.

### 1. Express Cues

A message often expressly signals its genesis at the time of its delivery. Straightforward examples include government press conferences where the government's position is communicated by a public official, press statements appearing on government letterhead and attributed to a government source, or reports on the dangers of smoking or the importance of energy conservation where the government expressly identifies itself as the author.<sup>80</sup> Because the expression's origins are so clearly exposed, the public's evaluation will not be skewed by misperceptions as to its source, and those displeased with the message know to complain to (or about) the government.<sup>81</sup>

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<sup>76</sup> See, e.g., *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 20-21 (1993) (assessing hostile work environment claims based on a reasonable person standard); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that a person is "seized" for Fourth Amendment purposes when a reasonable person in the same situation would have believed she was not free to leave); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988) ("A person is justified in using force against an aggressor when . . . he or she reasonably believes such force to be necessary."); PROSSER AND KEETON ON THE LAW OF TORTS 175 (W. Page Keeton ed., 5th ed. 1984) (assessing negligence based on a reasonable person standard).

<sup>77</sup> See *infra* notes 87, 120 and accompanying text.

<sup>78</sup> See Bezanson & Buss, *supra* note 53, at 1482.

<sup>79</sup> See, e.g., Mondak, *Public Opinion*, *supra* note 25, at 169-72.

<sup>80</sup> See generally U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *supra* note 9; NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY (2001). The "literal speaker" element of the four-part test for assessing government speech used by some lower courts may be seen as another way to capture this notion of express source cues. See *supra* note 47 and accompanying text.

<sup>81</sup> As one example of speech that expressly signaled its governmental source, consider the remarks of Deputy Assistant Secretary of Defense for Detainee Affairs Cully Stimson. In a 2007 radio interview in his official capacity, Mr. Stimson expressed shock that lawyers at many top law firms represented Guantanamo detainees and urged their clients in the business community to switch to other firms. *Pentagon Official Who Criticized Detainee Lawyers Quits*, WASH. POST, Feb. 3, 2007, at A6. Mr. Stimson was identified by name and

Because they are so clear, express cues are most helpful in assessing a message's governmental origins and thus facilitating meaningful accountability. For this reason, governments seeking to protect the integrity of their own expression should design their communications in a way that enhances, rather than obscures, transparency by employing express cues whenever possible. As an incentive for governments to engage in such transparency, express cues might trigger a rebuttable presumption that a contested message is governmental in origin and thus free from Free Speech Clause scrutiny, while their absence may be presumed to signal a nongovernmental source.<sup>82</sup> Such presumptions may be especially helpful in difficult cases.

Harder cases arise when no cue directly indicates a message's origin, or where available cues send mixed or ambiguous signals. Although a substantial body of social science evidence confirms that a message's source – once established – may shape its effectiveness,<sup>83</sup> available behavioral research provides virtually no guidance about how onlookers determine a message's origins when that source is contested.<sup>84</sup> Future research in this area would help inform our judgments with scientific evidence, rather than simply intuition and personal experience.<sup>85</sup>

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position, clearly revealing the expressed views as governmental in origin. His remarks generated considerable outrage in the form of protests by bar leaders, law school deans, and others in the legal community, and he ultimately resigned as a result of the political pressure, illustrating political accountability in action as a check on government speech. See *id.*

<sup>82</sup> See B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 541-42 (2005) (proposing, in the Establishment Clause context, a rebuttable presumption against religious displays on government property absent a government showing that the message is "unequivocally secular and nonendorsing").

<sup>83</sup> See *supra* note 24 and accompanying text.

<sup>84</sup> Although little social science evidence to date addresses the question of how onlookers identify the source of a particular message when that source is unclear, researchers have examined other issues related to source attribution, such as individuals' later ability to recall the uncontested source of an idea accurately. See generally Ute J. Bayen et al., *Source Discrimination, Item Detection, and Multinomial Models of Source Monitoring*, 22 J. EXPERIMENTAL PSYCHOL. 197 (1996); Gerald Echterhoff & Walter Hussy, *Strategies of Source Attribution: Semantic Features and Trace Strength as Cues to the Origin of Memories*, 63 SWISS J. PSYCH. 93 (2004); Joshua D. Landau et al., *Dissociation of Two Kinds of Source Attributions*, 113 AM. J. PSYCH. 539 (2000); Michel Tuan Pham & Gita Venkataramani Johar, *Contingent Processes of Source Identification*, 24 J. CONSUMER RES. 249 (1997).

<sup>85</sup> See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1000 (2006); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003). Note, however, that this development is not without its critics. See Zick, *supra*, at 221.

In the meantime, exploring the less-than-express source cues relied upon by courts in a range of contexts may help guide our inquiry, while also illustrating the challenges of this endeavor. As we shall see, these indirect cues carry both strengths and weaknesses in their ability to signal a message's governmental origins, and thus their capacity to further meaningful accountability.<sup>86</sup>

## 2. Lessons from Endorsement Analysis

The Supreme Court's Establishment Clause inquiry provides a helpful parallel to the public's assessment of a message's origin as governmental or private. The Court has sometimes evaluated Establishment Clause claims by determining whether reasonable onlookers would perceive the government to be endorsing religious expression or otherwise "appearing to take a position on questions of religious belief,"<sup>87</sup> thus sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>88</sup> While endorsement analysis is controversial<sup>89</sup> and its continuing vitality unclear,<sup>90</sup> it illuminates courts' assessments of whether and when the public will perceive the government to be the source of a particular message in one specific context. To be sure, much of the Court's endorsement analysis focuses on whether onlookers would understand what was concededly the government's own expression to be religious or secular in content<sup>91</sup> – an inquiry that raises unusual challenges because it may depend in

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<sup>86</sup> The limitations of these source cues also support the case for testing courts' assessments of sources through social science research. See Krieger & Fiske, *supra* note 85, at 1006-07 ("When subjected to empirical scrutiny, 'common sense' theories of how people perceive and judge themselves and others in their social environment often turn out to be wrong. Behavioral realism, understood as a prescriptive theory of judicial decisionmaking, addresses this problem by proposing that, before judges use lay or 'common sense' psychological theories in their legal analysis, they should take reasonable steps to ensure that those theories are valid.").

<sup>87</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).

<sup>88</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>89</sup> For a sampling of commentary critical of the Court's endorsement analysis, see, for example, Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 478-79; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987).

<sup>90</sup> See, e.g., Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 137 ("With the departure of Justice O'Connor – the author and most committed supporter of the endorsement notion – there is a good chance that the test will retire along with her.").

<sup>91</sup> See, e.g., *County of Allegheny*, 492 U.S. at 601, 620 (holding that the government's decision to acknowledge Christmas through the display of a crèche impermissibly endorsed a patently religious message, while its display of a menorah next to a Christmas tree endorsed only the holidays' secular aspects); *Lynch*, 465 U.S. at 671, 685 (holding that the

part on the observer's status as a religious insider or outsider.<sup>92</sup> More relevant to the inquiry here, and perhaps more straightforward, are the Court's efforts to determine whether onlookers would attribute a concededly religious display to the government or to a private party.

a. *The Message's Location as a Cue to Its Source*

In the Establishment Clause context, the Court has observed that absent express source cues to the contrary, onlookers often attribute signs, displays, and other visual messages to the owner of the property where they appear.<sup>93</sup> *Capitol Square Review & Advisory Board v. Pinette*, for example, wrestled with whether and when reasonable onlookers would perceive the state as endorsing a cross that appeared prominently on government property.<sup>94</sup> The Court considered the State's rejection of the Klan's request to post a cross in the capitol square for fear that the display would constitute government endorsement of Christianity in violation of the Establishment Clause.<sup>95</sup> Although the plurality ultimately found, for a range of reasons, that the State did not violate the Establishment Clause,<sup>96</sup> all of the Justices acknowledged that, absent an express notice or disclaimer, onlookers could mistakenly perceive the cross as the government's speech because the cross stood on its property.<sup>97</sup>

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government's inclusion of a nativity scene in a display featuring a number of secular symbols of Christmas did not impermissibly endorse Christianity).

<sup>92</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1293 (2d ed. 1988); Hill, *supra* note 82, at 518.

<sup>93</sup> See, e.g., *County of Allegheny*, 492 U.S. at 599-600.

<sup>94</sup> *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 758-59 (1995). Eight of the Justices assumed that the cross sent a religious message, and focused on whether its display on government property signaled the government's endorsement of that message. See *id.* at 760 (stating that the speech was religious); *id.* at 761 (stating that the board rejected the display because it was religious and wanted to avoid endorsing a religion as required by the Establishment Clause); *id.* at 797 (Stevens, J., dissenting) (agreeing with the majority that it was religious expression). Justice Thomas's concurrence, however, argued that the Klan's use of the cross was intended to convey a political, rather than a religious, message. *Id.* at 770-71 (Thomas, J., concurring).

<sup>95</sup> *Id.* at 757 (plurality opinion).

<sup>96</sup> *Id.* at 763-70.

<sup>97</sup> *Id.* at 768; *id.* at 769 n.4 (noting that an observer might be "misled" by the presence of the cross in Capitol Square if any disclaimer were of insufficient size or if the observer failed to inquire whether the State had sponsored the cross); *id.* at 776 (O'Connor, J., concurring) ("[C]ertain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message – particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings."); *id.* at 785 (Souter, J., concurring) ("[I]n some circumstances an intelligent observer may mistake private, unattended religious displays in a public forum for government speech endorsing religion."); *id.* at 801 (Stevens, J.,

According to Justice Souter's concurrence, for example, unattended displays on government property enhance the possibility of misattribution.<sup>98</sup> While an observer watching an individual speak in a public forum tends to attribute the speech to the speaker, one observing "an unattended display (and any message it conveys)" tends to attribute the display "to the owner of the land on which it stands."<sup>99</sup> Thus, when the State maintains the Klan's cross in front of the statehouse, the Court should consider "the power of a symbol standing alone and unexplained" in determining whether that unattended display conveys "a forbidden message of endorsement."<sup>100</sup>

In his dissent, Justice Stevens also emphasized that an unattended display's location is a significant cue in determining its source. Demonstrations and parades on public property, for example, usually remain easily identifiable as expressing the views of nongovernmental speakers.<sup>101</sup> On the other hand, an observer viewing an "unattended, immovable structure" on the lawn of the capitol building would likely identify the State as the messenger.<sup>102</sup> Justice Stevens contrasts "the image of the cross standing alone and unattended" with "the image the observer would take away were a hooded Klansman holding, or standing next to, the very same cross."<sup>103</sup>

As another example of the strength of a message's location as a cue to its source – and thus to its power and meaning – consider the Court's discussion in *City of Ladue v. Gilleo*.<sup>104</sup> There the Court upheld a free speech challenge to a city ban on homeowners' posting of signs, observing that the city had completely foreclosed a means of signaling a communication's source that is not only common, but also important and distinctive. For example, displaying a sign from one's home conveys a different message than displaying the same sign somewhere else or by some other means.<sup>105</sup> To use Justice Stevens' example, a "Peace in the Gulf" sign displayed on the front lawn of a retired general or decorated war veteran will likely invoke a different reaction than the

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dissenting) ("[T]he location of a stationary, unattended sign generally is both a component of its message and an implicit endorsement of that message by the party with the power to decide whether it may be conveyed from that location."); *id.* at 817-18 (Ginsburg, J., dissenting) ("Near the stationary cross were the government's flags and the government's statues. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.").

<sup>98</sup> *Id.* at 786 (Souter, J., concurring).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 802 (Stevens, J., dissenting).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 512 U.S. 43 (1994).

<sup>105</sup> *Id.* at 56.



same sign in a young child's bedroom window or as a bumper sticker on a passing car.<sup>106</sup>

For similar reasons, the expressive choices reflected in a facility's name – e.g., the Ronald Reagan National Airport or the Robert F. Kennedy Department of Justice Building – often expressly signal their governmental origin because of their intimate connection with government property.<sup>107</sup> Similarly, expressive decorations on government buildings also effectively signal their governmental source because onlookers generally understand a message to spring from the owner of the property on which it appears. For this reason, a state's expressive choice to display the United States, Confederate, or some other flag on its property remains transparently governmental as a functional matter,<sup>108</sup> as does a mayor's decision to display in City Hall only patriotic art for the city's Fourth of July celebration, or art advocating racial equality for its observance of Black History Month.<sup>109</sup>

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<sup>106</sup> *Id.* at 54-57.

<sup>107</sup> Recall, however, that a public entity remains free to decline to claim a building's naming as its own expression and instead to sell or otherwise cede that power to private parties, thus disavowing formal authorship and abandoning any regulation inconsistent with traditional First Amendment doctrine. See *supra* notes 71-72 and accompanying text. This practice, of course, may trigger concerns outside the First Amendment. See Bartow, *supra* note 35, at 929 ("Naming practices are important because the names of public amenities communicate information about a community and its heritage.").

<sup>108</sup> See, e.g., *Griffin v. Dep't of Veteran Affairs*, 274 F.3d 818, 818 (4th Cir. 2001) (upholding the federal government's refusal to fly a confederate flag over a Civil War cemetery), *cert. denied*, 537 U.S. 947 (2002); *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990) (upholding a state's decision to fly a confederate flag from its capitol dome).

<sup>109</sup> See, e.g., *People for the Ethical Treatment of Animals, Inc. v. Gitten*, 414 F.3d 23, 25-29 (D.C. Cir. 2005) ("If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee."); *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988). But note that, while the government's decision to buy certain art for display on its own property constitutes its own expressive choice that can satisfy the tests for formal and functional governmental origin, sometimes the government funds art or other expression not to claim that speech as its own, but instead to encourage private expression. In *National Endowment for the Arts v. Finley*, for example, the Court rejected a facial First Amendment challenge to Congress's instructions that, in awarding NEA funding for the arts, "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 524 U.S. 569, 572 (1998) (quoting 20 U.S.C. § 954(d)(1) (2000)). Without characterizing the funding program either as government speech or as some type of forum for private expression, the Court concluded that the statute imposed no categorical restraint on speech and found no evidence that it would be applied to suppress speech on the basis of viewpoint. *Id.* at 585. The Court has, however, noted that content-based distinctions may be unavoidable in certain arts-related contexts, e.g., where the government makes aesthetic judgments when selecting projects to fund, *id.* at 585-86, or when a public library makes collection decisions, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003).

Like other speakers, the government may use its property for its own expressive purposes and, indeed, such choices provide valuable information to the electorate about its government's values. Such speech serves First Amendment interests in facilitating self-governance when delivered in a way that clearly exposes its governmental origins both formally and functionally, thus maximizing prospects for meaningful accountability.<sup>110</sup>

b. *Past Practice as a Cue to a Message's Source*

Onlookers' expectations based on their understanding of past practice may also reveal – or sometimes obscure – a message's source. For example, Justices O'Connor and Stevens agreed in *Capitol Square* that onlookers might reasonably conclude that an unattended display expresses the views of the property owner on which the display appears.<sup>111</sup> They differed vigorously, however, over whether a reasonable onlooker should be presumed to be aware of the particular property's history as a forum for the open exchange of ideas, as opposed to a vehicle for ventilating the (government) property owner's own views. Justice O'Connor emphasized:

[O]ur hypothetical observer also should know the general history of the place in which the cross is displayed. Indeed, the fact that Capitol Square

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<sup>110</sup> But while a message's location might help establish its source as a functional matter – i.e., in at least some contexts, onlookers may understand a display as reflecting the government's views because of its location on government property – to satisfy my proposed definition of government speech, the government must also establish the message's source as a formal matter by claiming the expression as its own at the time of its creation. This requirement not only maximizes opportunities for political accountability, but also checks the opportunistic invocation of the government speech defense to excuse regulation of what is really private speech on government property. Consider, for example, *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003). There, the Ninth Circuit evaluated a First Amendment challenge to the State's decision to allow private individuals to post American flags, but not anti-war banners, on highway overpasses. The court rightly, in my view, rejected the state's government speech defense: "Here, the government neither hung the flag itself nor delegated that authority nor funded the project – private citizens spontaneously expressed their message of patriotism by hanging their flags." *Id.* at 1224. By simply allowing some spontaneous private displays while removing others from its property, the state failed the requirement of formal transparency, thus squelching opportunities for accountability at the initial decision-making stage, and inviting suspicions of after-the-fact censorship.

On the other hand, the state may freely exercise its own expressive interest in hanging its own flags or other displays from its overpasses or other property, so long as it makes clear that the expression is governmental in origin. In short, while it may not pick and choose among private speakers communicating a variety of messages on government property, the government may deliver its own message or even enlist third parties to deliver that message. See *infra* notes 207-09 and accompanying text. This distinction, while sometimes subtle, remains important because it recognizes the value of both government and private speech.

<sup>111</sup> See *supra* note 97 and accompanying text.

is a public park that has been used over time by private speakers of various types is as much a part of the display's context as its proximity to the Ohio Statehouse.<sup>112</sup>

In contrast, Justice Stevens maintained that many reasonable observers lack such knowledge: "Instead of protecting only the 'ideal' observer, then, I would extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement."<sup>113</sup>

While history, custom, and past practice provide cues to a message's source, this debate demonstrates that their effects can be challenging to assess. Some onlookers may understand that a display springs from a certain source given their awareness of specific traditions, but the extent and accuracy of that knowledge can vary dramatically from individual to individual. These difficulties in anticipating the reactions of a reasonable onlooker underscore the benefits of express cues in determining an expression's origin. Indeed, in *Capitol Square*, all of the Justices except Justice Stevens agreed that express notices or disclaimers could most directly clarify the display's source as private or governmental.<sup>114</sup>

### 3. Lessons from Trademark Law

Trademark law also provides a helpful parallel because it tracks similar concerns about the dangers of message misattribution.<sup>115</sup> Trademarks are features "used in trade, in conjunction with specific goods or services, to

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<sup>112</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring).

<sup>113</sup> *Id.* at 800 n.5 (Stevens, J., dissenting), stating:

The ideal human Justice O'Connor describes knows and understands much more than meets the eye. Her "reasonable person" comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some "ideal" standard.

<sup>114</sup> See *id.* at 769 n.4 (plurality opinion); *id.* at 776 (O'Connor, J., concurring) ("[A] disclaimer helps remove doubt about state approval of respondents' religious message."); *id.* at 784 (Souter, J., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); *id.* at 817 (Ginsburg, J., dissenting) (emphasizing the lack of display informing "the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message"). In contrast, Justice Stevens argued that a message's location may trump even express signals as a source cue. See *id.* at 806 (Stevens, J., dissenting) ("Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself.").

<sup>115</sup> See *supra* Part I.

indicate the source of goods or services and distinguish them from the commercial offerings of competitors.”<sup>116</sup> Trademark infringement actions thus seek to prevent one party from capitalizing on the additional persuasive effects of having its product’s source misattributed to another, potentially more credible, party. Trademark law seeks to prevent consumer confusion, which has the potential to disadvantage both purchasers and providers of goods and services.<sup>117</sup> Confusing or deceptive trademarks may trick buyers into purchasing goods and services they did not intend to purchase,<sup>118</sup> while the providers of goods and services lose sales when consumers are confused and deceived.<sup>119</sup>

Trademark infringement turns on whether the defendant’s use of its mark is “likely to cause confusion, or to cause mistake, or to deceive.”<sup>120</sup> To assess the likelihood that onlookers will confuse competing trademarks, and thus the source of a particular product, courts examine a number of factors. These include the similarity of the trademarks, the distinctiveness (or “strength”) of the plaintiff’s trademark, the proximity of the goods (i.e., whether the competitors’ goods are sufficiently similar that consumers would likely encounter both and assume they were produced by the same source),<sup>121</sup> evidence of consumers’ actual confusion,<sup>122</sup> and the alleged infringer’s intent in choosing the contested trademark.<sup>123</sup>

a. *Evidence of Onlookers’ Actual Confusion About a Message’s Source*

Professor Barton Beebe describes this multi-factor test as a heuristic, or shortcut, for assessing likely consumer confusion: “The test itself is essentially a substitute for empirical work.”<sup>124</sup> Ideally, courts would themselves conduct consumer surveys to determine the likelihood that consumers would be

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<sup>116</sup> Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 725 (2004); see also *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942); George Miaoulis & Nancy D’Amato, *Consumer Confusion & Trademark Infringement*, 42 J. MARKETING 48, 48 (1978).

<sup>117</sup> Bartow, *supra* note 116, at 744; see also Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005).

<sup>118</sup> Bartow, *supra* note 116, at 744.

<sup>119</sup> *Id.*

<sup>120</sup> 15 U.S.C. § 1114(1)(a) (2000).

<sup>121</sup> Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1631 (2006) (“The purpose of the proximity factor is to consider whether the parties’ goods are similar enough that a customer would assume they were offered by the same source . . .” (quotations and citations omitted)).

<sup>122</sup> Michael H. Bierman & Jeffrey D. Wexler, *Toward a Reformulation of the Test for Determining Trademark Infringement*, 80 TRADEMARK REP. 1, 12-13 (1990).

<sup>123</sup> Beebe, *supra* note 121 at 1589-90. In addition to these five “core” factors, courts often also “consider a wide variety of additional factors.” *Id.* at 1590.

<sup>124</sup> *Id.* at 1645.

confused by the defendant's trademark.<sup>125</sup> "But because a court lacks the time, resources, and capacity to do so, it must instead consider a variety of factors designed to help it estimate the results of that ideal survey."<sup>126</sup>

Professor Beebe goes on to note the value of such tests "in broadly political inquiries such as those found in constitutional law."<sup>127</sup> Thus, although this multi-factor test is not without its critics,<sup>128</sup> it too sheds some light on how, in another context, courts assess the public's functional understanding of a message's source.<sup>129</sup>

For example, survey evidence that assesses a respondent's characterization of a message's source, as well as actual evidence of onlooker confusion – e.g., direct evidence through witness testimony that they were fooled into misattributing a message's source<sup>130</sup> – might be useful in government speech cases. Indeed, Professors Shari Seidman Diamond and Andrew Koppelman propose the use of such survey and testimonial evidence in Establishment Clause claims to determine the related question of whether onlookers would understand government to be endorsing religion.<sup>131</sup>

Such evidence, however, has significant limitations. It invites the vexing question of what number or percentage of onlookers need to identify a message's source as governmental to establish the speech as governmental in origin as a functional matter. Because the purpose of this inquiry is to enable political accountability, the number should be large enough to make the prospect of such accountability meaningful. But how many is that? Fixing the number with any principled specificity poses substantial challenges.

b. *Evidence of a Speaker's Intent to Confuse Onlookers About a Message's Source*

A speaker's intent also may indicate a message's source as private or governmental. When an alleged infringer selects a trademark she knows to be similar to that of the plaintiff, courts often presume that she not only intends to cause the public to confuse the trademarks, but also that she is likely to

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

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1649.

<sup>128</sup> *See id.* at 1582.

<sup>129</sup> While some of the factors seem to have limited application outside of the trademark realm, others may facilitate our efforts to determine a message's private or governmental source as a functional matter.

<sup>130</sup> *See, e.g.,* Zippo Mfg. Co. v. Rogers Imps., Inc., 216 F. Supp. 670, 685 (S.D.N.Y. 1963). But such direct evidence can be hard to find, either because consumers do not ever realize that they have been misled or because they are reluctant to admit it. *Id.* Professor Beebe, moreover, found that such survey evidence "is in practice of little importance" to courts' decisions. Beebe, *supra* note 121, at 1622.

<sup>131</sup> Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 716 (2001).

succeed in doing so.<sup>132</sup> As Professor Beebe observes: “Courts that follow this approach typically reason that ‘one who intends to confuse is more likely to succeed in doing so’ or that the defendant’s intent ‘is relevant because it demonstrates the junior user’s true opinion as to the dispositive issue, namely, whether confusion is likely.’”<sup>133</sup>

With these lessons in mind, one might ask why the Sons of Confederate Veterans or Planned Parenthood or any other organization seeks a state-sponsored license plate with a particular logo or slogan, when bumper stickers and license plate frames with precisely the same words or symbols are easily obtained.<sup>134</sup> Those parties may intuit what social science confirms: that the perceived source of messages like “The Confederate flag is a symbol of heritage not hate” or “Pro-Choice” may shape their effectiveness. Sidestepping easily accessible communicative alternatives to specialty license plates suggests that these private speakers may believe that the public will understand this particular message to be endorsed by the government, and thus seek the added emphatic value of the government’s imprimatur for their speech.<sup>135</sup> When a private speaker bypasses readily available alternatives for communicating the same view to the same audience, one might infer that she intends to create – and is likely to succeed in creating – the perception that the government endorses her views.

On the other hand, ascertaining speakers’ motivations can be complicated. Indeed, speakers may have multiple objectives when choosing an expressive tool. Those seeking specialty license plates, for example, may also hope to communicate the depth of their commitment, and/or to direct financial support to a particular cause.<sup>136</sup> The limitations of these less direct signals of a message’s origin further underscore the appeal of express source cues.

#### 4. Other Possible Source Cues: Lessons from Lower Courts’ Government Speech Decisions

When determining expression to be private or governmental, judges skeptical of government speech claims have considered the number of messages in a specific communications context, as well as private speakers’ input into a message’s development.<sup>137</sup> These potential source cues, however,

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<sup>132</sup> Beebe, *supra* note 121, at 1626; Bierman & Wexler, *supra* note 122, at 14.

<sup>133</sup> Beebe, *supra* note 121, at 1628.

<sup>134</sup> See *Martin v. Vt. Agency of Transp. Dep’t of Motor Vehicles*, 819 A.2d 742, 757 n.7 (Vt. 2003) (Johnson, J., dissenting); *Katz v. Dep’t of Motor Vehicles*, 108 Cal. Rptr. 425, 426 (Cal. Ct. App. 1973).

<sup>135</sup> See, e.g., *Higgins v. Driver & Motor Vehicle Serv. Branch*, 13 P.3d 531, 541 n.4 (Or. Ct. App. 2000) (Wollheim, J., concurring).

<sup>136</sup> See Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424-25 (2001).

<sup>137</sup> In contrast, those courts that characterized contested expression as government speech either required no showing of functional transparency at all, relying only on what I have

offer only incomplete signals of a message's genesis, again highlighting the limitations of less direct indications and further emphasizing the value of express source cues.

a. *Multiple Messages as Obscuring a Single Governmental Source*

Some courts contend that the presence of a variety of messages within a particular setting undermines the conclusion, as a functional matter, that the government could be the author of them all. The Fourth Circuit, for example, found that the diverse array of slogans displayed on South Carolina specialty license plates obscured the State as the messages' source: "The array of choices makes the license plate forum appear increasingly like a forum for private speech. As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished."<sup>138</sup>

But governments, like other speakers, may have a great deal to say on a large number of issues, and thus may transparently choose to express a whole host of views, especially when accompanied by an express cue like the state's name prominently displayed on a license plate. As the Sixth Circuit emphasized, a state might plausibly choose to use its specialty plate program to convey a multitude of diverse messages so long as it does not "blatantly contradict itself in the messages it sends by approving such plates."<sup>139</sup>

The government can still be held accountable for a large number and/or variety of messages so long as they include express cues or otherwise strongly signal their governmental source. Indeed, the government's choice to promote a range of messages reveals valuable information about its priorities. The Postal Service's 2007 slate of commemorative U.S. stamps, for example, celebrates desegregation and the importance of jury duty, along with Mickey Mouse, Ella Fitzgerald, Henry Wadsworth Longfellow, and vintage mahogany speedboats.<sup>140</sup> The government clearly remains the author of these multiple messages as both a formal and functional matter, as the Postal Service made clear its intent to speak for itself in choosing who or what to feature on postage

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called formal transparency, *see* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), discussed in more detail *infra* notes 145, 212-216 and accompanying text; *Rust v. Sullivan*, 500 U.S. 173 (1991), discussed *infra* notes 202-11 and accompanying text, or have relied primarily on more express cues, *see* *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 251 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of rehearing en banc).

<sup>138</sup> *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 798-99 (4th Cir. 2004); *see also* *ACLU v. Bredesen*, 441 F.3d 370, 382, 383 n.6 (6th Cir. 2006) (Martin, J., dissenting), *cert. denied sub nom.*, *Hill v. Dixon*, 548 U.S. 906 (2006).

<sup>139</sup> *Bredesen*, 441 F.3d at 376.

<sup>140</sup> *A Peek at the 2007 Commemorative Stamps*, WASH. POST, Nov. 28, 2006, at A17.

stamps,<sup>141</sup> and the express cue “USA” on the stamps signals their source to onlookers.

b. *Private Parties’ Input as Obscuring a Message’s Governmental Source*

Other courts skeptical of government speech claims assert that private speakers’ input into a message’s development signals its nongovernmental source. Again pointing to specialty license plate programs, they maintain that the government’s invitation to the public to submit proposed content converts that setting to one reflecting private expression.<sup>142</sup>

But expression may remain transparently governmental in source even when the government has invited public participation into its development. Indeed, speakers often rely on suggestions from others when forming their own views, and the decision to encourage and select from a variety of inputs can be an expressive choice of its own – and one that provides valuable information to the electorate.<sup>143</sup> For example, the United States Postal Service’s Citizens’ Stamp Advisory Committee invites contributions from the public as to who or what might be honored with a postage stamp, but the Postal Service expressly maintains control over the ultimate decision.<sup>144</sup> The government’s expressive decision to honor Dr. Martin Luther King, Jr. with a commemorative stamp based in part on the public’s urging does not deprive that decision of its governmental source, nor should it compel the government to comply with requests to issue a stamp honoring George Wallace or David Duke. So long as the government makes clear that it simply solicits input into what it intends to claim and control as its own speech – thus encouraging public participation but preserving political accountability as the remedy for those displeased with its choices – that solicitation should not strip the expression of its governmental character.<sup>145</sup>

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<sup>141</sup> U.S. Postal Service, Citizens’ Stamp Advisory Committee, <http://www.usps.com/communications/organization/csac.htm> (last visited Mar. 29, 2008) (“While the Postal Service relies heavily upon the Citizens’ Stamp Advisory Committee for its advice, it has the exclusive and final authority to determine both subject matter and designs for U.S. postal stamps and postal stationery.”).

<sup>142</sup> See, e.g., *Bredesen*, 441 F.3d at 384 (Martin, J., dissenting).

<sup>143</sup> See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (observing that broadcasters by their very nature tend to “facilitate the expression of some viewpoints instead of others”); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569-70 (1995).

<sup>144</sup> See U.S. Postal Service, *supra* note 141; *A Peek at the 2007 Commemorative Stamps*, *supra* note 140.

<sup>145</sup> See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005); *infra* notes 212-16 and accompanying text. In *Johanns*, the Court characterized as government speech a beef promotion campaign established by Congress and developed by the Secretary of Agriculture to advance the image and desirability of beef and beef products. *Johanns*, 544 U.S. at 561. Congress and the Secretary provided the overarching message, but left development of the



Indeed, the government's reliance on the contributions of private speakers to bolster its message is both commonplace and valuable. Like many other speakers, governments often draw upon credible third-party sources to illustrate, bolster, and explain their positions. Consider, for example, a governor who approvingly quotes the American Lung Association but not a tobacco company in an op-ed supporting smoking bans in public places. Because the governor's deliberate expressive choice remains transparently governmental as both a formal and functional matter, it provides citizens with valuable information about her priorities and enables them to hold her accountable for those positions.

The school bulletin board at issue in *Downs v. Los Angeles Unified School District*<sup>146</sup> further illustrates this point. After the school district authorized celebration of Gay and Lesbian Awareness Month, a school established a bulletin board inviting faculty and staff submissions to promote the event.<sup>147</sup> The Ninth Circuit rejected a First Amendment challenge by a teacher who sought to post materials questioning the morality of homosexuality.<sup>148</sup> Concluding that the bulletin board's contents continued to reflect the district's own expression even when it invited individuals to join and contribute to it, the court held that the district could not be compelled to allow others to distort its position.<sup>149</sup>

In sum, courts have considered a wide range of possible cues to a message's source. These include not only express indications of a message's origin, but also less direct signals like a message's physical location or onlookers' expectations based on past practice. Express cues most clearly signal a message's source, and a government seeking to claim speech as its own should rely on such cues whenever possible. As we have seen, indirect cues vary in their effectiveness in signaling a message's governmental origins, and thus also

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remaining details to an entity with members answerable to the Secretary, some of whom were also appointed by him. *Id.* The fact that private speakers contributed to the expression – the advertising copy and promotional materials were designed by the nongovernmental Beef Board Operating Committee, only half of whose members were appointed by the Secretary – did not trouble the Court, because the government retained control over the ultimate message. *Id.* In this manner, the government established what I call formal authorship – it claimed the expression as its own when it created the program. *See supra* notes 66-67 and accompanying text. But while the public's input did not strip the speech of its governmental character, the promotions at issue in *Johanns* were not governmental as a functional matter because onlookers there had little chance of identifying the expression's actual source at the time of its delivery. Thus I quarrel with the Court's ultimate characterization of the promotions as government speech that should remain free from First Amendment scrutiny. *See infra* notes 212-16 and accompanying text.

<sup>146</sup> 228 F.3d 1003 (9th Cir. 2000).

<sup>147</sup> *Id.* at 1005-06.

<sup>148</sup> *Id.* at 1013.

<sup>149</sup> *See id.*

in their capacity to further meaningful credibility assessment and political accountability.

### III. APPLYING THEORY TO PRACTICE: SOME RECURRING CHALLENGES

The next Part examines the application of this approach to a range of factual settings. By exploring in some detail the specific features that obscure or reveal a message's origins as private or governmental, I hope to illustrate more concretely the demands of formal and functional analysis, as well as this framework's prospects for providing a principled approach to resolving government speech disputes.

#### A. *Joint Governmental and Private Speech: Specialty License Plates*

Classifying specialty license plates as either governmental or private speech raises additional challenges. Because states' specialty license plate programs "allow individual drivers to choose to buy a plate that advertises a particular organization's name, logo, or motto,"<sup>150</sup> they invite quarrels over whether the plates reflect the views of the government, the car owners, or both. Formal and functional analysis may be especially helpful in this context.

A number of these programs, which vary significantly in design from state to state,<sup>151</sup> do not appear to satisfy the test for formal transparency. Often a state legislature simply empowers an administrative agency to approve public requests to create specific plate content without making any claim of government authorship.<sup>152</sup> Just as the government may decide to sell naming rights to its property,<sup>153</sup> so too can the government abandon any claims that it "owns" license plates' expressive content.<sup>154</sup> Vanity (as opposed to specialty) license plate programs similarly reflect this sort of approach, with the government allowing individuals to select the identifying letters and numbers that appear on a plate for their own expressive purposes. In vanity plate programs, the government essentially sells space to private parties, with traditional First Amendment analysis constraining regulation of the plates' private expression.<sup>155</sup> The federal government has similarly created a "vanity stamp program," which allows private users to create content for metered

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<sup>150</sup> Jacobs, *supra* note 136, at 421.

<sup>151</sup> See *id.* at 426-27.

<sup>152</sup> See, e.g., *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1100 (D. Md. 1997); *Ariz. Life Coal., Inc. v. Stanton*, No. 05-16971, 2008 WL 217012, at \*1 (9th Cir. Jan. 28, 2008).

<sup>153</sup> See *supra* note 72 and accompanying text.

<sup>154</sup> See, e.g., *Glendening*, 954 F. Supp. at 1103.

<sup>155</sup> See, e.g., *Perry v. McDonald*, 280 F.3d 159, 169 (2d Cir. 2001) (characterizing a vanity plate program as a nonpublic forum for private speech); *Pruitt v. Wilder*, 840 F. Supp. 414, 417 & n.2 (E.D. Va. 1994) (assuming, without holding, that specialty plates are a non-public forum). But see *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 534 (Or. Ct. App. 2000) (characterizing vanity plates as the state's own expression).

postage, rather than for official U.S. stamps (which are considered U.S. currency).<sup>156</sup>

Programs like these helpfully contrast the government's available choices. On the one hand, as is the case with vanity stamp and vanity license plate programs, the government can disavow formal authorship of a particular means of communication, opening up the program as a type of forum for private speech, with any regulation consistent with First Amendment limitations.<sup>157</sup> On the other hand, the government may expressly maintain its intent to claim ownership of and control over the expression even while soliciting public input, as the federal government does with U.S. Stamps and as some states do with their specialty license plate programs.

In recent years, a number of states have emphasized their intent to use specialty license plates (as opposed to vanity plates) to reflect their own expressive choices, thus formally establishing the plates' content as governmental in origin. Indeed, governments often use license plates to transmit governmental messages – like the District of Columbia's "Taxation Without Representation"<sup>158</sup> or New Hampshire's "Live Free or Die" plates.<sup>159</sup> States increasingly argue that specialty plates simply expand the number of mottos or slogans endorsed by the state and, indeed, many use the programs to direct additional revenues – the extra fees paid by specialty plate purchasers – to specific state policy priorities. In South Carolina, for example, the state's "Choose Life" license plates were the product of a legislative initiative culminating in the Choose Life Act passed by both houses and signed into law by the governor.<sup>160</sup> The Act sought specifically "to promote the expression of a pro-life viewpoint" with proceeds distributed to local pregnancy crisis organizations throughout the state.<sup>161</sup>

Furthermore, as a functional matter, a license plate's prominent display of the state's name provides an express cue to their governmental source.<sup>162</sup>

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<sup>156</sup> See Annie Gowen, *A Tiny Canvas for Holiday Mirth: Personal Postage Is Giving Letter Traffic a Boost*, WASH. POST, Dec. 23, 2006, at B1.

<sup>157</sup> See *infra* notes 198-201 and accompanying text.

<sup>158</sup> See David Montgomery, *Mayor Signs Order for D.C. Democracy Plates*, WASH. POST, Aug. 17, 2000, at B3.

<sup>159</sup> See *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

<sup>160</sup> *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004); see also *Choose Life Ill., Inc. v. White*, No. 04-C-4316, 2007 WL 178455, at \*4-5 (N.D. Ill. Jan. 10, 2007) (describing Illinois's practice of requiring the state legislature to approve proposed specialty plate messages).

<sup>161</sup> *Rose*, 361 F.3d at 793.

<sup>162</sup> See *supra* notes 80-86 and accompanying text. That the state manufactures and owns the plates further cues their source as governmental. See, e.g., *ACLU v. Bredesen*, 441 F.3d 370, 377 (6th Cir. 2006); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 249-51 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of rehearing en banc).

Indirect cues to the messages' governmental source include the government's manufacture and retained ownership of the plates, as well as the fact that private speakers seek specialty plates rather than readily available bumper stickers or license plate frames – conveying the same message and visible to the same audience – suggesting that those speakers intend, and may be likely to achieve, the public's perception that the government endorses their views.<sup>163</sup>

At least two dynamics, however, may obscure specialty license plates' governmental origin as a functional matter. First, states generally invite multiple private individuals and/or organizations to provide input into specialty plates' substantive content. Second, and more important, the plates – while generally owned by the government – are displayed on drivers' private vehicular property. Here, public input into the message's content, along with the message's location, signal the possibility of joint speech: the government and the car owner both engage in expressive behavior when the government chooses to issue and the owner decides to pay for and display a particular plate. Lower courts have struggled in addressing situations that appear, like these, to involve expression shared by both government and private speakers, with some asserting that the government may never engage in viewpoint discrimination when it speaks jointly with private speakers.<sup>164</sup> The better approach, in my

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The same functional analysis could, of course, apply not only to specialty plates (which involve choices about additional slogans or logos that appear on the license plate) but also to vanity plates (which involve choices about the vehicle-identifying numbers and letters depicted on the license plate). Both appear on a plate manufactured, owned, and issued by the government and include express cues to its governmental origin by clearly identifying the state. But, as discussed above, state governments have generally not claimed vanity plates as their own speech as a formal matter, instead treating them as space for sale, with any regulation subject to the limits of traditional First Amendment forum grounds.

<sup>163</sup> Some might also seek to analogize specialty license plates to transit advertising – a form of private advertising on government property to which traditional First Amendment forum analysis applies – thus prohibiting the government's viewpoint-based (and sometimes content-based) regulation. *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (characterizing bus advertisements as designated public forums); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 81 (D.D.C. 2004) (characterizing bus and subway advertising as nonpublic forums). Indeed, vanity plates fit this description.

But specialty license plates and transit advertising are distinguishable for at least two reasons. First, states increasingly claim the specialty plates – and not transit advertising – as their own speech at the time of the program's creation, thus establishing their formal authorship. Second, unlike advertising, the plates themselves expressly signal a governmental source as a functional matter, with the state's name prominently displayed. Advertisements, in contrast, generally expressly indicate their private source, regardless of their location. Consider advertising by Pepsi, Toyota, or Wal-Mart, as a few examples. *See* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 97 (2006).

<sup>164</sup> *See, e.g., Rose*, 373 F.3d at 795-98. In his concurring opinion, Judge Luttig recognized the possibility of hybrid governmental and private speech, but suggested a

view, values both speakers' interests in expressive integrity and understands joint speech to require the assent of both parties, thus permitting the government to control the content of its own expression but not to compel others to join it.

Indeed, the Supreme Court has long acknowledged, at least implicitly, the government's power to control the character of its own expression together with its inability to force others to join that expression. For example, in *West Virginia State Board of Education v. Barnette*,<sup>165</sup> the Court did not dispute the state's expressive power to decide to start public schools' days with the Pledge of Allegiance.<sup>166</sup> Instead, it held that the First Amendment did not permit the State to force dissenting students to affirm that expression by joining the flag salute.<sup>167</sup> Similarly, in *Wooley v. Maynard*, the Court raised no quarrel with New Hampshire's communicative choice to feature its motto "Live Free or Die" on the State's license plates.<sup>168</sup> The government could not, however, require an objecting private speaker to display this message.<sup>169</sup>

In neither case did the Court find that the First Amendment compelled the government to provide an alternative pledge or state motto: the Court did not permit the dissenting private speaker to force the government to change its message to her liking.<sup>170</sup> Indeed, the government can deliver its speech without forcing dissenters to submit, just as dissenters remain free to express their viewpoints without compelling the government to join them. For this reason, for example, government may choose to print and sell "Support our Troops" bumper stickers or T-shirts, but not those featuring the message "U.S. out of Iraq." Those who agree may buy and display them, while those who disagree can decline and/or create their own counter-messages, but cannot compel the government to print them. Similarly, a governor could invite – but not force – a National Rifle Association spokesperson to join her on the podium at her press conference announcing her opposition to gun control legislation, without any obligation to share her microphone with gun control advocates, who remain free to voice their position elsewhere.

Recognizing that joint speech requires the consent of both parties simultaneously accommodates individuals' autonomy interests and the government's own valuable expressive choices. Political accountability, rather than free speech litigation, remains the appropriate recourse for those unhappy with the government's communicative decisions. States that wish to claim specialty license plates as reflecting their own views – together with the drivers

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balancing test: where private speech is "substantial and the government speech component less than compelling, viewpoint discrimination by the state is prohibited." *Id.* at 800.

<sup>165</sup> 319 U.S. 624 (1943).

<sup>166</sup> *Id.* at 638.

<sup>167</sup> *Id.* at 642.

<sup>168</sup> *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

<sup>169</sup> *Id.*

<sup>170</sup> See Shiffrin, *supra* note 8, at 567.

who choose to buy and display them – should be able to do so, so long as they design the program to ensure formal as well as functional transparency.

B. *Framing Challenges: Government Thanks or Private Advertising?*

Government efforts to avoid acknowledging private parties' monetary contributions or labor present particularly tough government speech questions because of the different ways in which they might be framed. Whether the government can exclude the Klan or any other group from Adopt-a-Highway or similar programs, for example, may turn on how we characterize the program. We might consider the program as a donation to which the government may (or may not) respond with thanks, or instead as a valuable government benefit promising public acknowledgment in exchange for volunteer services. In other words, do highway signs reflect the government's speech – "thank you for keeping our highways clean" – or that of the private group, which may believe that its labor has purchased public recognition of its efforts?<sup>171</sup> Does the private speaker seek to secure the government's perceived endorsement or is it simply trying to buy prominent advertising space?<sup>172</sup> The demands of formal and functional analysis may help us answer these questions.

For instance, almost all states have Adopt-a-Highway programs, which require those who volunteer "to pick up litter along 'their' mile or half-mile stretch of highway. The state provides garbage bags and orange safety vests to the volunteers. Signs are erected bearing the name of the organization that has adopted the highway."<sup>173</sup> Until recently, lower court decisions in these cases rarely addressed the possibility of government speech. The courts relied instead on various forms of forum analysis to characterize states' exclusion of the Klan from acknowledgment on Adopt-a-Highway signs as impermissible viewpoint-based regulation of private speech.<sup>174</sup> To be sure, states were slow

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<sup>171</sup> Even if highway signs do reflect government speech, there remains the interesting question of whether the government's positive acknowledgment of an individual or group could be considered a government benefit triggering unconstitutional conditions analysis. I hope to address that issue in the future.

<sup>172</sup> See Bartow, *supra* note 35, at 930.

<sup>173</sup> Debbie Howlett, *States, KKK Clash over Road Cleanup*, USA TODAY, July 23, 1997, at 3A.

<sup>174</sup> See, e.g., *Knights of the Ku Klux Klan v. Ark. State Highway and Transp. Dep't*, 807 F. Supp. 1427, 1438 (W.D. Ark. 1992) (concluding that the State had impermissibly excluded the Klan from a traditional public forum – highway rights-of-way – on the basis of viewpoint). But see *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) (characterizing the Adopt-a-Highway program as a non-public forum, from which the Klan's exclusion from a specific highway was a reasonable and viewpoint-neutral effort to prevent its efforts to thwart court-ordered desegregation of a nearby housing project through repeated threats and acts of intimidation).

to invoke the government speech defense in these cases, undermining any claims that the expression was governmental in origin as a formal matter.<sup>175</sup>

But even if states were formally to announce their intent to claim the Adopt-a-Highway acknowledgments as their own expression, available cues may provide onlookers with decidedly mixed signals about the message's source as a functional matter. On the one hand, the government's production and ownership of the expressive means (the sign), along with its placement on government property, indicate the possibility of government endorsement. On the other hand, the express text of the signs may or may not identify the state.<sup>176</sup> Indeed, the message's content as well as its source may be contested: the text (in Missouri's case, "Adopt-A-Highway Sponsor: National Knights of the Ku Klux Klan") might be understood as a statement of fact, implying that "The Klan is responsible for cleaning up this stretch of road," or as an indication of the state's approval or opinion (e.g., "The state thanks the Klan for its civic-mindedness in cleaning up this road.").

The government's longstanding role in maintaining highways further complicates this functional inquiry. On the one hand, given that onlookers may view a party performing a traditionally governmental function as a quasi-public actor,<sup>177</sup> the government's willingness to delegate highway upkeep to the Klan or similar groups exacerbates concerns that the public will understand the government to be endorsing those organizations. On the other hand, we might characterize the program simply as the state contracting for private services, with the unconstitutional conditions doctrine constraining the government from discriminating on the basis of viewpoint in dispensing government benefits in the form of contracts.<sup>178</sup>

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<sup>175</sup> See, e.g., *Cuffley v. Mickes*, 208 F.3d 702, 708-12 (8th Cir. 2000); *cert. denied sub nom.*, *Yarnell v. Cuffley*, 532 U.S. 903 (2001).

<sup>176</sup> Brief of Appellants at 16-17, *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004) (No. 03-3547). Sign design and text vary considerably from state to state. See, e.g., Adopt A Highway Maintenance Corporation, <http://www.adoptahighway.com/markets.html> (last visited Mar. 29, 2008). Some signs make no reference to the state at all; some include a graphic outlining the state's shape while others expressly identify the state (e.g., "Keep New Hampshire Clean and Scenic"). Adopt A Highway Maintenance Corporation, New Hampshire, <http://www.adoptahighway.com/markets-nh.html> (last visited Mar. 29, 2008).

<sup>177</sup> See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374 (2003).

<sup>178</sup> Kathleen Sullivan defines the unconstitutional conditions doctrine as requiring that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). Government actions will most likely run afoul of the unconstitutional conditions doctrine when they appear to target behavior unrelated to the government program. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 79-80 (1996) (contrasting the government's refusal to fund abortions with the government's withdrawal of welfare or

Cases like these are especially tough because the available source cues are mixed and ambiguous. In such close cases, the government should bear the burden of establishing the expression's governmental origins both formally and functionally, thus encouraging public entities to maximize prospects for meaningful accountability.<sup>179</sup> Governments seeking to protect the integrity of their own expression should design those communications to enhance, rather than obscure, transparency – ideally, by employing express cues whenever possible. For these reasons, although I believe that states have a significant interest in ensuring that they are not misunderstood as endorsing the Klan or similar organizations, Missouri's Adopt-a-Highway program was not sufficiently governmental in origin to satisfy the functional demands of government speech analysis.<sup>180</sup>

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other benefits unrelated to family planning based on a woman's decision to have an abortion).

Note that the Court's unconstitutional conditions doctrine remains the subject of considerable criticism. See, e.g., Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025, 1070-71 (2002) (criticizing the Supreme Court's unconstitutional conditions analysis as result-oriented, often drawing "inexplicably fine distinctions"); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 102-03 (1998) (characterizing the doctrine of unconstitutional conditions as "decreasingly useful").

<sup>179</sup> Even if the program does not satisfy the test for government speech, *Bob Jones University v. United States* might provide a separate justification in some cases for the government's exclusion of the Klan and other private parties engaging in racial discrimination. 461 U.S. 574, 584-85 (1983). *Bob Jones University* involved the denial of a tax exemption to a religious school that engaged in race discrimination. *Id.* at 579. Even though the denial burdened the school's free exercise of religion, the Court found that the burden satisfied strict scrutiny as necessary to the government's compelling interest in eradicating racial discrimination in education. *Id.* at 604. But Kenneth Karst also identified "the core of an argument the Court did not make in *Bob Jones University*," observing that:

Denying tax exemptions to the University and the segregation academy unquestionably did communicate the government's disapproval of the free exercise claimants' religious views. By the same token, however, granting the exemptions would have its own communicative impact, placing the government's moral support behind Jim Crow education . . . . Neutrality was impossible in this zero-sum contest over group status. Whatever the government might do, its action would have expressive effects that imposed costs on constitutionally protected values – and expressive effects that conferred benefits, too.

Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 370-71 (1994).

Similarly, a state might argue that excluding the Klan or similarly racist groups from its Adopt-a-Highway program satisfies strict scrutiny as necessary to achieving its compelling interest in communicating its commitment to eradicating racial discrimination. That interest, however, may be seen as less compelling outside of the education context.

<sup>180</sup> I took a different position in my earlier essay on this topic, where I concluded that Missouri's signs constituted government speech because of the significant risk that the



But the decision of whether to acknowledge – and, if so, how effusively – is an extremely expressive activity. Thus, the government speech defense should permit the government to maintain control over what it expressly claims as its own thanks, free from First Amendment constraints, so long as it clearly exposes itself, both formally and functionally, as the acknowledgments' source. For example, the government might accept gifts of money or labor from private parties without any promise of acknowledgment, retaining the expressive choice as to whether and how to acknowledge the gift.<sup>181</sup> Examples include not only explicit governmental thanks – e.g., “The State of Missouri thanks ‘X’ for its commitment to keeping our roadsides beautiful,” but also policies in which school districts, with or without public input, name facilities after individuals “who have made some significant ‘contribution’ to the school or community.”<sup>182</sup>

*Wells v. City and County of Denver*<sup>183</sup> provides a helpful illustration of formal as well as functional analysis of governmental acknowledgments of private parties' philanthropic contributions. There, the Tenth Circuit held that Denver could exclude a private speaker who sought to join and alter the government's acknowledgment of private donors. Denver erected an annual holiday display on the steps of the City and County Building that included depictions of a crèche, reindeer, snowmen, Christmas trees, Santa Claus, and elves, along with a large holiday greeting sign. The plaintiff claimed Denver violated the Free Speech Clause by excluding her display (which proposed to challenge what she saw as the city's impermissible endorsement of religious holidays) from what she characterized as a collection of private, rather than governmental, speech.<sup>184</sup> In support of her contention, she pointed to the sign's text as expressly identifying the private sponsors as the speakers: “Happy Holidays from the Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building,” followed by a listing

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public would perceive the signs as conveying the state's endorsement of the Klan. Norton, *supra* note 19, at 1346–47. While that remains a real danger, since that time I have focused in much greater detail on the specific cues that may signal a message's governmental source. I now conclude that the demands of political accountability should require government entities to bear the burden in close cases of establishing authorship of its signs. Missouri's signs – at least as originally designed – fail this requirement as a functional matter, because they did not expressly signal a governmental source and because the available indirect cues sent mixed signals. Missouri's signs also failed the test for formal government authorship because it apparently did not claim the speech as its own at the time it created or revised its Adopt-a-Highway program. See *Robb v. Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004); *Cuffley*, 208 F.3d at 708–12.

<sup>181</sup> See *Thornburg*, *supra* note 72, at 336–37 (“[T]he traditional method of naming collegiate athletic centers is in thanks for the benevolence of university alumni.”).

<sup>182</sup> *Blocher*, *supra* note 72, at 120–21.

<sup>183</sup> 257 F.3d 1132 (10th Cir. 2001).

<sup>184</sup> *Id.* at 1139–42. The Tenth Circuit separately addressed, and rejected, the plaintiff's Establishment Clause claims. *Id.* at 1152–53.

of six corporate sponsors.<sup>185</sup> She sought to post her own sign on the steps with the following message:

At this season of THE WINTER SOLSTICE may reason prevail. There are no gods, no devils, no angels, no heaven or hell. There is only our natural world. THE 'CHRIST CHILD' IS A RELIGIOUS MYTH. THE CITY OF DENVER SHOULD NOT PROMOTE RELIGION. 'I believe in an America where the separation of church and state is absolute.' *John F. Kennedy – 1960 Presidential Campaign*. PRESENTED BY THE FREEDOM FROM RELIGION FOUNDATION.<sup>186</sup>

Denver, for its part, claimed the display as its own speech that celebrated the holiday season and thanked the display's financial sponsors.

The majority and dissent differed greatly in their functional assessment of the message's source. The majority emphasized the city's asserted purpose to thank its sponsors (i.e., its claim of what I call formal authorship), along with the city's ownership, control, and maintenance of the sign, and the display's historical context (indirect cues supporting what I call its functional authorship).<sup>187</sup> In contrast, the dissent carefully examined the display's text and concluded that "the language of the billboard is not phrased as a thank you from Denver to the sponsors. Rather, it is a greeting from the sponsors to the public. To a passerby, the billboard does not appear to be from Denver, but from the sponsors . . . ."<sup>188</sup>

The dissent appropriately emphasized the display's text as an express cue to its source as a functional matter. Indeed, the text should have been significantly clearer in designating the message's governmental source satisfying the government speech defense. But if Denver had expressly identified itself as the source (e.g., "Denver thanks the following sponsors for this display. . . ."), the government speech defense appropriately permits the exclusion of private speakers who seek to alter that governmental expression of thanks.<sup>189</sup>

In another helpful example, *Knights of the Ku Klux Klan v. Curators of the University of Missouri*,<sup>190</sup> the Eighth Circuit considered a First Amendment challenge to a public radio station's rejection of the Klan's proffered financial support that would have required its on-air acknowledgement.<sup>191</sup> The Klan offered to contribute to the university station, and submitted the following underwriting acknowledgment copy to be read on-air by the station's

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<sup>185</sup> *Id.* at 1137, 1140 n.4.

<sup>186</sup> *Id.* at 1137.

<sup>187</sup> *Id.* at 1141.

<sup>188</sup> *Id.* at 1155 (Briscoe, J., dissenting).

<sup>189</sup> See *supra* note 180 and accompanying text.

<sup>190</sup> 203 F.3d 1085 (8th Cir. 2000).

<sup>191</sup> *Id.* at 1087. The Klan sought to underwrite National Public Radio's "All Things Considered" because its local leader "enjoyed the program, wanted to support KWMU, and hoped to attract more highly educated people to his organization." *Id.* at 1089.

broadcasters: “The Knights of the Ku Klux Klan, a White Christian organization, standing up for the rights and values of White Christian America since 1865. For more information please contact . . . .”<sup>192</sup>

The panel rejected the Klan’s First Amendment claim, holding that underwriting acknowledgments constituted the university broadcaster’s own expression, with the university free to control its content.<sup>193</sup> In reaching this conclusion, the court emphasized that because station employees would actually utter the acknowledgment copy themselves, government employees’ role as the actual speakers of this message served as an important cue identifying the government as its source.<sup>194</sup> The opinion further noted that the acknowledgments’ central purpose was “not to promote the views of the donors, but to acknowledge” – i.e., to thank – donors.<sup>195</sup>

To be sure, a public entity that retains the choice of whether and how to express thanks may undermine its attractiveness to potential donors who cannot be assured of public acknowledgment. The government may, of course, encourage private participation by selling advertising space on its property in exchange for labor or financial support. For example, the government might promise recognition on a commemorative brick or sell naming rights to a classroom in exchange for a donation of a certain amount.<sup>196</sup> But any government regulation of what then must be private expression – because the government has declined to claim it as its own – of course falls under the constraints of traditional First Amendment analysis, including its prohibition on viewpoint-based regulation.<sup>197</sup> As an example, consider the program at

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<sup>192</sup> *Id.* at 1089.

<sup>193</sup> *Id.* at 1096.

<sup>194</sup> The court also emphasized the station’s institutional status as a communications enterprise engaging in expressive editorial choices. *Id.* at 1093. Leslie Gielow Jacobs, for example, justifies public broadcasters’ selection among potential sponsors as an expressive editorial decision, supported both by the program’s structure and by the broadcasters’ engagement in programming decisions. Jacobs, *supra* note 54, at 104-05.

<sup>195</sup> *Knights of the Ku Klux Klan*, 203 F.3d at 1093.

<sup>196</sup> See, e.g., Susan Kinzie, *Exacting Donors Reshape College Giving*, WASH. POST, Sept. 4, 2007, at A1 (“The new philanthropy is more like an investment than a gift . . . . It’s a business transaction in a way it wasn’t even a few years ago.” (quoting Trinity University president Patricia McBride)).

<sup>197</sup> See Karlyn Barker, *Ad Rules Don’t Apply for NFL Bash*, WASH. POST, Sept. 4, 2003, at B1 (distinguishing advertising from “sponsor recognition”); Blocher, *supra* note 72, at 109 (noting that purchasers of school naming rights “usually describe the arrangements as ‘contributions’ motivated by a sense of community obligation and charity,” while “[c]ritics counter that the deals are nothing more than paid advertising”). The government might avoid the choice altogether and abandon the program entirely. A Maryland county, for example, dropped its Adopt-a-Highway program after the Klan requested to participate. Tom Belton, *Klan Bid To Join Adopt-a-Road Leads to Closing*, BALT. SUN, Mar. 6, 1999, at 1A.

issue in *Demmon v. Loudon County Public Schools*,<sup>198</sup> where a school raised funds by selling personalized commemorative stones to donors.<sup>199</sup> The court concluded that although “the school did not intend to create a public message board to unbridled expression, the school not only allowed, but also encouraged, brick purchasers to express their feelings about their favorite student or faculty members.”<sup>200</sup> Appropriately, the school did not claim the program as its own speech because it had clearly offered an expressive opportunity for sale. For this reason, the school’s exclusion of the private speaker’s religious references was appropriately evaluated under traditional First Amendment forum doctrine.<sup>201</sup> While these distinctions may sometimes seem subtle, there should remain a meaningful difference between a government speaker’s choice of whether and how to express thanks, and a government’s decision to engage in the commercial transaction of selling advertising space on its property. Again, in close cases, a government seeking to claim the government speech defense to protect its control over its own thanks should bear the burden of expressly signaling its authorship, both formally and functionally.

C. *Failing Functional Analysis: Unidentified Government Agents and Unattributed Government Advertising*

Recognizing that government speech is most valuable and least dangerous when its source is apparent illuminates how the Supreme Court has sometimes stumbled by failing to require both the government’s functional and formal authorship of a particular message in order to establish the government speech defense.

Consider, for example, *Rust v. Sullivan*,<sup>202</sup> where the Court rejected a First Amendment challenge to federal regulations that barred recipients of Title X federal family planning funding from engaging in abortion counseling, referral, or other activities advocating abortion.<sup>203</sup> Employees of clinics receiving Title X funding were “expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that ‘the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.’”<sup>204</sup> There, the Court concluded that the government’s decision to

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<sup>198</sup> 342 F. Supp. 2d 474 (E.D. Va. 2004).

<sup>199</sup> *Id.* at 476-77; *see also* *Kiesinger v. Mexico Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 184-86 (N.D.N.Y. 2006).

<sup>200</sup> *Demmon*, 342 F. Supp. 2d. at 482-83.

<sup>201</sup> *Id.* at 482.

<sup>202</sup> 500 U.S. 173 (1991).

<sup>203</sup> *Id.* at 177.

<sup>204</sup> *Id.* at 180 (quoting 42 C.F.R. § 59.8(b)(5) (1989)). The regulations did not require that the government be identified as the message’s source, although the majority observed

pay others to deliver its chosen message did not strip that message of its governmental character:

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, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established its National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.<sup>205</sup>

Although couched at the time as an unconstitutional conditions case,<sup>206</sup> the Court later described *Rust* as a government speech decision, where government simply paid others to deliver its own views.<sup>207</sup>

The Court's decisions dealing with public employees' First Amendment challenges similarly support the proposition that the government's decision to hire agents or employees to deliver its chosen views does not attenuate those messages' governmental source. In *Garcetti v. Ceballos*, for example, the Court rejected a prosecutor's First Amendment challenge to his discharge for recommending dismissal of a case based on police misconduct, holding that the government remains free to "exercise . . . employer control over what the employer itself has commissioned or created."<sup>208</sup> The Court has thus distinguished speech that the government has paid its employees or agents to deliver – and thus remains free to control – from speech delivered by those individuals in their private capacities.<sup>209</sup>

In *Rust*, however, doctors, nurses, and other clinic employees delivered the contested counseling and referral speech without any requirement that its governmental origins be disclosed.<sup>210</sup> Under these circumstances, patients might well misunderstand clinic employees to be offering their own independent counsel, rather than speaking as agents required to espouse the government's view that abortion is not a method of family planning to be discussed.<sup>211</sup> Because health professionals may be seen as more credible than

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that "[n]othing in [the Title X regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200.

<sup>205</sup> *Id.* at 194.

<sup>206</sup> *Id.* at 198-99.

<sup>207</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

<sup>208</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

<sup>209</sup> *See id.* As I plan to develop more fully in another article, however, I believe that the *Garcetti* Court was too quick to attribute employees' on-duty speech to the government, overstating government's expressive interests while undermining the public interest in transparently governmental speech.

<sup>210</sup> *Rust*, 500 U.S. at 180.

<sup>211</sup> *See, e.g.,* Randall P. Bezanson & William G. Buss, *The Many Faces of Government*

the government in this setting based on public perception of their expertise and objectivity, patients may have been misled into evaluating the counseling differently than they would have if the speakers had made clear its governmental source. Expressly signaling the message's governmental origins, in contrast, would have permitted listeners to evaluate its quality more accurately, as well as to engage in political accountability measures if they thought it appropriate to do so. *Rust* thus illustrates the danger of treating expression that fails to satisfy the demands of functional transparency as government speech free from First Amendment scrutiny.

*Johanns v. Livestock Marketing Ass'n*<sup>212</sup> offers a more recent example of the Court's failure to insist on functional transparency as a requirement of government speech.<sup>213</sup> In *Johanns*, the Court considered a First Amendment challenge to a generic beef promotion campaign the government claimed as its own. The ads bore only the attribution, "Funded by America's Beef Producers" – an express cue signaling a nongovernmental source. A number of beef producers objected to the government's requirement that they fund the program because they felt the campaign undermined their efforts to promote their own specialty beef products.

The entire Court agreed that private speakers *can* be compelled to pay for government speech with which they disagree, emphasizing that an effective government requires taxpayers to fund government speech with which they quarrel.<sup>214</sup> But the *Johanns* majority characterized the campaign as government speech based simply on the government's formal authorization and control of the message at the time of its creation:

[T]he beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.<sup>215</sup>

But more *should* be required to ensure that political accountability provides a meaningful check on the government's expressive choices: to constitute government speech, the public must also understand the speech as governmental in source at the time of its delivery. As Justice Souter

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*Speech*, 86 IOWA L. REV. 1377, 1394-96 (2001) (arguing that patients could mistakenly attribute the government's views to their doctors); Post, *supra* note 18, at 172-75 (same).

<sup>212</sup> 544 U.S. 550 (2005).

<sup>213</sup> *Id.* at 550.

<sup>214</sup> See *id.* at 574 (Souter, J., dissenting).

<sup>215</sup> *Id.* at 563-64.

maintained in his dissent, meaningful political accountability is unavailable if, as in *Johanns*, government officials “are allowed to use their control (and in fact are deliberately using it) to conceal their role in creating the message from voters with the power to hold them accountable.”<sup>216</sup>

As in *Rust*, the speech at issue in *Johanns* was not governmental in source as a functional matter. Thus the Court should have rejected the government’s efforts to characterize the expression as government speech subject to meaningful political accountability checks.<sup>217</sup>

Express cues signaling the governmental source of the ad campaign could easily solve this problem. Contrast, for example, the facts in *R.J. Reynolds Tobacco Co. v. Shewry*, where tobacco companies brought an unsuccessful First Amendment challenge to California’s surtax on cigarettes that paid for a public health campaign criticizing the tobacco industry.<sup>218</sup> There the advertisements bore the transparently governmental tagline: “Sponsored by the California Department of Health Services.”<sup>219</sup> Exposing the message’s governmental source permitted onlookers to assess its quality more accurately as well as to take any desired political accountability measures.

Some might wonder whether this focus on political accountability rests on too optimistic a view of the citizenry’s willingness to hold government responsible for its choices, pointing to evidence of the public’s political disengagement, apathy, and distraction.<sup>220</sup> But the alternative – relying on courts to perform this function through First Amendment litigation – poses even greater problems. The Court in *Rust* and *Johanns*, for example, demanded so little that neither political accountability *nor* First Amendment litigation provided any meaningful check on the government’s action.

#### CONCLUSION

Because the government’s expression is most valuable and least dangerous when its governmental origin is apparent, I have proposed that the government

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<sup>216</sup> *Id.* at 578-79.

<sup>217</sup> Not only should the lack of functional transparency defeat the government’s assertion of the government speech defense to First Amendment challenges, but, in some circumstances, the government’s failure to disclose its role in authoring promotional materials may violate statutory anti-propaganda prohibitions. *See, e.g.*, Letter from General Accounting Office to Senators Frank R. Lautenberg and Edward M. Kennedy (Sept. 30, 2005) (concluding that the Department of Education’s contract with columnist Armstrong Williams to produce op-eds supporting the Administration’s “No Child Left Behind” initiative, without assuring that the Department’s role was disclosed to the target audience, violated statutory prohibition on use of appropriations for “publicity or propaganda”).

<sup>218</sup> 384 F.3d 1126 (9th Cir. 2004).

<sup>219</sup> *Id.* at 1130.

<sup>220</sup> *See Fenster, supra* note 64, at 928; Domi Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 911-14 (2005).

speech defense should be available only when the government establishes itself as the source of the contested speech both formally and functionally – i.e., where the government claims the speech as its own when it authorizes the expression, and where onlookers understand that expression to be the government's at the time of its delivery. This dual requirement maximizes prospects for meaningful credibility assessment and political accountability by identifying two junctures at which the government must expose its expressive choices to the public: when it decides to express a certain idea and when it actually communicates that idea. While I do not pretend that this framework will generate easy answers to all government speech disputes, my hope is that it will force us to ask and focus on answering the right question: whether we have enough information about the source of the speech to identify it as the government's in a way that enables the public to evaluate the message's credibility more accurately and to hold the government politically responsible for its choices.