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When Leviathan Speaks: Reining in the Government-Speech Doctrine Through A New and Restrictive Approach

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When Leviathan Speaks: Reining in the Government-Speech Doctrine Through A New and Restrictive Approach

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COMMENTS

WHEN LEVIATHAN SPEAKS: REINING IN THE GOVERNMENT-SPEECH DOCTRINE THROUGH A NEW AND RESTRICTIVE APPROACH

CARL G. DETEGRIS*

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. . . . Such, in my opinion, is the command of the Constitution.

—Justice Louis Brandeis1

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INTRODUCTION

Government speaks. From the spoken word of the Presidential podium\(^2\) to the written messages more subtly conveyed through state mottos,\(^3\) the government’s voice is everywhere.\(^4\) In a republican democracy, the idea that the government needs to be able to establish and maintain its own

\(^2\) The presidential press conference is one clear example of the executive branch expressly conveying its messages and views, usually through policy statements, to the general public. See, e.g., Caroline Mala Corbin, Mixed Speech: When Speech is Both Private and Governmental, 83 N.Y.U. L. Rev. 605, 628 (2008) (observing that a “White House spokesperson’s announcement of the administration’s policy at a press conference” is a clear example of government speech).

\(^3\) Symbols and mottos adopted by governments and placed on government property—such as license plates or the national currency—are used to convey the values and themes that the government wishes to express. See, e.g., Wooley v. Maynard, 430 U.S. 705, 716–17 (1977) (recognizing that New Hampshire’s purpose in placing its motto on state license plates was to disseminate the state’s ideology); Paul Kulwinski, Note, Trust In God Going Too Far: Indiana’s “In God We Trust” License Plate Endorses Religion At Taxpayer Expense, 43 Val. U. L. Rev. 1317, 1317–18 nn.4–5 (2009) (describing how the motto “In God We Trust” was placed on United States currency partly in response to religious fervor during the Civil War and how the decision to adopt this phrase as the official motto of the United States was “heavily influenced” by the Cold War and the “conflicting views on human morality that the United States and the Soviet Union held”).

voice is almost axiomatic. This is because a healthy democracy depends on the government’s ability to transmit substantive messages about its policies and actions to the public that will eventually hold it accountable. Accountability requires, then, that the voice of the government be clear and unmistakably its own. Otherwise, a government’s message may be distorted by, or confused with, private viewpoints.

This is the essential premise of the “recently minted” government-speech doctrine: “when the government speaks for itself, it ‘may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.’” Government as a speaker, therefore, is not subjected to the same First Amendment limitations that government as a


6. See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (observing that “[w]hen the government speaks” in order to “promote its own policies and ideas it is, in the end, accountable to the electorate” for these ideas); see also Mary Jean Dolan, The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech, 31 HASTINGS CONST. L.Q. 71, 125 (2004) (explaining that the government’s right to express a certain message “is based on the reality that governments are elected to promote certain values, often to the exclusion of others”); Helen Norton, The Measure of Government Speech: Identifying Expression’s Source, 88 B.U. L. REV. 587, 590 (2008) (“Government speech . . . furthers citizens’ capacities to participate in democratic self-governance by enabling them to . . . learn and evaluate the views of their elected representatives.”).

7. See Norton, supra note 6, at 591 (observing that the public can hold its elected officials accountable for their views and expressions “only when it actually understands the contested expressions as the government’s”). Although the second prong of the two-prong government-speech test proposed by Professor Norton looks to whether “onlookers understand that expression to be the government’s at the time of its delivery”—what she calls establishing the source of a message “functionally”—her test is different from the one proposed in this Comment because the “formal” part of her analysis (which is given equal weight) looks to whether the government explicitly claims speech as its own. Id. at 632. While such official acknowledgment of speech would certainly factor into the reasonable-observer test proposed in this Comment, should the observers be aware that the government had claimed the speech as its own, this factor is not an independent prong of the test proposed in Part III. See infra Part III.A.

8. See Norton, supra note 6 at 632 (acknowledging the effects that the misattribution of private views has on government speech and public debate).


regulator of private speech must contend with. This means that a government-speech defense grants the government a far greater ability to regulate its own message by preferring certain viewpoints to others when it is determined to be the speaker than it does when a private party is speaking in a public forum. However, the distinction between government speech and private speech is not as clear as it may seem, and granting the government extensive speech powers could have a devastating effect on private speech rights. Furthermore, allowing the government free range to control any speech it claims is its own — may threaten [the democratic] processes of consent through indoctrination and the withholding of vital information. Thus, extensive government-speech power could distort the “marketplace of ideas” that the First Amendment was designed to protect.

11. See, e.g., Summum, 129 S. Ct. at 1131 (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”); Johanns, 544 U.S. at 553 (“The Government’s own speech . . . is exempt from First Amendment scrutiny.”); Helen Norton, Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech To Protect Its Own Expression, 59 DUKE L.J. 1, 22 (2009) (“Because government speech is so important to a thriving democracy, the constitutional standards for evaluating government’s control of its own speech differ dramatically from those that apply to the government’s regulation of private expression.”). While the government may not be subjected to the same First Amendment restrictions when it is the speaker, such as the Free Speech Clause’s limitations against viewpoint discrimination, this does not mean that it is completely unrestrained by the First Amendment. Id. at 24 (recognizing that limits may be placed on government speech by constitutional constraints other than the Free Speech Clause). For example, the First Amendment’s Establishment Clause would certainly prohibit any government entity from espousing a message that clearly supports one religion or religious sect to the exclusion of others. See id. ( “[G]overnment expression that endorses religion may violate the Establishment Clause.”); infra note 112 and accompanying text (recognizing the limits placed on government speech by the Establishment Clause).

12. See Summum, 129 S. Ct. at 1131 (claiming that the government has “the right to ‘speak for itself’” and to subsequently exclude from its own speech any views that it disagrees with); accord David L. Hudson Jr., Government Speech Doctrine, in 1 ENCYCLOPEDIA OF THE FIRST AMENDMENT 528, 528 (John R. Vile et al. eds., 2009) (observing that the government “has its own rights as speaker” and is “immune from free speech challenges” under the government-speech doctrine).

13. See Norton, supra note 6, at 590 (acknowledging that it “is not always easy” to distinguish between governmental and private speech and that courts have “struggle[d] with the challenge of parsing government expression from private expression”); Hudson, supra note 12 (observing that “[m]uch difficulty exists” in distinguishing governmental from private speech and citing the lower courts division in the specialty license plate line of cases as an example).

14. See Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863, 897 (1980) (“The passage of time since adoption of the Bill of Rights has revealed that laws and practices that permit massive government communications activities may as effectively silence private speakers as a direct regime of censorship.”).

15. Id. at 898.

16. See Bezanson & Buss, supra note 5, at 1505 (recognizing that extensive government speech powers could negatively affect the speech marketplace by “threaten[ing]
Over the last three decades, the role of government speech in the American constitutional system has gone from being discussed through mere scholarly speculation to an express doctrine in First Amendment jurisprudence.\(^5\) While the Supreme Court has laid out the broad contours of the doctrine, it has provided little—and often conflicting—insight into how courts should distinguish between what is government speech and what is private speech.\(^18\) Without much guidance by the Court, the circuit courts’ attempts at fashioning a functioning government-speech test have led to inconsistent results, which are most evident in the context of specialty license plates.\(^19\) The Court passed up an opportunity to establish a uniform and effective government-speech test when it recently, and “[f]or at least the fifth time,\(^20\) denied certiorari to a case involving the controversial “Choose Life” specialty license plates.\(^21\)

\(^17\) Compare Summum, 129 S. Ct. at 1134–35 (recognizing and applying the government-speech doctrine), and Bezanson & Buss, supra note 5, at 1509–11 (analyzing and critiquing the government-speech doctrine), with Steven Shiffrin, Government Speech, 27 UCLA L. REV. 565, 569–70 (1980) (recognizing that prior to the 1980s free speech theory “had little to say about the process by which the government” speaks), and Yudof, supra note 14, at 906 (arguing that “[d]irect judicial action is probably not the best way to limit the impact of government speech”).

\(^18\) See Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (noting that the few cases in which the Court had addressed the government-speech doctrine had “not gone much beyond . . . broad observations”); Norton, supra note 11, at 26 (“[T]he Supreme Court has yet to announce a definitive test for identifying government speech . . . .”); Lilia Lim, Comment, Four-Factor Disaster: Courts Should Abandon the Circuit Test For Distinguishing Government Speech From Private Speech, 83 WASH. L. REV. 569, 570–71 (2008) (noting that the Supreme Court “has not clearly explained how to tell” government from private speech, and arguing that the four-factor circuit court test should be abandoned but not proposing an alternative test). Compare Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001) (finding that the government could not control the message of attorneys funded through the government-run Legal Services Corporation because their message constituted private speech), with Johanns, 544 U.S. at 560 (finding that a promotional campaign funded by taxes targeted towards beef producers constituted government speech because the government “effectively controlled” the message).

\(^19\) See infra notes 161–65 (describing the inconsistent results of the circuit courts’ government-speech tests).

\(^20\) Adam Liptak, Justices Decline to Hear Some 2,000 Cases, N.Y. TIMES, Oct. 6, 2009, at A19 (noting that by refusing to hear a “Choose Life” license plate case, the Court refrained from “taking sides in the abortion debate”).

\(^21\) Choose Life Ill., Inc. v. White, 547 F.3d 853 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009). “Choose Life” specialty license plates were initially created with the dual intentions of “encouraging adoption and raising funds for organizations that discourage abortions.” Traci Daffer, Comment, A License To Choose or a Plate-Ful of Controversy? Analysis of the “Choose Life” Plate Debate, 75 UMKC L. REV. 869, 871–72 (2007). Since the first “Choose Life” plate was issued by Florida in 1999, the plates have been the cause of litigation across the country. See generally id. at 871–78 (discussing the history of
This Comment will argue that current government-speech tests lead to inconsistent results, do not sufficiently focus on the concerns that led to the creation of the government-speech doctrine and, most importantly, do not ensure political accountability and provide adequate safeguards for private speech rights. It will propose that the Supreme Court refine its government-speech doctrine by establishing a reasonable-observer test similar to the endorsement test used in Establishment Clause jurisprudence\(^\text{22}\) and identical to the test used by Justice Souter in his recent concurrence in Pleasant Grove City v. Summum.\(^\text{23}\) It will further propose that courts guard against inappropriate use of the government-speech defense by assessing certain factors before permitting the government to use the defense. Part I will examine the history of the government-speech doctrine as it arose through key Supreme Court cases and how it has been applied by the circuit courts in the specialty license plate cases. Part II will analyze the current tests used to determine whether certain contested speech is governmental or private and the effectiveness and consistency of these tests. After showing that these current tests lead to inconsistent results and unnecessarily infringe on private speech rights, Part III will propose a stricter and more focused reasonable-observer test that will better ensure political accountability. Furthermore, Part III concludes that inquiries into both the interests involved and whether there are less intrusive means to protect governmental interests are necessary to protect First Amendment speech rights from abuse flowing from the government-speech defense.

\[^{22}\text{See infra Part II.C (describing the endorsement test).}\]
\[^{23}\text{129 S. Ct. 1125, 1142 (2009).}\]
A. From Wooley to Summum: The Evolution of the Supreme Court’s “Newly Minted” Government-Speech Doctrine

The idea that governments speak is not a new concept, but it was not until the late seventies and early eighties that constitutional scholars began to seriously analyze the effects of such speech on other First Amendment doctrines. The Supreme Court itself did not explicitly acknowledge the distinction between government and private speech until 1990, but the notion that the government has certain speech powers could have been inferred as far back as the decision in Wooley v. Maynard. In Wooley, the Supreme Court held that the State of New Hampshire could not force an individual to “becom[e] the courier for” the state’s own message (in this case, the state’s motto, “Live Free or Die”) if the individual found the message objectionable.

24. See Shiffrin, supra note 17, at 566 n.3 (observing that one of the concerns for nineteenth century philosopher John Stuart Mill when writing his seminal work, On Liberty, was “the danger of government speech”).

25. See generally Shiffrin, supra note 17, at 655 (arguing that certain limits must be placed on government speech in order to prevent “major and unacceptable incursions on liberty”); Yudof, supra note 14 (analyzing government speech in the context of the First Amendment).

26. See Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (explaining the “crucial difference” between government speech that endorses religion and private speech that endorses religion). It is important to note that First Amendment jurisprudence has often distinguished between what it has termed “private” and “public” speech in the context of private speakers. See JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 804–11 (10th ed. 2006) (recognizing the Supreme Court’s distinction between “private” and “public” speech, and explaining that the difference depends on the speech’s content, form, and context). That is, the Supreme Court has found that the First Amendment places a greater value on speech involving issues of public concern than it does on speech involving issues that are purely a private matter. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (“It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’ . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.”). In the context of this Comment, however, private speech refers to speech that is attributable to a private actor, while government—or governmental—speech refers to speech that is attributable to the state. Thus, the distinction between private and public speech focuses on the content of private actors’ speech, while the private/governmental distinction focuses on the identity of the speech actor. Compare id. at 762 (finding the content of a credit report to be “private” speech and not speech addressing a matter of public concern), with Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009) (finding the placement of privately funded monuments in a public park to be a form of government, and not private, speech).

27. See 430 U.S. 705, 717 (1977) (acknowledging that New Hampshire’s interest in requiring its state motto be displayed on license plates was to “communicate to others an official view as to proper appreciation of history, state pride and individualism”).

28. See id. at 707, 717 (holding that “the State’s interest” in “disseminating another ideology” did not “outweigh an individual’s First Amendment right” in disassociating themselves from the state’s message).
while the state cannot force a private individual to endorse or promote its message, a state may maintain and promote its own viewpoints in a manner that does not compel individuals to be spokespeople for such a message.29

Fourteen years after Wooley recognized an association between license plates and speech interests, the Supreme Court laid down the foundations of what would become its government-speech doctrine.30 In Rust v. Sullivan,31 the Court was asked to decide whether certain regulations promulgated under Title X of the Public Health Service Act32 violated the First Amendment.33 A group of Title X-funded doctors challenged, among others, a regulation prohibiting them from counseling patients about abortion, claiming that such restrictions violated their free speech rights.34 In a 5-4 decision, the Court upheld the regulations on the grounds that “the Government . . . had merely chosen to fund one activity to the exclusion of the other” and had not, therefore, unconstitutionally violated the doctors’ private speech rights.35 The Court held that the government does not unconstitutionally engage in viewpoint discrimination where it “selectively fund[s] a program [that] it believes to be in the public interest.”36 While the phrase “government speech” is never mentioned in the opinion, in later cases the

29. See id. (noting that “the State may legitimately pursue [its] interests” of “communicat[ing] to others” the views it hoped to express through its state motto “in any number of ways”). While Wooley explicitly dealt with the question of whether the state could compel an individual to be a courier of its message, implicit in this inquiry was the notion that the state does have a message of its own and the power to promote that message. Id. Also implicit in this analysis is that there is a significant distinction between government and private speech. Id.

30. See infra note 37 (recognizing Rust v. Sullivan, 500 U.S. 173 (1990), as a government speech case); see also Alana C. Hake, Note, The States, A Plate, And The First Amendment:  The “Choose Life” Specialty License Plate As Government Speech, 85 Wash. U. L. Rev. 409, 422 (2007) (observing that Rust has been recognized as the “fountainhead” of the government-speech doctrine).


33. Rust, 500 U.S. at 181.

34. Id. The challenged regulations in Rust laid out three conditions that, if not satisfied by Title X projects and their staff, prohibited the disbursement of funds. Id. at 179–81. First, the regulations forbade “counseling concerning the use of abortion as a method of family planning or [referrals] for abortion as a method of family planning” and “expressly prohibited [Title X projects] from referring a pregnant woman to an abortion provider, even upon specific request.” Id. at 179. Second, the regulations prohibited recipients of Title X funds from “engaging in activities that ‘encourage, promote or advocate abortion as a method of family planning,’” such as “lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion,” or “providing speakers to promote abortion.” Id. at 180. Lastly, the regulations mandated that all Title X-projects be organized in such a way as to be “physically and financially separate” from prohibited abortion activities.” Id.

35. Id. at 193.

36. Id.
Court recognized that its decision in *Rust* was based on government-speech concerns and that the Title X-funded doctors were essentially speaking on behalf of the government.\(^{37}\)

In 2001, the Court came to a very different conclusion in a case involving facts similar to those in *Rust*.\(^{38}\) *Legal Services Corp. v. Velazquez*\(^{39}\) involved a restriction that prohibited attorneys who received money from the government-funded Legal Services Corporation (LSC) from seeking to amend or challenge existing welfare law on behalf of their clients.\(^{40}\) As in *Rust*, the Court had to determine whether the government could limit what individuals participating in a government-funded program could say without running afoul of the First Amendment.\(^{41}\) The Court, in another 5-4 decision, held that the restrictions did violate the First Amendment.\(^{42}\) It reasoned that, unlike the government program in *Rust*, the LSC program “was designed to facilitate private speech, not to promote a governmental message.”\(^{43}\) The purpose of the LSC program, according to the majority, was to provide indigent citizens with attorneys who would best represent the interests of their clients,\(^{44}\) while the purpose of the program in *Rust* was for the government to fund family planning measures it believed best served the interests of the general public.\(^{45}\)

Several years later, in *Johanns v. Livestock Marketing Association*,\(^{46}\) the Court expanded on its government-speech doctrine by laying out two criteria it found to be particularly instructive when determining whether

\(^{37}\) *See*, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities . . . amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“In *Rust*, we recognized that when the government disburses public funds to . . . convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted . . . .”); *But see Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) (“If the private doctors’ confidential advice to their patients at issue in *Rust* constituted ‘government speech,’ it is hard to imagine what subsidized speech would not be government speech.”).

\(^{38}\) *See Velazquez*, 531 U.S. at 558–59 (Scalia, J., dissenting) (arguing that the statutory scheme in *Velazquez* was “indistinguishable in all relevant aspects from” the scheme upheld in *Rust*; *Note, The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2430 (2004) (“In soft focus, Velazquez appears indistinguishable from *Rust* . . . .”)).


\(^{40}\) Id. at 536–37.

\(^{41}\) Id. at 539.

\(^{42}\) Id. at 537.

\(^{43}\) Id. at 542.

\(^{44}\) *See* id. (“The LSC Lawyer . . . speaks on behalf of his or her private, indigent client.”).

\(^{45}\) *See supra* notes 35–36 and accompanying text (describing the Court’s interpretation of the purpose of the program in *Rust*).

certain speech is governmental or private. In *Johanns*, two associations of beef producers challenged the Beef Promotion and Research Act of 1985 (Beef Act)\(^47\) on First Amendment grounds.\(^48\) As part of an overarching goal of promoting the American beef industry, the Beef Act imposed a tax on beef producers and designated that part of the tax revenue be used to fund an advertising campaign with the trademarked slogan, “Beef. It’s What’s for Dinner.”\(^49\) Many of these generic advertisements also bore the message “Funded by America’s Beef Producers.”\(^50\) The beef producers who challenged the program claimed that the generic advertising campaign funded by their tax dollars violated their First Amendment rights by impeding “their efforts to promote the superiority of” their own specialty beef and beef brands.\(^51\) The Court, however, held that there was no violation of the beef producers’ First Amendment rights because, since the government created and maintained administrative control over the program, the messages were government speech.\(^52\) Writing for the majority, Justice Scalia laid out two criteria the Court found to be determinative of whether the beef ads constituted governmental or private speech: the government (1) set the overall message communicated; and (2) approved every word that was disseminated.\(^53\)

In its most recent decision involving the government-speech doctrine, *Pleasant Grove City v. Summum*,\(^54\) the Court addressed the question of whether privately funded monuments displayed in a public park were government or private speech.\(^55\) In *Summum*, the Church of Summum (Summum), a religious organization headquartered in Utah, filed an action against Pleasant Grove City (Pleasant Grove) after it had rejected Summum’s repeated requests to erect a monument containing “the Seven Aphorisms of Summum”\(^56\) in Pleasant Grove’s Pioneer Park.\(^57\) At the time


\(^{48}\) *Johanns*, 544 U.S. at 556.

\(^{49}\) Id. at 554.

\(^{50}\) Id. at 555. The “Cattlemen’s Beef Promotion and Research Board” was appointed by the Secretary of Agriculture and approved the messages and slogans in the promotional ads. Id. at 553–55.

\(^{51}\) Id. at 556.

\(^{52}\) Id. at 560–62.

\(^{53}\) See id. (noting that Congress implemented the promotional program and set the overarching message along with the Secretary of Agriculture, who “exercise[d] final approval authority over every word used”). At least one circuit has used these criteria to establish a two-pronged government-speech test. See infra Part II.B (discussing the Sixth Circuit’s incorporation of the *Johanns* criteria in its government-speech test).

\(^{54}\) 129 S. Ct. 1125 (2009).

\(^{55}\) Id. at 1129.

\(^{56}\) See id. at 1129–30 n.1 (describing the Seven Aphorisms of Summum as explained in the respondent’s brief); see also Summum—Seven Summum Principles,
of Summum’s request, Pioneer Park had at least eleven permanent displays donated by private organizations or individuals, including a Ten Commandments monument. Summum claimed that Pleasant Grove had engaged in unconstitutional viewpoint discrimination by allowing the Ten Commandments monument to be displayed in the park but rejecting a proposed monument that touched on the general tenets of its own faith. The Court unanimously found the Pioneer Park monuments to be government speech, with eight justices concluding that “the placement of a permanent monument in a public park is best viewed as a form of government speech”; accordingly, the government was not required to maintain viewpoint neutrality in its selection process. Notably, the majority cited the government’s degree of editorial control, the monument’s permanence, and the fact that observers “routinely—and reasonably—interpret [donated monuments] as conveying some message on the property owner’s behalf” as important factors guiding its decision.

Concurring with the majority in Summum, Justice Souter cautioned the Court against “relying on a per se rule to say when speech is governmental.” He noted that sectarian identifications—such as a Christian cross or a Jewish Star of David—on markers in national cemeteries are one instance in which “permanent monuments” on public land do not appear to be government speech, but rather the speech of private individuals. Informing by the Establishment Clause and its endorsement test, Justice Souter concluded that whether a monument is


57. Summum, 129 S. Ct. at 1129.
58. Id.
59. Id. at 1130.
60. Id. at 1129.
61. See id. at 1134 (“[T]he City has ‘effectively controlled’ the messages sent by the monuments in the Park . . . .”).
62. See id. at 1137 (“[M]onuments . . . endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space.”).
63. See id. at 1133 (concluding that it is uncommon for a property owner to allow “permanent monuments that convey a message with which they do not wish to be associated” onto their land).
64. Id. at 1141.
65. Id. at 1142.
66. Id.
67. See id. (Souter, J., concurring) (noting that the reasonable-observer test he employs is similar to the endorsement test used in Establishment Clause cases). Acknowledging that Summum was litigated with “one eye on the Establishment Clause,” Justice Souter was concerned with the ways in which the developing government-speech doctrine may affect the Establishment Clause doctrine. Id. at 1141. He believed that his proposed reasonable-observer test would “serve coherence within Establishment Clause law” because of its parallels with the endorsement test. Id. at 1142; see also Patrick M. Garry, Pleasant Grove City v. Summum: The Supreme Court Finds a Public Display of the Ten Commandments
government speech depends on the specific context in which it is displayed. He stated that the best approach to determine whether the monuments were government speech was to “ask whether a reasonable and fully informed observer would understand the expression to be government speech.” Applying this reasonable observer test to the facts in *Summum*, Justice Souter came to the same conclusion as the majority: the monuments in Pioneer Park were clearly government speech. Since its decision in *Rust*, the Supreme Court has articulated and reaffirmed the broad outlines of the government-speech doctrine, but has yet to articulate a “clear standard . . . for determining when the government is ‘speaking.’” Without a clear standard established by the Court, the circuit courts have created their own tests for determining what qualifies as government speech. As recent lower court decisions involving specialty license plates show, this has led to inconsistent and convoluted findings in the realm of the government-speech doctrine.

**B. License to Speak: Circuit Courts’ Use of the Government-Speech Doctrine**

At the circuit court level, much of the jurisprudence surrounding the government-speech doctrine in the last decade has involved specialty license plates and whether personalized messages on state-issued license plates constitute government or private speech. In *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor...
Vehicles, a provision in a Virginia specialty license plate statute prohibited the Sons of Confederate Veterans (SCV) from using its logo incorporating the Confederate flag on the organization’s specialty plates. The SCV brought an action to enjoin the DMV commissioner from enforcing this provision, arguing that the prohibition violated SCV’s First Amendment speech rights, while the State argued that no such violation existed because the SCV plates, and all Virginia specialty plates, were government speech. To determine whether the specialty plates were government speech, the Fourth Circuit established a four-factor test that looked to the following:

1. The central “purpose” of the program in which the speech 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.

Applying this test to the SCV specialty plate program, the Fourth Circuit determined that the plates constituted private speech and that the prohibition of the Confederate flag was, therefore, unconstitutional viewpoint discrimination.

The Fourth Circuit again applied its four-factor test two years later in Planned Parenthood of South Carolina Inc. v. Rose. This time, the court used the test to determine whether a “Choose Life” specialty plate program established by the South Carolina legislature was government speech—allowing the state to exclude the opposing pro-choice viewpoint—or

75. 288 F.3d 610 (4th Cir. 2002).
76. The Sons of Confederate Veterans, Inc. is a non-profit corporation whose members are descendants of Confederate army veterans. See id. at 613 n.1.
77. Id. at 613. The specific statute that authorized the issuance of specialty plates to SCV members provided that “no logo or emblem of any description shall be displayed or incorporated into . . . this section.” Id.
78. Id. at 614.
79. Id. at 615.
80. Id. at 618. The court derived these four factors from a number of criteria that other circuits found to be determinative in speech analysis. See id. at 619 (“We find the recent approaches of our sister circuits instructive here.”). The majority acknowledged, however, that it did not believe these factors “constitute[d] an exhaustive or always-applicable list” but that they did resolve the issue before the court. Id.
81. See id. at 619 (finding the “purpose” of the program was to generate revenue for the state while providing citizens with a means to “express their pride” in an organization). Considering the rest of the factors, the court found the following: the Virginia legislature exercises “little, if any, [editorial] control,” the “literal speaker” is the vehicle’s owner “because of the connection of any message on the plate to the driver,” and it is unclear who bears “ultimate responsibility.” Id. at 620–21. Weighing all these factors led the court “to conclude that the SCV’s special plates constitute private speech.” Id. at 621.
82. 361 F.3d 786 (4th Cir. 2004).
private speech—making such viewpoint discrimination unconstitutional.\textsuperscript{83} The court held that the “Choose Life” plates constituted hybrid speech,\textsuperscript{84} or “a mixture of private and government speech.”\textsuperscript{85} It then concluded that the State should not be allowed to discriminate based on viewpoint when speech is both government and private because the “State’s advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life plate,”\textsuperscript{86} thus insulating the State from electoral accountability.\textsuperscript{87} Finding that the “Choose Life” specialty plate program violated the First Amendment, the court invalidated the enacting statute.\textsuperscript{88}

The Ninth Circuit has also adopted the four-factor SCV test believing it to be an effective tool for distinguishing government and private speech.\textsuperscript{89} In Arizona Life Coalition Inc. v. Stanton,\textsuperscript{90} the Ninth Circuit used the test and concluded that, while the contested “Choose Life” specialty plates did have some characteristics that suggested they might be government speech, the overall balance of the four factors tipped in favor of private speech.\textsuperscript{91} Of particular note, the court found that the fact that license plates are owned by the state suggested that the government was the literal speaker, but ultimately concluded that the decision in Wooley indicated that license plates implicate strong private speech rights.\textsuperscript{92}

\textsuperscript{83} Id. at 792.
\textsuperscript{84} While speech is generally characterized as private or governmental, some courts—although notably not the Supreme Court—and scholars have argued that a large amount of speech should be classified as mixed government-private speech, and that mislabeling such speech could have negative consequences on the government-speech doctrine. See generally Corbin, supra note 2, at 607–08 (2008) (observing that “not all speech is purely private or purely governmental” and arguing that the classification of “mixed speech as purely private or purely governmental masks the competing interests at play”).
\textsuperscript{85} Rose, 361 F.3d at 793. Because the “Choose Life” plates were specifically approved by the legislature, the “degree of editorial control” factor weighed heavily towards finding the state to be the speaker. Id. But the “literal speaker” and “ultimate responsibility” factors were seen as weighing in favor of private speech, as “no one who sees a specialty license plate imprinted with the phrase ‘Choose Life’ would doubt that the owner of that vehicle holds a pro-life viewpoint.” Id. at 794. But see Choose Life III, Inc. v. White, 547 F.3d 853, 867–68 (7th Cir. 2008) (Manion, J., concurring) (“The [Choose Life] message acknowledges both choice and life . . . . [This] petition expressly recognizes that it is the woman’s choice. But at the same time it recognizes that the life of the developing baby is also at stake.”).
\textsuperscript{86} Rose, 361 F.3d at 795.
\textsuperscript{88} Rose, 361 F.3d at 799–800.
\textsuperscript{89} Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008).
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 968.
\textsuperscript{92} Id. at 966–67.
While the Fourth and Ninth Circuits have employed a circuit-created four-factor test when deciding whether speech is governmental or private, the Sixth Circuit has looked to the Supreme Court for guidance. Using the criteria mentioned in *Johanns*, the Sixth Circuit adopted a two-pronged government-speech test in *ACLU of Tennessee v. Bredesen*. First, the test looked to whether the government set the overall message communicated; second, it looked to whether the government approved every word that was disseminated. Applying this two-pronged test to yet another “Choose Life” specialty plate program, the Sixth Circuit concluded that the Tennessee legislature set the overall message as well as approved every word used on the specialty plates. The plates, therefore, were found to be government speech expressing the legislature’s own views on the abortion debate. Significantly, the court justified its finding by saying, “the medium in this case [is] a government-issued license plate that every reasonable person knows to be government-issued.”

Two other recent “Choose Life” specialty license plate cases from the Seventh and Eighth Circuits have synthesized the current government-speech case law and attempted to simplify the government-speech tests. While the Seventh Circuit in *Choose Life Illinois, Inc. v. White* found the exclusion of the entire subject of abortion to be a permissible “content based but viewpoint neutral” restriction and the Eighth Circuit in *Roach* found the exclusion of the entire subject of abortion to be a permissible “content based but viewpoint neutral” restriction and the Eighth Circuit in *Roach*.

93. *See supra* note 80 (acknowledging that the four-factor test was based on criteria taken from other circuits).
94. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–76 (6th Cir. 2006) (using the Supreme Court’s decision in *Johanns* to establish a government-speech test).
95. *Id.*
96. *Id.* at 375.
97. *See id.* at 376 (concluding that the Tennessee legislature “chose the ‘Choose Life’ plate’s overarching message . . . when it spelled out in the statute” the specific words to be placed on the plates).
98. *Id.*
99. *Id.* at 377 (emphasis added). *But see* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008) (“[T]here is nothing . . . to even suggest that [the state] intended to adopt the message of each special organization plate as its own state speech.”).
100. *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (“Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party.”); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (finding that the Fourth and Ninth Circuit multi-factor tests can be “distilled” by focusing on whether, under all the circumstances, a reasonable person would consider the speaker to be the government or a private entity).
101. 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).
102. *Id.* at 855–56. *But cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (“The dissent’s assertion that no viewpoint discrimination occurs because [there is discrimination] against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar.”).
v. Stouffer\textsuperscript{103} found the denial of a “Choose Life” specialty plate application to be unconstitutional viewpoint discrimination,\textsuperscript{104} both circuits concluded that the specialty plates were primarily private speech.\textsuperscript{105} More importantly, both circuits acknowledged that the “key question” in government-speech analysis is whether a reasonable person would, under all the circumstances, see the speech to be governmental or private.\textsuperscript{106}

Although the Supreme Court has recently denied certiorari in White,\textsuperscript{107} it is likely that the question of whether specialty license plates are private or government speech will come before it again in the near future.\textsuperscript{108} When it does, the Court should use the opportunity to provide the circuits with a uniform and effective government-speech test.\textsuperscript{109} Any effort at establishing a coherent speech test, however, should be informed by the brief, although convoluted, history of the government-speech doctrine,\textsuperscript{110} as well as the long body of Establishment Clause doctrine that has touched on government-speech restrictions.\textsuperscript{111}

C. Government Speech and Religion: The Establishment Clause
Endorsement Test

Long before the Supreme Court began to etch the broad contours of its government-speech doctrine, it dealt with the limitations placed on government speech through the Establishment Clause.\textsuperscript{112} Throughout its long history of Establishment Clause jurisprudence, the Court has attempted to draw lines between those government activities that use religious symbols in a secular and constitutionally permissible manner and

\begin{itemize}
\item \textsuperscript{103} 560 F.3d 860, 867 (8th Cir. 2009).
\item \textsuperscript{104} \textit{Id.} at 870.
\item \textsuperscript{105} \textit{Id.} at 868; \textit{White}, 547 F.3d at 864.
\item \textsuperscript{106} \textit{See supra} note 100 (describing the Eighth and Seventh Circuits’ reasonable person analyses).
\item \textsuperscript{107} \textit{Choose Life III,} Inc. v. \textit{White}, 130 S. Ct. 59 (2009).
\item \textsuperscript{108} \textit{See Liptak, supra} note 20 (noting that this is a “heavily litigated question” that has come before the Court at least five previous times).
\item \textsuperscript{109} \textit{See discussion infra} Parts II, III (explaining the problems with the current government-speech tests and arguing for a more coherent and workable approach to the government-speech doctrine).
\item \textsuperscript{110} \textit{See supra} Part I.A–B (discussing the history of the government-speech doctrine).
\item \textsuperscript{111} \textit{See infra} Part I.C (discussing the relationship between government speech and the Establishment Clause).
\item \textsuperscript{112} \textit{See Pleasant Grove City v. Summum,} 129 S. Ct. 1125, 1132 (2009) (acknowledging that government speech is restrained by the Establishment Clause); \textit{County of Allegheny v. ACLU Greater Pittsburgh Chapter,} 492 U.S. 573, 593 (1989) (“[I]t has been noted that the prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’” (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985)(O’Connor, J., concurring in judgment))); \textit{Corbin, supra} note 2, at 615–18 (discussing the limits that the Establishment Clause places on the government’s ability to speak on matters of religion).
\end{itemize}
those activities that are an unconstitutional endorsement of religion. But just as determining what is government speech has proven to be a difficult task for the courts, deciding whether a certain government activity amounts to government endorsement of religion has proven to be complex, convoluted, and extremely fact intensive.

Seven years prior to the Court’s decision in Rust, Justice O’Connor sought to clarify the prevailing Establishment Clause test. Concurring with the majority’s judgment in Lynch v. Donnelley, Justice O’Connor first noted the constitutional concerns of government endorsement of religion: “Endorsement sends a message to nonadherents that they are outsiders... and an accompanying message to adherents that they are insiders.” She then laid out the rationale for what would become the Establishment Clause “endorsement test,” recognizing that the “crucial factor is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion” because “[i]t is only practices having that effect... that make religion relevant.”

Five years after Lynch, in County of Allegheny v. ACLU Greater Pittsburgh Chapter, Justice O’Connor further articulated what she saw as the important inquiry of the endorsement test, stating that the central question of endorsement analysis is “whether a reasonable observer would view” certain government practices as an endorsement of religion. Such a test, she explained, must be “highly context specific” in order to determine the effect on the reasonable observer of the challenged government practice.

Although it was not unanimously accepted as an effective tool of analysis, the endorsement test has been routinely used in Establishment Clause jurisprudence. This is because the test has been recognized as “capturing” the essential mandate of the Establishment Clause,” due to its

113. See Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (acknowledging that the test to determine whether the government has violated the Establishment Clause “calls for line drawing” between permissible and impermissible government association with religion).
114. See id. at 679 (“The [Establishment] Clause erects a ‘blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.’” (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971))).
115. Id. at 687 (O’Connor, J., concurring) (“I write separately to suggest a clarification of our Establishment Clause doctrine.”).
116. Id.
117. Id. at 688.
118. Id. at 692.
120. Id. at 631 (O’Connor, J., concurring).
121. Id. at 630–31.
122. See id. at 669 (Kennedy, J., dissenting in part) (finding the endorsement test to be “flawed” and “unworkable”).
123. See Garry, supra note 67, at 285 (acknowledging that courts have frequently used the endorsement test when analyzing the constitutionality of religious displays).
focus on the audience of the challenged practice. Since the Establishment Clause itself has been understood to be an explicit constitutional check on government speech, an effective government-speech test should be mindful of the relationship between the Establishment Clause and government-speech doctrines. Recently, Justice Souter recognized the relationship between these two doctrines when he cited the endorsement test as the basis for the “reasonable observer test” used in his Summum concurrence. The endorsement test, therefore, should provide an instructive model when formulating a new government-speech test.

II. CURRENT SPEECH TESTS DO NOT ENSURE EFFECTIVE GOVERNMENT ACCOUNTABILITY, LEAD TO INCONSISTENT RESULTS, AND DO NOT PROVIDE ADEQUATE FIRST AMENDMENT SAFEGUARDS

As explained above, the central purpose of the government-speech doctrine, or the government-speech defense, is to allow the government to control its own message without the limitations that the First Amendment places on it when it accommodates or invites private speech. Thus, any test that distinguishes governmental from private speech must focus on this core idea. But a truly effective government-speech test must also account for the fact that “the First Amendment protects [the] individual’s free speech rights from infringement by the government; it does not exist to protect the government from free speech claims by would-be speakers.”

This point underscores two general criticisms of the government-speech doctrine.

The first concern surrounding the application of the government-speech doctrine is that it might be used to silence speech that the government does not approve of, even in cases where the speech is not reasonably attributed to the government. For example, the court in Rose warned that accepting

125. See supra note 112 and accompanying text (describing the Establishment Clause as an explicit constitutional check on government speech).
126. See Garry, supra note 67, at 284 (discussing Justice Souter’s recognition of a relationship between the government-speech and Establishment Clause doctrines and his concerns with the effect of government-speech analysis on Establishment Clause analysis).
127. See supra notes 9–12 and accompanying text (discussing the essential purpose of the government-speech defense).
128. Dolan, supra note 6, at 125.
129. See Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009) (recognizing that there is a legitimate concern that the government-speech doctrine could “be used as a subterfuge for favoring certain private speakers over others based on viewpoint”); see also
the “Choose Life” plates as government speech would have allowed South Carolina to continue favoring its own pro-life viewpoint while effectively silencing the pro-choice position in what appeared to be a limited forum for expressive speech.\textsuperscript{130} Second, there is a fear that the government might evade political accountability if it were allowed to maintain strong editorial control over a message that is not reasonably attributed to it.\textsuperscript{131} This concern was also acknowledged in \textit{Rose} when the court recognized that, because “the State’s advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life plate,” South Carolina would have been insulated from electoral accountability if the plates were found to be government speech.\textsuperscript{132} The current government-speech tests do little to address either concern.

\textbf{A. The Beef With Johanns: No Concern for Attribution}

To understand the inherent problems of the \textit{Johanns} two factor test, with its focus on whether or not the government set the overall message and approved every word in the message, it is best to begin with the key observations made by the \textit{Johanns} dissenters. In their dissent, Justices Souter, Stevens and Kennedy identified what they saw as two clear principles of the “relatively new” government-speech doctrine: (1) the necessity of recognizing government’s power to speak and to determine its own message without First Amendment viewpoint limitations; and (2) the importance of being able to identify which speech is the government’s so that it may be held accountable by the electorate for such speech.\textsuperscript{133} If one of the central rationales behind the government-speech doctrine is that the government is accountable to the electorate for the messages it conveys,\textsuperscript{134}

Note, \textit{supra} note 38, at 2418 (“Because such an image looks a lot like the government . . . evaluating competing viewpoints, the current government speech doctrine makes for an unconvincing safeguard against the endangerment of private speech rights.”).

\textsuperscript{130} See Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004) (“[T]he State has favored itself as a speaker within the license plate forum, giving its own viewpoint privilege above others.”).

\textsuperscript{131} See, e.g., Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 578–79 (2005) (Souter, J., dissenting) (“Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.”); see also Manohar, \textit{supra} note 87, at 234–35 (recognizing that the government may use its newly developed speech defense to “monopolize or distort the marketplace of ideas” or “to indoctrinate and to dull the individual’s ability to think critically”).

\textsuperscript{132} Rose, 361 F.3d at 795.

\textsuperscript{133} Johanns, 544 U.S. at 574–75.

\textsuperscript{134} See \textit{supra} notes 5–10 and accompanying text (identifying democratic accountability as an important notion underlying the government-speech doctrine); accord Norton, \textit{supra} note 11, at 22 (“Political accountability, rather than the Free Speech Clause, provides the recourse for those unhappy with their government’s expressive choices.”).
then the majority’s decision in *Johanns* does little to support this concept of electoral accountability.\(^{135}\)

In *Johanns*, the majority casually brushed over the possibility that the audience of the government’s promotional speech program might attribute the ads to the beef producers.\(^{136}\) With little explanation, the Court found that the promotional ads “labeled as coming from ‘America’s Beef Producers’” were “not sufficiently specific to convince a reasonable factfinder” that the beef producers would be associated with the content of the ads.\(^{137}\) The Court based these findings on the two-factor test described earlier in this Comment: did the government (1) set the overall message communicated; and (2) approve every word that was disseminated?\(^{138}\)

There are several problems with using this analysis as a government-speech test.\(^{139}\)

First, there is so much overlap between these two factors that they can effectively be reduced to a single inquiry: Did the government exercise a strong degree of editorial control over the message?\(^{140}\) Such a narrowly

\(^{135}\) See infra notes 136–145 and accompanying text.

\(^{136}\) See *Johanns*, 544 U.S. at 565–66 (acknowledging that the beef producers First Amendment challenge might have been successful “if it were established . . . that individual beef advertisements were attributed to [them],” but finding that “the trial record is altogether silent” on this matter).

\(^{137}\) *Id.* at 566. Justice Scalia does note, albeit without much support, that the trademarked title “America’s Beef Producers” could just as likely have been interpreted as “refer[ing] to a particular organization of beef producers.” *Id.* at 566 n.11.

\(^{138}\) See supra note 53 and accompanying text (describing the *Johanns* test); see also Roach v. Stouffer, 560 F.3d 860, 865 (8th Cir. 2009) (“*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.” (quoting ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375 (6th Cir. 2006))).

\(^{139}\) See infra notes 140–155 and accompanying text (discussing the problems with the *Johanns* test). Besides the problems discussed in this Comment, it has also been argued that the Court’s analysis in *Johanns* is specifically designed for the facts in the case and is not necessarily to be used by the courts in other distinguishable government-speech cases. See, e.g., Bredesen, 441 F.3d at 385 (Martin, J., dissenting) (concluding that the *Johanns* test is applicable to the compelled subsidy case it was first applied to, but does not work in the specialty license plate context). Moreover, the Court’s rationale in *Johanns* seems somewhat conclusory: certainly whether the government has “effectively controlled” a message can only be discerned after the message is determined to be government speech, because a government-speech defense allows the government to effectively protect its message against First Amendment challenges. See supra note 12 and accompanying text (describing the speech powers exercised through the government-speech defense).

\(^{140}\) See Stephanie S. Bell, Note, *The First Amendment and Specialty License Plates: The “Choose Life” Controversy*, 73 Mo. L. Rev. 1279, 1298 (2008) (noting that the “only factor considered in the *Johanns* test is that of editorial control”); accord Roach v. Stouffer, 560 F.3d 860, 864 (8th Cir. 2009) (interpreting the holding in *Johanns* as “the more control the government has over the content of the speech, the more likely it is to be government speech”). Exercising “editorial control,” as discussed here, refers to the process of “selecting and compiling” messages and determining the means by which these messages are conveyed. See Jacobs, supra note 4, at 50–52 (explaining the role of “government
focused speech test, however, does not take into account the major concerns surrounding the government-speech doctrine, namely, whether the audience attributes a specific message to the government or to a private entity.  

141 The dissent recognized this flaw in the majority’s analysis when it took issue with the fact that the advertisements were put forth as coming from “America’s Beef Producers.”  

142 The dissenters argued that “if government relies on the government-speech doctrine to compel specific groups to fund speech,” it must ensure that the speech is identifiable as its own in order to “make itself politically accountable.”  

143 The Beef Act, as the dissent recognized, “did not establish an advertising scheme subject to effective democratic checks” because it effectively ensured that the advertisements would be attributed to “America’s Beef Producers.”  

Responding to the dissent’s concerns that government-speech not readily identified as belonging to the government could insulate the government from accountability and unnecessarily burden private speech, the Johanns majority argued that it found no First Amendment provision even hinting at a requirement that “government speech funded by a targeted assessment must identify government as speaker.”  

147 While this is true on its face, it is a shortsighted analysis of the government-speech doctrine that misses a fundamental point of the court-created government-speech defense: it is used to limit the application of First Amendment free speech safeguards.  

149 Any doctrine that could have such severe ramifications on editors” in programs designed to disseminate messages through private speakers). Thus, the “editor label” is appropriate “whenever [there is a choice] among private speakers” or messages.  

141 Bell, supra note 140, at 1299 (recognizing that one of the “major concern[s] with the Johanns test is that it fails to address the problem of attribution”); see also infra notes 179–181 and accompanying text (arguing that an effective government-speech test should focus on the perceptions of the reasonable observer of contested speech).  

142 Johanns, 544 U.S. at 577.  

143 Id. at 571.  

144 Id. at 577.  

145 See id. (Souter, J., dissenting) (arguing that the tagline “Funded by America’s Beef Producers” would lead anyone reading it to believe that the message was from America’s Beef Producers and not the federal government).  

146 Id. at 578–79.  

147 See id. at 564 n.7 (finding that such a disclaimer “is more than we think can be found within ‘Congress shall make no law . . . abridging the freedom of speech.’”).  

148 See Manohar, supra note 87, at 236–37 (noting that, while “deceptive government speech does not violate the letter of the First Amendment,” the Supreme Court has consistently dismissed “any narrow, literal conception” of the First Amendment because it is understood that “the Framers were concerned with broad principles, and wrote against a background of shared values and practices”).  

free speech rights should only be applied after strict scrutiny of the contexts in which it is invoked.\textsuperscript{150} Furthermore, in order to remain faithful to the government-speech doctrine’s underlying premise of electoral accountability, such contextual scrutiny should focus on the perceptions of the audience of contested speech.\textsuperscript{151}

The misguided focus of the \textit{Johanns} test is most evident when it is applied to the specialty license plate context. As \textit{Bredesen} demonstrates, applying the \textit{Johanns} test to the specialty plate cases leads to a finding that such plates are government speech.\textsuperscript{152} This is because specialty license plate programs are usually created by statutory schemes designed by state legislatures, which suggests that legislators maintain “effective editorial control” of the messages on specialty plates.\textsuperscript{153} But focusing on the editorial control factor does not give due weight to what the audience of a license plate might perceive, and thus seems to conflict with the Court’s finding in \textit{Wooley} which suggested that messages on license plates strongly implicate the speech rights of the vehicle’s owner.\textsuperscript{154} The state motto “Live Free or Die” was certainly, from beginning to end, determined by the State of New Hampshire, yet it did not outweigh the

\textsuperscript{150} See infra note 178; see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 338 (2004) (“Courts are prepared to require this when a fundamental right, such as the right of freedom of speech, is being infringed.”); cf. Griswold v. Connecticut, 381 U.S. 479, 503–04 (1965) (White, J., concurring) (“[S]tatutes regulating sensitive areas of liberty do, under the cases of [the Supreme Court], require ‘strict scrutiny.’”). While it may seem that strict scrutiny analysis is inappropriate in a speech context that is clearly governmental in nature, such as a speech by the president, this Comment assumes that: (1) such speech is unlikely to be challenged on First Amendment grounds because of its clear nature; and (2) such speech would pass strict scrutiny analysis because of the strong government interest in being able to conduct these speech activities which are so central to the function of government. See supra note 2 (describing the presidential press conference as a clear example of government speech); Bezanson & Buss, supra note 5, at 1380 (“Speech is but one means that government must have at its disposal to conduct its affairs and to accomplish its ends.” (emphasis added)).

\textsuperscript{151} See supra notes 141–45 and accompanying text (discussing the importance of observers being able to correctly identify government speech in order for the government to be held accountable for such speech).

\textsuperscript{152} ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006).

\textsuperscript{153} See, e.g., id. at 376 (noting that “Tennessee set the overall message” of its specialty plate program).

\textsuperscript{154} See Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 967 (9th Cir. 2008) (acknowledging that the \textit{Wooley} Court indicated that license plate messages “implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle” (quoting Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002))); Lim, supra note 18, at 592 (“The Court [in \textit{Wooley}] implicitly held that messages on license plates involve private-speech interests.”).
private speech interests involved. Even more to the point, determining whether speech is governmental or private by asking who maintains a strong “degree of editorial control” does not take into account the crucial fact that people who purchase specialty plates choose to actively associate with a specific organization or message. This is perhaps the most striking point regarding whether to accept the Johanns test as a legitimate government-speech test in the specialty plate context: taken to its logical conclusion, Johanns leads to outcomes that are entirely inconsistent with the Court’s holding in Wooley.

B. The Four-Factor Folly: Ill-Defined and Inconsistently Applied

Although a number of circuits have accepted the four-factor test as a legitimate and effective means of distinguishing government speech from private speech, this test also has significant flaws. While these factors may have a place in government-speech analysis, the problem with the four-factor test as it has been applied by the circuits is that the factors are not well-defined and do not properly focus on the reasonable observer of the message. This has led to inconsistent results in the application of the four-factor test.

For instance, when applying the four-factor test to specialty license plates, courts have come to differing conclusions under similar factual situations. In Stanton, the district court analyzed a “Choose Life” specialty plate program using the four-factor test and found that the factors

156. See Roach v. StoUFFER, 560 F.3d 860, 868 (8th Cir. 2009) (recognizing that vehicle owners take “the initiative to purchase the specialty plate,” thus, reasonable observers are likely to perceive the vehicle owner as “voluntarily communicating his or her own message”); Choose Life III, Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (observing that vehicle owners choose to display specialty plates, suggesting that the owners are “the most obvious speakers in the specialty plate context”); Stanton, 515 F.3d at 967 (recognizing that “[p]rivate individuals choose to spend additional money to obtain [specialty] plate[s]” and finding this fact to support the classification of specialty plates as private speech).
157. See Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 578 (2005) (Souter, J., dissenting) (acknowledging that “if messages on license plates implicated no private-speech interests at all, then Wooley (among other cases) would have come out differently”).
158. See supra Part I.B (defining the four-factor test and identifying the circuits that have applied it).
159. See infra notes 166–176 and accompanying text (discussing the inherent problems with the four-factor test).
160. See infra notes 162–165 and accompanying text (describing the inconsistent results coming from the four-factor analysis).
161. See Lim, supra note 18, at 585 (“The inconsistent results produced by the four-factor test are especially apparent in specialty-plate cases, as courts have reached different conclusion in cases with strikingly similar facts.”).
weighed heavily in favor of government speech.\textsuperscript{162} Upon review, however, the Ninth Circuit applied the same four-factor test and concluded that specialty license plates are private speech, overturning the district court’s decision.\textsuperscript{163} In \textit{Rose}, the Fourth Circuit concluded that South Carolina’s “Choose Life” specialty plates should be seen as a mixture of government and private speech.\textsuperscript{164} Strangely enough, in analyzing a different specialty license plate program two years prior to its decision in \textit{Rose}, the Fourth Circuit concluded that the SCV specialty plates were a form of private speech, never mentioning mixed speech.\textsuperscript{165}

How does a test that appears to be so straightforward lead to such varied results when applied to nearly identical factual situations? The major flaw in the four-factor analysis is that the factors themselves are not well-defined, which makes it unclear how each relates to the question of whether the speech is governmental or private.\textsuperscript{166} For example, in the case of specialty license plates, how should a court determine the “central purpose” of a specialty license plate program when there appear to be multiple, legitimate purposes?\textsuperscript{167} Which “degree of editorial control” factor should weigh more heavily: the fact that it usually takes a legislative act to create a specialty license program, or the fact that private organizations often design the specialty plates that represent their own views and the views of their members?\textsuperscript{168} Assuming that “literal speaker” is not to be taken

\begin{thebibliography}{99}
\bibitem{Note} See \textit{Ariz. Life Coal. Inc. v. Stanton}, No. CV031691PHXPGR, 2005 WL 2412811, at *3–6 (D. Ariz. Sept. 26, 2005), rev’d, 515 F.3d 956, 968 (9th Cir. 2008) (finding the “primary purpose” factor to weigh in favor of government speech because license plates were primarily issued to identify vehicles and drivers).
\bibitem{Note} Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008).
\bibitem{Note} \textit{Planned Parenthood of S.C., Inc. v. Rose}, 361 F.3d 786, 794 (4th Cir. 2004).
\bibitem{Note} Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002).
\bibitem{Note} See \textit{Norton}, supra note 6, at 598 (“Courts’ use of these factors . . . would be significantly more defensible from both a theoretical and a practical standpoint if they explained \textit{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 . . . .”); Lim, supra note 18, at 585 (“The factors themselves are inherently nebulous and susceptible to manipulation, failing to direct judicial decision-making, and case law has failed to clarify their meanings.”); cf. Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (noting that it “has never been entirely clear” how the different parts of the \textit{Lemon} test “relate to the principles enshrined in the Establishment Clause”).
\bibitem{Note} See \textit{Sons of Confederate Veterans}, 288 F.3d at 619 (looking at the central “purpose” of the state’s specialty license plate programs and concluding that the primary purpose is to produce revenue for the state as well as provide a forum for the expression of private views).
\bibitem{Note} Compare \textit{Rose}, 361 F.3d at 793 (finding the editorial control factor to weigh in favor of government speech because “the [Tennessee] legislature determined that the plate will bear the message ‘Choose Life’”), \textit{with Stanton}, 515 F.3d at 966 (finding the editorial control factor to weigh in favor of private speech because “the idea of a ‘Choose Life’ license plate originated with” a private organization).
\end{thebibliography}
literally (as one must assume in the context of specialty license plates, because neither license plates nor cars literally speak), is this factor and the “ultimate responsibility” factor to be “assessed when the speech is created, or when the speech is conveyed or displayed”? Ultimate responsibility itself seems to depend on who is determined to be the speaker, suggesting that this factor can be dismissed as redundant and irrelevant. How a court chooses to define each of these four factors and their relationship to the distinction between government speech and private speech determines whether it will view a specific form of speech as governmental, private, or a mix of the two.

Recently, the Seventh Circuit has attempted to clarify the four-factor government-speech test by “distill[ing] (and simplify[ing])” the factors into “the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?” Applying this “simplified” analysis to the Illinois specialty license plate program, the court concluded that messages on license plates “cannot be characterized as the government’s speech” but rather implicate strong private speech rights. While the court’s analysis seems to be a more coherent and consistent approach to the government-speech test, there is nothing in the Seventh Circuit’s opinion suggesting that other courts using the four-factor test will examine the factors from the perspective of the reasonable observer of specialty plates. In fact, an analysis of specialty license plate cases applying the four-factor test suggests that other circuits have rarely focused their attention on the reasonable observer of the speech

169. See Lim, supra note 18, at 587 (distinguishing the context of radio broadcasts, where there is always a literal speaker, from the specialty license-plate and monument contexts, where “literal” must be used in a “non-literal sense”).

170. See id. at 588 (noting that the court in Sumnum v. City of Ogden, 297 F.3d 995, 1004 (10th Cir. 2002), “ultimately focused on the moment of creation” while other courts have assessed the literal speaker at the time the speech was displayed).

171. See, e.g., Stanton, 515 F.3d at 967 (“The question of who bears ‘ultimate responsibility’ . . . is very similar to the question of who is the literal speaker.”); Sons of Confederate Veterans, Inc., 288 F.3d at 621 (finding the literal speaker and ultimate responsibility factors to weigh heavily in favor of private speech because of the strong connection between license plate messages and drivers as indicated in Wooley).

172. Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008); accord Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) (“Our analysis boils down to one key question . . . .”)

173. White, 547 F.3d at 863 (finding individual vehicle owners to be the obvious speakers of specialty license plates as they choose to display the plates).

174. See infra Part III.A (discussing why a reasonable observer test would benefit from government speech analysis).

175. Indeed, the court’s recommendation of factors to consider, which includes whether “the message originates with the government” and “the degree to which the government exercises editorial control,” suggests that its “reasonable person” does not necessarily have to be an observer of the speech in question; rather they need only be an observer of the structure of the contested speech program. See White, 547 F.3d at 863.
in question. Perhaps this lack of focus on the audience is because it is uncertain whether a reasonable observer of specialty license plates is aware of the factors that are the focus of the four-factor test, suggesting that these factors have little effect on the reasonable observer’s perceptions.

III. FOCUSING ON THE REASONABLE OBSERVER AND LIMITING THE GOVERNMENT-SPEECH DEFENSE

Although the Supreme Court has long established strong free-speech protections, an abuse of the government-speech doctrine could have serious ramifications for both private speech rights and government accountability. With this in mind, courts should strictly limit the application of the government-speech defense to situations in which the government has a substantial interest in ensuring that messages reasonably attributed to it are not distorted by private speakers. This means, first, that any test designed to determine whether speech is governmental or private should focus on the reasonable observer of the speech. Second, if it is determined that a reasonable observer is likely to view a specific message as government speech, courts should conduct an additional two-part inquiry in order to ensure that the government-speech defense is only applied in situations where it is absolutely necessary.

176. See, e.g., Stanton, 515 F.3d at 964–68 (applying the four-factor test without focusing on the reasonable-observer of the specialty plate); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 792–94 (4th Cir. 2004) (same); Sons of Confederate Veterans, Inc., 305 F.3d at 243–44 (same).

177. See infra notes 193–196 and accompanying text (recognizing that reasonable observers are unlikely to be aware of non-transparent factors and such factors are unlikely to influence their perceptions of a message’s source).

178. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (“From 1791 to the present [we have] . . . permitted restrictions upon the content of speech in a few limited areas . . . .” (emphasis added)); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (“Freedom of speech . . . [is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.” (emphasis added)); accord Mary Jean Dolan, Why Monuments Are Government Speech: The Hard Case of Pleasant Grove City v. Summum, 58 Cath. U. L. Rev. 7, 46 (2008) (“[F]or the most part the pride of the First Amendment is its protection of even the most offensive speech.”).

179. Supra notes 14–16 and accompanying text (discussing the dangers of extensive government speech powers); accord Bezanson & Buss, supra note 5, at 1381 (“[A]n expanding] use of speech by government . . . presents heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace [or] employing devices to conceal hidden government messages in private speech . . . .”); Bell, supra note 140, at 1280 (“[E]xpanding the government speech doctrine may chill private citizens’ free speech rights.”).

180. See infra Parts III.A–B (explaining that adopting a reasonable-observer and balance-of-interest test would protect private speech rights and guarantee that the government is held accountable for its own speech).

181. See infra Part II.A (defining the reasonable-observer test).

182. See infra Part II.B (discussing the balance-of-interest and less-inclusive-means inquiries and why they are necessary safeguards to protect free speech rights).
inquiry would require courts to balance the government and private interests involved, and determine whether there is a less intrusive means of protecting the government’s speech interests. 183 Under this inquiry, courts should permit a government-speech defense if: the speech is reasonably attributable to the government; the government’s interest is substantial; and there is no less intrusive means of protecting this interest.

A. The Reasonable-Observer Test

While Justice O’Connor recognized that the important inquiry in Establishment Clause analysis was whether a government practice had the effect of communicating a message of endorsement or disapproval of religion, 184 the important inquiry in government-speech analysis is whether a communicated message was effectively perceived as governmental in origin. 185 These inquiries are similar in that both “require courts to evaluate onlookers’ perceptions of a message’s source.” 186 Thus, as Justice Souter recently recognized in Summum, 187 the Establishment Clause endorsement test should be instructive when determining whether contested speech is governmental or private. 188 This means that, in order to capture the “important inquiry” of the government-speech doctrine, courts should ask the following question: Under the totality of the circumstances, would a reasonable observer view the message as that of the government or of a private individual or entity? 189

183. See infra note 225 and accompanying text (noting that speech may be regulated only in limited circumstances where it is necessary to preserve a compelling government interest and then must be regulated by the least restrictive means).

184. See supra note 118 and accompanying text (recognizing that if a government practice does communicate endorsement or disapproval it solidifies religion’s relevancy to status within the political community).

185. See Jacobs, supra note 4, at 109 (“The primary question . . . is whether [the Government] sent an identifiable message . . . .”); Norton, supra note 11, at 29 (“[I]f the expression is to be characterized as government speech exempt from First Amendment scrutiny, the expression should be delivered in a way that allows the public to understand it as their government’s.”).

186. Norton, supra note 6, at 604 (arguing that analysis of a message’s source can be guided by cues or triggers such as communication of a position through government press conferences or press statements).

187. See supra note 126 and accompanying text.

188. See Pleasant City Grove v. Summum, 129 S. Ct. 1125, 1141–42 (2009) (Souter, J., concurring) (“This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion . . . .”), see also Norton, supra note 6, at 606 (“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.”).

189. Supra notes 106, 172; accord Garry, supra note 67, at 279–80 (“For [government-speech] accountability to exist, there must be transparency regarding the source of the speech—that is, citizens must be aware that the government is the entity responsible for the speech.”); Jacobs, supra note 4, at 61 (“The [Supreme Court’s] treatment of
Although Justice Souter contemplated a “reasonable and fully informed observer,” it should not be presumed that the audience of any particular form of speech knows every facet of the program that supports or disseminates the message. The reasonable-observer test, therefore, should be content-specific like the endorsement test, but should preclude any information that is not readily available to the public. The reason for omitting information unavailable to the public is because such programmatic factors as “editorial control” and “central purpose” will have little effect on how a reasonable observer perceives a particular message if they are not made known to that observer. For instance, the fact that the Beef Act promotional program in *Johanns* was administered as part of a wider government campaign would not be of great importance in a reasonable-observer test if the government did not openly acknowledge that it was responsible for the program. Similarly, the government’s “purpose” of discouraging abortion in *Rust* would not have much relevance in a reasonable-observer analysis if patients were not informed about the government’s policy. Thus, the reasonable observer is not omniscient, but is aware of the reasonably ascertainable information in the contested-speech context.

Focusing the government-speech analysis on the perspective of the reasonable observer would properly address the twin concerns that are not adequately dealt with by the current speech tests: safeguarding free speech
rights and ensuring government accountability. First, private speech rights are sure to enjoy greater protection if the government-speech defense is limited to situations in which it is necessary to protect the government’s voice from misattribution. Better safeguards would exist under a reasonable-observer standard because the government must establish that the contested speech was attributable to the government at the time it was disseminated. Thus, a reasonable-observer standard would effectively prevent “after-the-fact manufacture of a government speech defense as an opportunistic reaction to thwart those challenging government’s regulation of what is in fact private speech.” In short, such a standard would reduce the government’s ability to control private expressions by simply claiming the expressions were governmental in nature.

Second, establishing a reasonable-observer standard of analysis would also promote greater accountability by encouraging the government to clarify messages it intends to have attributed to it and disclaim private speech that might be wrongly attributed to it. If the Supreme Court were to adopt a reasonable-observer test, the government would be on notice that programs designed to disseminate its own views will not be protected by the government-speech defense if these views are not reasonably attributed to the government. This would mean that the government could be forced to fund or provide support for views it does not agree with. A prudent government entity, then, would implement programs that effectively attribute messages to the government that it wants to be associated with. This would also provide an effective safeguard against

197. See supra Parts II.A–B (arguing that the current government-speech tests do not adequately address these concerns).
198. See generally Helen Norton, Not For Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression, 37 U.C. DAVIS L. REV. 1317, 1333 (2004) (arguing that a government entity attempting to protect its expressive interests should be required to show that the views of private individuals are reasonably being misattributed to the government); see also Bell, supra note 140, 1301–02 (“A test which includes the attribution factor and weights it more heavily would be a step in the right direction.”).
199. See supra notes 189, 195 (emphasizing the importance of transparency as to the source of speech in determining whether speech is attributable to the government or a private individual).
200. Norton, supra note 11, at 27 (advocating the use of the government-speech defense only when it can be established that the government claimed the speech as its own and that the speech was understood to be the government’s at the time of its release).
201. See supra note 189 (acknowledging that any test concerned with government accountability requires transparency).
202. See Norton, supra note 11, at 27 (“[R]equiring that government identify itself as the source of a message at the time of its creation forces government to articulate, and thus think carefully about, its expressive decisions.”). For example, in a case such as Rust, where the government did not want to fund doctors who counseled patients on abortions, a provision requiring doctors to inform each patient that the government forbids them from providing such advice might have effectively attributed the doctor’s advice to the government. Id. at 29–30.
deceptive government speech by preventing the government from escaping accountability.\textsuperscript{203}

While the reasonable-observer test is applicable outside of the specialty license plate context (as will be discussed later), this tangible expression of speech provides the best example of the effectiveness of the reasonable-observer analysis. Applying the reasonable-observer standard to specialty license plates, courts should conclude that specialty plates are private speech. First, if \textit{Wooley} indicates that standardized messages on license plates implicate private speech interests,\textsuperscript{204} then a reasonable observer is likely to see an even stronger association between the driver of a vehicle and the content of a specialty license plate.\textsuperscript{205} A stronger association between the driver and the content of the license plate is likely because specialty plates require a vehicle owner to take the affirmative, voluntary action of paying a fee for a plate with a specific message and design.\textsuperscript{206} Consequently, if the passive acceptance of a standardized state motto on a license plate implicates private speech interests, then surely the voluntary and affirmative steps taken to place a specialty plate on one’s car are even more indicative of private speech.

Despite the lessons of \textit{Wooley}, states have argued that because legislatures implement specialty plate programs and usually approve of a plate’s content, observers of the specialty plates would reasonably assume that the government has endorsed the organizations and messages associated with the plates.\textsuperscript{207} Furthermore, there is a strong argument that, since states manufacture and maintain ownership over all license plates, a reasonable observer is likely to conclude that all messages on these state-created and state-owned plates are at least partially governmental in nature.\textsuperscript{208} And even the \textit{Wooley} Court explicitly recognized that

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\item \textsuperscript{203} \textit{See id}. at 30 (“Expressly signaling the message’s governmental origins [in \textit{Rust}] 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.”).
\item \textsuperscript{204} \textit{See supra} note 29–31 and accompanying text (arguing that license plates should be considered private speech because of the connection of any message on the plate to the owner of the vehicle).
\item \textsuperscript{205} \textit{See supra} note 156 and accompanying text (recognizing that a reasonable observer would likely recognize that the vehicle owner took the initiative in purchasing a specialty plate, and thus is communicating a personal message).
\item \textsuperscript{206} \textit{See supra} note 156 and accompanying text (recognizing that a reasonable observer would likely recognize that the vehicle owner took the initiative in purchasing a specialty plate, and thus is communicating a personal message).
\item \textsuperscript{207} \textit{See, e.g.}, \textit{Rose}, 361 F.3d at 794–95 (acknowledging that the state had argued that the “Choose Life” specialty plate statute was the “most visible expression” of its “clear and oft-repeated preference for childbirth over abortion”).
\item \textsuperscript{208} \textit{See, e.g.}, Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles, 305 F.3d 241, 251 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of reh’g en banc) (“I respectfully submit that it is impossible to avoid the conclusion that the [state],
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standardized license plate messages are generally perceived as government speech when it held that private individuals had a First Amendment right to dissociate from such speech. Yet, the wide variety of specialty plates that are currently on the road would suggest, to a reasonable observer, that the state is probably not endorsing every individual specialty plate message. An observer who is aware of the diversity of license plate messages will likely assume that the state has created a limited forum for private expression. Thus, it is unlikely that a legislature’s association with most specialty plate programs is significant enough to outweigh the private speech interests in the eyes of the reasonable observer.

Finally, while it may seem that the reasonable-observer test described above is only applicable in situations where there are concrete physical expressions of speech (such as license plates or monuments), this test should apply to all modes of expression where there may be a conflict between government and private speech interests. This includes the more abstract expressions found in the rules and regulations of government-funded programs.

For example, the workability of the reasonable-observer test in the government-funded program context is evident when such an analysis is applied to the abortion restrictions in Rust. In order for these restrictions to be classified as government speech under a reasonable-observer analysis, it must be reasonably apparent to the Title X patients that the government strictly prohibits participating physicians from providing advice related to abortion and that the government “does not consider abortion to be an

by manufacturing license plates, placing its name at the top of those plates, and retaining ownership of them, is the speaker of any message contained on those plates . . . .‖).

209. See supra notes 28–29 and accompanying text (recognizing that the state’s interest in communicating an ideology cannot outweigh an individual’s First Amendment right to avoid being tied to such a message).

210. See Roach v. Stouffer, 560 F.3d 860, 868 (8th Cir. 2009) (“With more than 200 specialty plates available to Missouri vehicle owners, a reasonable observer could not think that the State of Missouri communicates all of those messages.”).

211. See id. (“[T]he wide variety of available specialty plates further suggests that the messages on specialty plates communicate private speech.”); Rose, 361 F.3d at 798–99 (observing that “the array of specialty license plates available in South Carolina” suggests that the public is more likely to associate the content of specialty plates with the vehicle’s driver than with the state).

212. See supra notes 204–211 and accompanying text (discussing why the reasonable observer would associate specialty license plate messages with a vehicle’s owner and not the government). But see Corbin, supra note 2, at 646 (“A reasonable person is unlikely to attribute the message displayed on specialty license plates solely to private speakers or solely to the government.”).

213. See infra notes 214–221 and accompanying text (discussing the application of the reasonable-observer test to determine whether anti-abortion counseling and attorney-client advice constitute government speech).

214. See supra note 34 (describing the challenged regulations in Rust).
appropriate method of family planning.”

Yet, as the dissent recognized, Title X participants are not required to inform their patients that the abortion regulations are government-mandated and the regulations do not necessarily represent the physician’s unbiased medical opinion. And while researching and investigating the Title X rules and regulations may reveal the government as the source of the abortion restrictions, it is unreasonable to expect the recipients of Title X services to conduct such extraordinary measures because “[a] woman seeking the services of a Title X clinic has every reason to expect, as do we all, that her physician will not withhold relevant information regarding the very purpose of her visit.”

Thus, under the reasonable-observer test, the government mandated abortion restrictions in Rust would not have withstood the First Amendment challenges.

Applying the reasonable-observer test to the program restrictions in Velazquez also demonstrates the effectiveness of this test outside the license plate context. As the Velazquez majority noted, the purpose of the LSC program was to allow attorneys to represent the interests of indigent clients. This means “[t]he lawyer is not the government’s speaker” but rather “speaks on the behalf of his or her private, indigent client.” Thus, the reasonable observer of the LSC litigation would conclude that any message delivered by the LSC attorneys was delivered on behalf of their clients, and was therefore private speech. If the regulations prohibiting LSC attorneys from challenging denials of welfare benefits were upheld, the reasonable observer would likely conclude that “[t]he attorney[s] defending the decision to deny benefits” were speaking on behalf of their clients, when in fact they were “deliver[ing] the government’s message in

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215. Rust v. Sullivan, 500 U.S. 173, 209 (1990) (Blackmun, J., dissenting) (arguing that the Title X regulations are viewpoint based and suppress speech relating to abortion services).

216. See id. (“If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning.” (emphasis added)). But see id. at 200 (majority opinion) (“Nothing in [the Title X program regulations] requires a doctor to represent as his own any opinion that he does not in fact hold.”).

217. Id. at 211–12 n.3. The Title X program regulations thus place a heavy burden on the doctor-patient relationship and create a disadvantage for the many patients who lack the resources to seek healthcare from multiple providers. Id.

218. See supra note 44 and accompanying text (recognizing that an attorney’s advice to his client does not constitute government speech).


220. See id. at 542–43 (“The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.”).
the litigation.” Therefore, under the reasonable-observer test, the regulations in Velazquez were properly struck down on First Amendment grounds.

The applicability of the reasonable-observer test to the program restrictions in Rust and Velazquez demonstrates the general applicability of a government-speech test that focuses on the audience of a particular message. Although the modes of expression will not always be as apparent as when a message or motto is written on a license plate, nearly all modes of expression have an audience that will objectively determine the message’s source. It is this objective determination—based on the specific context and factors of each mode of expression—that should be used to decide whether contested speech is governmental or private.

B. Other Safeguards Against Abuse of the Government-Speech Defense

Adopting a government-speech test that focuses on the reasonable observer should bring coherency and accountability to the government-speech doctrine, but there are additional steps that courts should take to limit the scope of the government-speech defense. After a court determines that a certain message is likely to be seen as government speech, and before it allows the government to invoke the heavy-handed government-speech defense to regulate private speech, it should ask two additional questions: (1) is there a substantial government-speech interest outweighing the private speech rights that may be encumbered; and (2) is there a less intrusive and reasonably feasible means of ensuring the message is properly attributed to the rightful speaker? These factors

221. Id. at 542.
223. See supra Part III.A (arguing that a reasonable-observer standard would reduce the government’s ability to censor private expression and encourage governmental clarification of messages that be may attributed to it).
224. See Jacobs, supra note 4, at 42 (“The reason for such limited governmental discretion to discriminate among private speakers is the fear that underpins the First Amendment of government censorship in the private speech market.”).
225. See, e.g., United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”); Roe v. Wade, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”).
should be employed to find a practical balance between the governmental and private interests involved in the specific speech context in question.

1. *Is there a substantial government speech interest that outweighs the private speech rights that may be burdened?*

   Recognizing that the government-speech defense restricts speech that would otherwise enjoy strong First Amendment protection, courts should only allow the government to invoke the defense if its interests are substantial. It might be suggested that such an inquiry is unnecessary because the very fact that the government is seeking to control a message by invoking the government-speech doctrine would suggest that its interests are substantial; however, this inquiry should not turn on a subjective claim by the government, but rather on an objective determination of whether the government’s interest outweighs the private speech interests at stake. This balancing test should incorporate a multitude of relevant factors, including whether there are alternative and reasonable means of expression for the private parties whose speech interests are involved.

   Using the specialty license plates as an example, assume for the sake of this hypothetical exercise that these plates are reasonably seen as government speech, or at least a government endorsement of a private message. A court should then ask whether the government’s interest in disassociating itself with the content of a specific specialty plate outweighs the private interest of the vehicle’s driver in associating with the plate’s message. The outcome of this inquiry would depend on the content of the plate, as the government’s interest in not being associated with the controversial issue of abortion would be far greater than its interest in not being associated with a particular sport or recreational activity. Additionally, a court might conclude that the state does not unduly burden a private party’s speech interests when it refuses to issue specialty plates that convey a particular viewpoint because of the availability of alternative

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226. *See supra* notes 11–12 and accompanying text (describing the government-speech defense as an exception to Free Speech Clause limitations).

227. *Cf. Barnett, supra* note 150, at 261 (“[T]he bare assertion that legislation abridging freedom of speech serves a legitimate legislative end is also insufficient. When the First Amendment is implicated we maintain a healthy skepticism of legislative motivations.”).


229. *Compare Choose Life Ill., Inc. v. White, 547 F.3d 853, 866 (7th Cir. 2008) (finding that the State of Illinois has a legitimate interest in remaining neutral on the subject of abortion), with Kulwinski, supra* note 3, at 1319 (noting that “many specialty license plates simply promote local sports teams”).
means of expression, such as bumper stickers that endorse the excluded viewpoint.230 The strength of the government’s interest and the burden on private interests should be weighed against one another to determine if the government’s speech interest is substantial.

2. **Is there a less intrusive, reasonable, and feasible means of ensuring the message is properly attributed to the rightful speaker?**

Even if the government’s interest is substantial, the inquiry should not end there. The Supreme Court has consistently held that “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”231 If, then, there is a reasonable and less intrusive means by which to achieve the government’s objective of protecting its expressive interest, a court should preclude the government from using the government-speech defense.232

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230. *Cf.* Wooley v. Maynard, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting) (arguing that compelling individuals to display a state motto on their license plate does not unduly burden their speech interests because they could place “a conspicuous bumper sticker explaining in no uncertain terms that they . . . violently disagree with the connotations of that motto”). It is important to note that this is just a hypothetical exercise that assumes specialty plates are reasonably viewed as strongly implicating government speech, which makes the “availability of alternative means of expression” argument relevant. This argument, rejected by the majority in *Wooley* in the context of compelled speech, also carries little weight when dealing with the voluntary speech involved in specialty license plates. *See id.* at 716. The reason is that there are at least two significant distinctions between a vehicle owner’s association with messages on specialty plates and his or her association with messages on bumper stickers. First, the process of acquiring a specialty plate is likely much more burdensome and expensive than purchasing and placing a bumper sticker on one’s vehicle. *See supra* note 156 and accompanying text (recognizing that vehicle owners must apply for and purchase specialty plates). This additional trouble and expense involved in expressing oneself through a specialty plate could reasonably suggest a stronger connection toward the speech on the plate. *Supra* notes 205–206 and accompanying text. The second point closely mirrors the first: the fact that most specialty license plate programs allow for a portion of the program’s fees to go towards supporting certain organizations also suggests a stronger connection between a vehicle owner and the message that the organization hopes to disseminate. *See, e.g.*, Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008) (“Arizona’s specialty plate program provid[es] a forum in which philanthropic organizations can exercise their First Amendment rights in the hopes of raising money to support their cause.”); Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles, 288 F.3d 610, 620 (4th Cir. 2002) (“[M]otorists who have them send a personal message by carrying [specialty] plates on their vehicles, because the plates identify them as members of the organization.”). Thus, the very act of acquiring a specialty license plate, with the additional costs and effort that goes into adopting an organization’s message, is itself a unique, intimate and expressive speech act by the individual who has consciously purchased the specialty plate.


232. *See supra* note 225 (stating that legislative enactments must be narrowly drawn so as to preserve speech rights); *see also* BARNETT, supra note 150, at 340 (“A particular restriction on liberty is unnecessary if there is some other means of accomplishing the proper purpose that is less restrictive or does not restrict liberty at all.”).
In the context of misattribution of speech, one alternative means of ensuring that a specific viewpoint is correctly associated with the right party is to issue a disclaimer or a statement accepting responsibility for a specific message.\textsuperscript{233} It is not always necessary or feasible, however, for a government to explicitly notify the public what is and is not its own message.\textsuperscript{234} For example, the Summum Court found a formal resolution publicly embracing the messages conveyed by the Pioneer Park monuments to be unnecessary because the City’s actions—that is, taking ownership of the monuments and permanently displaying them on public property—“provided a more dramatic form of adoption.”\textsuperscript{235} In the specialty plate context, it has been argued that the content of license plates leave no room for a disclaimer;\textsuperscript{236} therefore, it would be unreasonable to require a state to place one on its specialty plates.

Nevertheless, there are situations in which a simple disclaimer could provide the audience of certain speech with sufficient notice that the speech is governmental or private. Take, for example, a government promotional campaign like the one implemented in Johanns.\textsuperscript{237} By including a reasonably visible disclaimer acknowledging that the beef promotions were part of a government authorized program and did not necessarily represent the views of all of America’s beef producers, the government might have effectively attributed the promotional messages to itself.\textsuperscript{238} As the dissent

\textsuperscript{233.} See generally Bezanson & Buss, supra note 5, at 1485 (“[B]ecause the government’s capacity for communicating its position is extensive, it is better to rely on the government’s access to the marketplace of ideas than to permit the government to curtail the marketplace.”); Norton, supra note 198, at 1339 (discussing factors to consider when determining when the government may protect its own expression and arguing that “[i]f government can adequately protect the integrity of its expression by disclaiming private speech, then it should do so”).

\textsuperscript{234.} See Pleasant City Grove v. Summum, 129 S. Ct. 1125, 1134 (2009) (rejecting Summum’s argument that the government should be required “to go through a formal process of adopting a resolution publicly embracing ‘the message’” that privately donated monuments convey and noting that imposing such a requirement across every jurisdiction in the country “would be a pointless exercise that the Constitution does not mandate”); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 794 n.2 (1995) (Souter, J., concurring) (concluding that a disclaimer may not always be effective when other factors “outweigh the mitigating effect of the disclaimer”); see also Norton, supra note 198, 1339–40 (recognizing that “[d]isclaimers . . . are ineffective in some circumstances”).

\textsuperscript{235.} Summum, 129 S. Ct. at 1134.

\textsuperscript{236.} See Norton, supra note 198, at 1339–40 (“License plates, for example, offer no space in which a state may disavow or rebut personalized or specialty messages.”).

\textsuperscript{237.} See supra Part I.A (discussing Johanns).

\textsuperscript{238.} See Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 578 (2005) (Souter, J., dissenting) (observing that it is difficult to understand how anyone would view the beef promotional ads as coming from the government “unless the message[s] came out and said so”). In fact, the petitioners in Johanns actually argued that the government did just this when it included a red checkmark with the word “beef” above it in the beef ads, “because this ‘distinctive checkoff logo is a direct sign that the ads are disseminated pursuant to the federal checkoff program.’” Id. at 577 n.6 (Souter, J., dissenting). The dissent found this
inferred, this would better ensure that the government was held accountable for the content of its promotional ads. Thus, if there is a reasonable and less intrusive means of protecting the government’s expressive interests, such as expressly claiming or disclaiming a particular message, it should be pursued before employing the government-speech defense to quiet a First Amendment challenge.

CONCLUSION

While the government-speech doctrine was formulated as a means of protecting the government’s ability to send, maintain, and clarify its own message, its misapplication and an unnecessary expansion of that misapplication pose a serious threat to free speech protections and political accountability. The dangers of the current government-speech tests used by the circuits are that they provide ample opportunity for the government or courts to silence disfavored viewpoints in the name of protecting the government’s voice, and that they do not ensure the electoral accountability that is at the heart of the government-speech doctrine. The Johanns test’s focus on editorial control does little to guarantee that audience perception is taken into account, precluding any meaningful accountability if a government program is designed in such a way as to conceal the government’s role in the program. Furthermore, the relationship between the four-factor test and the distinction between government speech and private speech is unclear. As its application has shown, an analysis of the four factors does not necessarily focus on the reasonable observer of a particular message. Because electoral accountability of government expression is only possible if the public can distinguish governmental viewpoints from private viewpoints, focusing on the reasonable observer of speech should be a necessary requisite of any useful government-speech test.

For these reasons, the Supreme Court should step in and establish a uniform test that focuses on the reasonable observer of contested speech. Additionally, the Court should limit the application of the government-speech defense through both a balance-of-interests and less-intrusive-means analysis once it has determined that a reasonable observer is likely to see a specific message as governmental. These additional inquiries will

argument to be unconvincing, given that most Americans were unlikely to understand the significance of the red checkmark. Id. (“It seems to me quite implausible that most (or even some) Americans associate a red checkmark underneath the word ‘beef’ with the Federal Government.”).

239. See id. at 577 (finding that by avoiding the disclaimer the government has masked its role in producing the ads).
ensure that the government-speech defense is limited solely to situations where the government’s expressive interest is so substantial that it outweighs the opposing private speech interests, and to situations where there is no less intrusive means, such as a disclaimer, that would protect the government’s interest.

Besides providing a uniform analysis to determine what is government speech, the approach proposed in this Comment would strictly limit the application of the “government speech” label to speech that is readily identifiable as the government’s and to situations where it is absolutely necessary to protect the government’s expressive interest. This would reduce the possibility of potential First Amendment harms that are sure to result from an expansive government-speech doctrine. Furthermore, the approach proposed in this Comment would encourage greater transparency in government programs designed to disseminate the government’s own message and would encourage the government to speak more clearly when expressing itself to the public. Ultimately, a clear government voice only furthers the deliberative discourse necessary for an effective democratic republic, and remedies the dangers of misattribution through what Justice Brandeis called the “command of the Constitution”: more speech, not less.