

Not For Attribution: Government's Interest in Protecting the Integrity of Its Own Expression

Helen Norton*

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* Visiting Assistant Professor of Law, University of Maryland School of Law; B.A. Stanford University; J.D., Boalt Hall School of Law, University of California at Berkeley. Special thanks to the University of Maryland School of Law for its generous financial support for this work, to Nicole Farmer and Sandra McLelland for their excellent research assistance, and to Darcy Conklin and the staff of the U.C. Davis Law Review for their excellent editorial assistance.

INTRODUCTION

Public entities increasingly maintain that the First Amendment permits them to ensure that private speakers' views are not mistakenly attributed to the government. Consider, for example, Virginia's efforts to ban the Sons of Confederate Veterans' display of the Confederate flag logo on state-sponsored specialty license plates. Seeking to remain neutral in the ongoing debate over whether the Confederate flag is a symbol of "hate" or "heritage,"¹ Virginia argued that the state would be wrongly perceived as endorsing the flag if the logo appeared on a state-issued plate adorned by the identifier "VIRGINIA."² The Fourth Circuit was unpersuaded, holding that the logo's exclusion violated the First Amendment.³

Such clashes between public and private entities' expressive claims raise a series of interesting questions. Do governmental entities have a legitimate interest in ensuring that they are not mistakenly understood as endorsing or delivering what are actually the views of private speakers? If so, what actions does the First Amendment permit them to take to protect that interest?⁴ As disputes involving these questions rise in number,⁵ courts increasingly search for guidance.⁶

¹ See *Sons of Confederate Veterans, Inc. v. Comm'r, Va. Dep't of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing en banc) (describing debate over symbolic meaning of Confederate flag); *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131, 1140 (D. Kan. 2002) (same).

² *Sons of Confederate Veterans, Inc. v. Comm'r, Va. Dep't of Motor Vehicles*, 288 F.3d 610, 615-16 (4th Cir. 2002).

³ See *id.*

⁴ Note that asserting that the First Amendment permits government to control its own expression is not the same as arguing that government has its own First Amendment "right" to free speech. For a thoughtful discussion, and ultimately rejection, of the notion of government as a First Amendment "rightholder," see Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501-08 (2001).

⁵ See *id.* at 1381 ("[T]he use of speech by government is expanding and taking new forms . . ."); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221-22, 1262 (1984) (predicting accurately that "government attempts to regulate access to certain channels of communication on the basis of content are likely to recur with greater frequency in the years ahead"); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 35 (2002) ("[I]ncreasingly, through various different types of interactions, government and private groups or individuals are speaking together."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 569-70 (1980) (discussing emerging issues involving government speech).

⁶ See, e.g., *Sons of Confederate Veterans, Inc.*, 288 F.3d at 618 ("No clear standard has yet been enunciated in our circuit or the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so."), *en banc reh'g denied* 305 F.3d 241, 245 (2002)

Several recent cases illustrate courts' difficulties in distinguishing the government's constitutionally suspect regulation of private expression from its permissible efforts to protect its own speech from private appropriation. On one hand, the Eighth Circuit in 2000 held that the University of Missouri's public radio station did not violate the First Amendment when it refused to accept — and thus acknowledge on-air — financial support from the Ku Klux Klan.⁷ Just a few months later, however, a different panel from the same circuit held that Missouri's Highway and Transportation Commission ran afoul of the First Amendment when it rejected the Klan's application to participate in a roadside clean-up program that would require its recognition on a state highway sign.⁸ In both cases, Missouri argued that it legitimately sought to ensure that the Klan's views were not erroneously attributed to the state, while the Klan maintained that its exclusion violated the First Amendment.⁹

Inconsistent outcomes are often driven by hard cases. These particular cases are challenging because they present elements of both governmental and private speech when a court's decision to characterize speech as governmental or private triggers very different, often outcome-determinative tests. Under prevailing doctrine, government's viewpoint-based regulation of private speech is constitutionally suspect, while government is largely free to determine which views it will itself express.¹⁰

But sometimes speech may most accurately be described as simultaneously belonging both to government and to private individuals or groups. This is often the case when a public actor offers private

(Luttig, J., respecting denial of rehearing en banc) (characterizing government speech doctrine as "still in its formative stages, and, as yet, it is neither extensively nor finely developed."); *id.* at 252 (Gregory, J., dissenting from denial of rehearing en banc) ("Speech by attribution," a largely unexplored concept of First Amendment jurisprudence, demonstrates the tricky interplay and relationship between the concepts of private and government speech."); *Wells v. City & County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001) ("The Supreme Court has provided very little guidance as to what constitutes government speech."), *cert. denied*, 534 U.S. 997 (2001).

⁷ *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000).

⁸ *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001).

⁹ Other cases implicating both governmental and private expression have generated similarly split results. For example, in 2001, the Eighth Circuit held unconstitutional Missouri's refusal to issue a personalized license plate with the message "ARYAN-1," while the Second Circuit found no constitutional infirmity in Vermont's rejection of a "SHTHPNS" plate. *Compare Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002), *with Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001).

¹⁰ See *infra* notes 43-54 and accompanying text.

speakers an expressive opportunity that is especially attractive because it appears to carry some indication of government endorsement or imprimatur.¹¹ Recognizing that public and private entities sometimes speak jointly may help us sort through some of these hard cases.

Part I of this Article argues that government has a significant interest in protecting the integrity of its own expression — i.e., in ensuring that its own views and messages are not distorted by others. Although government remains politically accountable for its speech, I assert that it should be held responsible only for its own views, and not those of others mistakenly attributed to it.

Part II then describes the very different standards applied by the Supreme Court when evaluating government's efforts to express itself, as opposed to government's regulation of private speakers. I go on to suggest that courts have too often felt compelled to choose between these two apparently mutually exclusive categories, rather than acknowledging that some cases may implicate expression by both public and private entities simultaneously.

I seek in Part III to identify the factors that help us determine whether speech is understood as partly or fully the government's own speech and thus sufficiently attributable to the government to trigger its own expressive interest. These measures include the identity of the literal speaker, the purposes that both government and private participants seek to achieve, the availability of alternative vehicles for private expression, and the effectiveness of government disclaimers. Examining these factors helps us determine whether government is motivated by a sincere interest in its own expressive integrity and whether it reasonably fears that — absent preventive action — it will be misunderstood as uttering and endorsing what are really the opinions of others.

Finally, in Part IV, I apply these factors to some challenging cases, concluding that government should have considerable latitude to protect what is truly its own speech from being appropriated by others.

I. GOVERNMENT'S EXPRESSIVE INTERESTS AND THEIR VALUE

Government may make affirmative or negative expressive choices. By "affirmative" expressive interests, I refer to a governmental entity's deliberate decision to promote a specific message, such as New Hampshire's "Live Free or Die" or the District of Columbia's "Taxation Without Representation" license plates. Public entities may also exercise

¹¹ See *infra* notes 86-89 and accompanying text.

significant “negative” expressive choices in dissociating themselves from the views of others — i.e., by preventing private speech from being mistakenly attributed to the government.¹²

A. *Government’s “Affirmative” Expressive Interests*

Professors Bezanson and Buss offer this helpful explanation of the value of government’s affirmative speech:

Democratic governments must speak, for democracy is a two-way affair. This is particularly true in representative democracies, where governments’ speech must consist not just of information, but also of explanation, persuasion, and justification to a polity tethered to the policies and preferences acted upon by its representatives. . . . Speech is but one means that government must have at its disposal to conduct its affairs and to accomplish its ends.¹³

As an example of a government’s efforts to ensure that private speakers do not undermine its affirmative message, consider *Downs v. Los Angeles Unified School District*.¹⁴ In *Downs*, a school district had established a bulletin board inviting faculty and staff submissions to promote the district’s support for Gay and Lesbian Awareness Month celebrations.¹⁵ A teacher brought a First Amendment challenge when the

¹² See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) (noting difference between school’s desire to convey affirmative message from what court termed “negative imprimatur” cases, where school seeks to avoid perception that it endorsed speech of another); *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 550 (Or. Ct. App. 2000) (observing that private individuals should not “be free to make the state say whatever they choose”), *aff’d*, 335 Or. 481 (2003); Bezanson & Buss, *supra* note 4, at 1387 (“[G]overnment may want to avoid the erroneous perception that privately chosen messages are supported by the government.”).

¹³ Bezanson & Buss, *supra* note 4, at 1380; see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects — which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary.”); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 69 (2000) (“Government speech has many virtues, and those virtues do not disappear if the speech is on a matter of current social contest.”); Jacobs, *supra* note 5, at 41 (“Government at all levels must speak to function effectively.”); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1825 (1987) (“[I]t is probably not too outlandish an exaggeration to conclude that government organizations would grind to a halt were the Court seriously to prohibit viewpoint discrimination in the internal management of speech.”); Shiffrin, *supra* note 5, at 606 (“Government has legitimate interests in informing, in educating, and in persuading.”).

¹⁴ 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001).

¹⁵ *Id.* at 1005.

school refused to allow him to post materials questioning homosexuality's morality. The school district argued that, rather than suppressing private dissent, it sought only to safeguard its own celebratory expression from interlopers.¹⁶ The Ninth Circuit had no trouble concluding that the bulletin board and its contents constituted the government's own speech:

We conclude that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose. Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist. As applied here, the First Amendment allows . . . [the school district] to decide that Downs may not speak as its representative. This power is certainly so if his message is one with which the district disagrees.¹⁷

Similarly, in *Griffin v. Department of Veterans Affairs*, the Fourth Circuit found that the First Amendment posed no bar to the federal Veterans Administration's (VA's) rejection of what it characterized as private efforts to undermine its affirmative message.¹⁸ Citing its choice to honor those killed in the Civil War and buried in federal cemeteries as Americans, rather than as Confederates, the VA denied plaintiffs' request that the Confederate flag be flown over Point Lookout Confederate Cemetery. The Fourth Circuit held that "[r]equiring the VA to allow the Confederate flag to fly daily over Point Lookout certainly 'garbles [and] distorts' the VA's chosen message that 'Point Lookout does not commemorate fallen Confederates as such[, but rather,] . . . pays tribute to them as *citizens of the United States* who died in service of the Confederacy during a national conflict.'"¹⁹ The court further explained that because the VA is free to determine its own message, it should be allowed to take action to protect the integrity of that message.²⁰

Of course, different governmental entities hold and express a wide range of views. While *Griffin* upheld a federal agency's exclusion of the Confederate flag as inimical to its affirmative message, the state of

¹⁶ See *id.* at 1011-16.

¹⁷ *Id.* at 1013.

¹⁸ 274 F.3d 818 (4th Cir. 2001), *cert. denied*, 537 U.S. 947 (2002).

¹⁹ *Id.* at 822 (emphasis added by Fourth Circuit) (quoting Appellant's Reply Br. at 7).

²⁰ See *id.* at 824.

Alabama successfully embraced the same flag as its own expression in *NAACP v. Hunt*.²¹ Denying private plaintiffs' First Amendment challenge to the state's display of the Confederate flag over the capitol dome, the Eleventh Circuit concluded that Alabama was free to use the dome for its own communicative purposes. Identifying political accountability as the appropriate means for policing governmental speech, the court advised that the remedy for those in disagreement with the state's chosen message "lies within the democratic processes of the State of Alabama and the voting rights of all its citizens"²²

B. Government's "Negative" (or "Dissociative") Expressive Interests

Government's negative expressive interests can be described as the flip side of the proposition that the First Amendment prohibits a government from compelling an individual to utter — or otherwise display or publicly associate with — a viewpoint with which he or she disagrees. Recall *Wooley v. Maynard*, where the Supreme Court held that New Hampshire's affirmative interest in expressing itself through a license plate featuring the state's "Live Free or Die" motto "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message."²³ The Court characterized New Hampshire's actions as forcing individuals to choose between using their private property as a "mobile billboard for the State's ideological message or suffer[ing] a penalty."²⁴ The Court concluded that the First Amendment does not permit the government to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."²⁵

Conversely, courts have recognized that government may similarly have significant "negative" interests in "avoid[ing] becoming the courier"²⁶ for views that are not its own. In certain educational contexts, for example, courts have held that First Amendment values are not frustrated by a public school's efforts to dissociate itself from private

²¹ 891 F.2d 1555 (11th Cir. 1990).

²² *Id.* at 1566.

²³ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (holding that government-compelled inclusion of gay and lesbian groups in parade violated First Amendment because groups' views might be erroneously attributed to parade organizers).

²⁴ *Wooley*, 430 U.S. at 715.

²⁵ *Id.* at 713.

²⁶ *See id.* at 717.

speech that it reasonably fears will be mistakenly attributed to it and thus undermine its pedagogical goals.²⁷

Consider *Hazelwood School District v. Kuhlmeier*,²⁸ where the Supreme Court upheld a public school's refusal to publish articles in its newspaper discussing student experiences with birth control, pregnancy, and divorce.²⁹ Emphasizing educators' authority over school-sponsored publications "and other expressive activities that students, parents, and the members of the public might reasonably perceive to bear the imprimatur of the school,"³⁰ the Court concluded that the school's action was justified, *inter alia*, by its interest in ensuring that "the views of individual speakers are not erroneously attributed to the school."³¹

Courts have acknowledged the strength of government's dissociative expressive interests in other situations as well.³² The Second Circuit, for

²⁷ See, e.g., *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 827 (9th Cir. 1991) (upholding school district's exclusion of family planning organization's advertisements from high school newspapers and other publications and recognizing school's interest in, *inter alia*, "disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is.").

²⁸ 484 U.S. 260 (1988).

²⁹ *Id.* at 263.

³⁰ *Id.* at 270-71.

³¹ *Id.* at 271. Even in dissent, Justice Brennan recognized the legitimacy of this interest: "[T]he majority is certainly correct that indicia of school sponsorship increase the likelihood of such attribution [i.e., that the views of the individual speaker might be erroneously attributed to the school], and that state educators may therefore have a legitimate interest in dissociating themselves from student speech." *Id.* at 288-89 (Brennan, J., dissenting). He went on, however, to characterize as excessive the school's actions in protecting that interest: "Dissociative means [e.g., disclaimers or direct rebuttals] short of censorship are available to the school." *Id.* at 289. For a different view of how schools might permissibly protect themselves from mistaken attribution, see LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 812 (2d ed. 1988) (arguing that public schools "can be powerful means of indoctrination. To reduce the potential for abuse, some diversity of viewpoints must be ensured, not by limiting the spectrum of views that the school system may communicate, and not by prescribing official requirements of artificially 'balanced' coverage of such topics as evolution and creationism, but by providing genuine opportunities for more speech — by safeguarding the academic freedom of students and teachers, and by affirming the constitutionally-protected status of private schools."). For further discussion of disclaimers and their limits, see *infra* notes 91-92 and accompanying text.

³² See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985) (holding that federal government did not violate First Amendment when it limited participation in Combined Federal Campaign "to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (suggesting in dictum that city's exclusion of political advertisements is justified by legitimate interest in avoiding "lurking doubts about favoritism").

example, recognized government's interest in protecting itself from mistaken attribution in *General Media Communications, Inc. v. Cohen*.³³ The court upheld a federal ban on the sale or rental of sexually explicit materials by military personnel in their official capacity (e.g., in military exchanges), noting the statutory purpose as "avoid[ing] the appearance that the military, by selling sexually explicit materials in military exchanges, endorses these materials."³⁴ The court emphasized that the statute intended to dissociate the military from, rather than suppress, sexually explicit speech.³⁵

The Second Circuit reiterated the significance of this distinction more recently in *Perry v. McDonald*.³⁶ In *Perry*, the court upheld Vermont's refusal to issue a "SHTHPNS" personalized license plate because the government intended "not to suppress but to dissociate" itself from the plate's language. The court reasoned that "inevitably [license plates] will be associated with the state that issues them" because they are governmental property designed to accomplish governmental goals.³⁷

Dissenting from a deeply fractured decision to deny an en banc hearing in *Sons of Confederate Veterans*, two members of the Fourth Circuit similarly voiced support for government's dissociative interests.³⁸ As Judge Niemeyer wrote in defense of Virginia's decision to deny the appearance of the Confederate flag logo on state specialty license plates:

The State, however, has not taken a position on this controversial symbol; rather it has removed itself from the fray, simply refusing to authorize the Confederate Flag logo on license plates issued by it. In doing so, of course, Virginia has not prohibited any citizen from displaying the Confederate Flag logo on his or her vehicle. Rather, the state has only indicated that the Confederate Flag logo should not be included on a license plate issued and owned by the state and bearing the name 'VIRGINIA' on the top.³⁹

Judge Gregory echoed these concerns: "I would have hoped, if rehearing were granted, that we would consider the government's interest in avoiding 'speech by attribution;' that is, the government's right not to be

³³ 131 F.3d 273 (2d Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

³⁴ *Id.* at 276.

³⁵ *See id.* at 281 n.10.

³⁶ 280 F.3d 159 (2d Cir. 2001).

³⁷ *Id.* at 169, 170.

³⁸ 305 F.3d 241 (4th Cir. 2002).

³⁹ *Id.* at 249.

compelled to speak by private citizens.”⁴⁰

To be sure, a number of insightful commentators who acknowledge the value of government’s affirmative speech remain skeptical about the strength of its negative expressive interests.⁴¹ But a government’s justifiable efforts to inform and persuade the public of its affirmative views are too easily undermined if that government cannot take dissociative action to ensure that private opinions are not erroneously attributed to it.⁴² The more formidable challenge, in my opinion, is determining whether such government actions are a pretext for censoring private speech or are instead spurred by a sincere and reasonable concern that others’ speech will be mistakenly understood as the government’s own.

II. THE CONSEQUENCES OF CHARACTERIZING SPEECH AS PRIVATE OR GOVERNMENTAL

The First Amendment standards for evaluating government’s efforts to express itself differ dramatically from those that apply to government’s regulation of private speech. In short, when government speaks on its own behalf, it is free to adopt and deliver whatever message it chooses. On the other hand, government may not favor or exclude private speakers based on the viewpoint — and often the content — of their communication.

When government regulates private speech, attention to First Amendment values requires vigilance to ensure that government is not

⁴⁰ *Id.* at 252.

⁴¹ See, e.g., Bezanson & Buss, *supra* note 4, at 1384 (urging that government speech be defined to include only “purposeful action by the government, expressing its own distinct message, which is understood by those who receive it to be the government’s message”); Jacobs, *supra* note 5, at 66-68 (2002) (recognizing government’s affirmative expressive interests, but expressing doubt as to strength of any negative or dissociative interest).

⁴² Professors Bezanson and Buss emphasize the difficulty of ascertaining “reasonable audience interpretations” for these purposes: “Attribution, in short, is a difficult, subtle, fact-intensive, and circumstance-specific question.” See Bezanson & Buss, *supra* note 4, at 1482. But in other contexts, the law has long accorded great significance to the perceptions and behavior of reasonable individuals. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-21 (1993) (adopting standard for evaluating Title VII hostile work environment claims that assesses whether reasonable person would find harassment severe or pervasive); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that person is “seized” for Fourth Amendment purposes when reasonable person in same situation would have believed that he was not free to leave); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988) (“A person is justified in using force against an aggressor when . . . he or she reasonably believes such force to be necessary.”).

seeking to suppress unpopular or inconvenient messages.⁴³ Key to this inquiry is a commitment to evenhandedness, to uncovering and rejecting government attempts to suppress speech based on content or viewpoint.⁴⁴ Bedrock First Amendment doctrine thus makes clear that government may not regulate communication simply because the government — or the public — finds the speech objectionable.⁴⁵ For this reason, government's content-based restrictions on fully protected speech face strict scrutiny.⁴⁶

Government's ability to regulate private speech is similarly constrained when government creates a forum for private expression.⁴⁷ The Supreme Court's public forum doctrine is relatively easy to recite, albeit often hard to apply.⁴⁸ Courts first assess what type of forum has

⁴³ See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 516 (1996) (“[M]ost of First Amendment doctrine constitutes a highly, but necessarily, complex scheme for ascertaining the governmental purposes underlying regulations of speech.”).

⁴⁴ NAACP v. Hunt, 891 F.2d 1555, 1565-66 (11th Cir. 1990) (“[T]he government may not abridge ‘equality of status in the field of ideas’ by granting the use of public forums to those whose views it finds acceptable while denying their use to those with controversial views.”) (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

⁴⁵ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that First Amendment does not permit state to prohibit flag-burning, even though such expressive conduct is offensive to many); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (finding that offensiveness is “classically not [a justification] validating the suppression of expression protected by the First Amendment”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (“[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”).

⁴⁶ See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

⁴⁷ As discussed *infra* notes 48-50 and accompanying text, government may engage in neither content-based nor viewpoint-based regulation of private speech in traditional or designated public fora, but is free to engage in content-based — but not viewpoint-based — discrimination while regulating private speech in nonpublic fora. As many have observed, however, the distinction, if any, between content-based and viewpoint-based discrimination is slippery. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (noting that distinction between content and viewpoint discrimination “is not a precise one”); *Sons of Confederate Veterans, Inc. v. Comm’r, Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 624 n.11 (4th Cir. 2002) (“As the Ninth Circuit has noted, the ‘coherence’ of the distinction between ‘content discrimination’ and ‘viewpoint discrimination’ may be seen as ‘tenuous.’”) (citations omitted); *Martin v. Vt. Dep’t of Motor Vehicles*, 819 A.2d 742, 749 (Vt. 2003) (noting that “law on viewpoint neutrality is not a model of clarity”); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 105 (1998) (“[I]t is hardly clear that the line between viewpoint and other forms of content discrimination can be sustained, except possibly in extreme cases.”).

⁴⁸ The Court's public forum doctrine remains the topic of extensive criticism. See Post, *supra* note 13, at 1715 n.7 (“In a world of disputatious academic criticism, the unrelenting

been created, and then determine whether the government regulation can withstand the appropriate test. Speakers may be blocked from traditional or designated public fora only when their exclusion is narrowly tailored to serve a compelling government interest.⁴⁹ Government may limit or deny access to a nonpublic forum only if its restrictions are reasonable and do not target speakers on the basis of their viewpoints.⁵⁰

The rules are completely different when government itself is speaking, as the Supreme Court has repeatedly confirmed. The Court emphasized this distinction, for example, in *Rosenberger v. Rector and Visitors of University of Virginia*:⁵¹

[W]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. . . . It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.⁵²

The Court stressed the First Amendment significance of the difference between governmental and private speech yet again in *Board of Regents v. Southworth*:

The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to

and unanimous condemnation of contemporary public forum doctrine is truly remarkable."); see also *TRIBE*, *supra* note 31, at 987 (noting public forum doctrine has "proven to be quite manipulable and problematic"); *Bezanson & Buss*, *supra* note 4, at 1381 (stating that public forum analysis is "so riven with incoherence and fine distinctions that it is on the verge of collapse"); *Farber & Nowak*, *supra* note 5, at 1234 ("Classification of public places as various types of forums has only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases"); Suzanne Stone Montgomery, Note, *When the Klan Adopts-A-Highway: The Weakness of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557, 558 (1999) ("The public forum doctrine has proved unworkable in practice.").

⁴⁹ See *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

⁵⁰ See *id.*

⁵¹ 515 U.S. 819, 835 (1995).

⁵² *Id.* at 834-35.

overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself. . . . Our decision ought not to be taken to imply that in other instances, the University, its agents or employees, or — of particular importance — its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.⁵³

In short, characterizing the speech as governmental or private drives the decision of which test to apply, and thus often the litigation's outcome.⁵⁴

Determining whether certain expression belongs to the government or to private speakers, however, can be tricky — so tough, in fact, that courts wrestling with these questions have generated inconsistent and often unsatisfying opinions.⁵⁵ When confronted with the stark choice between characterizing speech as governmental or private, courts have too often responded by forcing the expression into one box or another.⁵⁶

⁵³ 529 U.S. 217, 229, 234-35 (2000) (citations omitted).

⁵⁴ See also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 534, 541 (2001) (holding that Congress violated First Amendment when it banned Legal Services Corporation (LSC) funding recipients from challenging existing welfare law and characterizing LSC program “as designed to facilitate private speech” rather than as government’s own expression that would trigger very different and more lenient rules).

⁵⁵ See, e.g., *Sons of Confederate Veterans, Inc. v. Comm’r, Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (“No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’ and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.”), *en banc reh’g denied*, 305 F.3d 241, 245 (2002) (Luttig, J., respecting denial of rehearing en banc) (characterizing government speech doctrine as “still in its formative stages, and, as yet, it is neither extensively nor finely developed”); *id.* at 252 (Gregory, J., dissenting from denial of rehearing en banc) (“‘Speech by attribution,’ a largely unexplored concept of First Amendment jurisprudence, demonstrates the tricky interplay and relationship between the concepts of private and government speech.”); *Wells v. City & County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001) (“The Supreme Court has provided very little guidance as to what constitutes government speech.”), *cert. denied*, 534 U.S. 997 (2001).

⁵⁶ See *Sons of Confederate Veterans*, 305 F.3d at 244-45 (Luttig, J., respecting denial of en banc review) (observing that courts have “assumed, in oversimplification, that all speech must be either that of a private individual or that of the government, and that a speech event cannot be both private and governmental at the same time”); *Bezanson & Buss*, *supra* note 4, at 1381, 1430 (noting that despite supposed doctrinal “chasm” between them, “the chambers of government speech and the public forum are not watertight, . . . [nor] mutually exclusive.”).

Sometimes courts “resolve” the problem by simply ignoring one party’s expressive interests altogether. For example, a number of courts have allowed government to regulate personalized license plate messages while denying altogether the plates’ significant opportunities for drivers’ personal expression.⁵⁷ Perhaps because they feel compelled to make a choice, these courts make their selection “easier” by refusing to acknowledge that any private expressive interest is involved.⁵⁸

Just as commonly, courts fail to consider the possibility that government expression may also be at stake. This omission may at times be attributable to a government litigant’s failure to raise its own expressive interests as a defense⁵⁹ (which, of course, may signal that government instead impermissibly sought to suppress others’ speech). For example, Missouri apparently did not assert (and the Eighth Circuit thus did not consider) the state’s own expressive interest in defending its rejection of an application for an “ARYAN-1” license plate.⁶⁰ Instead, the

⁵⁷ California state courts, for example, have consistently denied that personalized license plates provide any significant vehicle for private expression. See *Kahn v. Dep’t of Motor Vehicles*, 16 Cal. App. 4th 159, 166-67 (1993) (upholding state rejection of “TPUBG” plate, which in stenographic symbols can be read either as “IF YOU CAN” or “FUCK,” and stating “[t]hat the state permits license holders, for an additional fee, to vary minimally their vehicle identification from the prescribed form by selecting letter and/or number combinations which may reflect” personal identity or expressive interests does not trigger First Amendment rights; little expression is possible “within the limited confines of the [plate’s] seven alphabetical and numerical symbols”); *Katz v. Dep’t of Motor Vehicles*, 108 Cal. Rptr. 424, 427 (Ct. App. 1973) (upholding government rejection of proposed “EZLAY” personalized plate because State’s regulation is “[a]t best a minimal and incidental restriction on Katz’ alleged First Amendment freedom of expression;” First Amendment considerations are at best minimal, if present at all).

⁵⁸ As discussed *infra* notes 97-109 and accompanying text, I agree with the California courts’ conclusion that government may regulate license plates’ content, but not the courts’ analysis. Instead of denying private speakers’ expressive interests altogether, I believe that government should not be compelled to act as the “ventriloquist’s dummy” through which those views are aired.

⁵⁹ See *Cuffley v. Mickes*, 208 F.3d 702, 711 (8th Cir. 2000), *cert. denied* 532 U.S. 903 (2001) (noting that “the State admitted repeatedly in depositions that it does not view the erection of an Adopt-a-Highway sign as an endorsement or promotion of the adopter,” court found no government expressive interest asserted and decided case under unconstitutional conditions doctrine); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1101-02 (D. Md. 1997) (noting that state conceded that Sons of Confederate Veterans’ use of Confederate flag logo on their specialty plate design constituted private expression, court found that state’s ban on logo in response to citizen complaints violated First Amendment). *But see* Recent Cases, *Constitutional Law — First Amendment — Viewpoint Discrimination — Eighth Circuit Holds that Missouri May Not Exclude Knights of the Ku Klux Klan from Public Program*, 114 HARV. L. REV. 660, 665 (2000) (characterizing *Cuffley* panel as “ben[ding] over backward to ignore the relevant government speech interest”).

⁶⁰ See *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (recognizing personalized license plates’ opportunities for private, but not government, expression: “[I]t occurs to us

state unsuccessfully attempted to justify Missouri's law banning personalized plates that are "obscene, profane, inflammatory, or contrary to public policy" as "promoting highway safety by rejecting license plates that could incite so-called road rage."⁶¹ Such government efforts to justify regulation of private speech because it offends or upsets its viewers are generally doomed to constitutional failure.⁶²

The handful of courts that have acknowledged even the possibility of joint or simultaneous government/private speech have offered little guidance on the standards for evaluating government action in this context.⁶³ Even those courts that acknowledge the legitimacy of government's interest in protecting its own expressive integrity too often muddy the waters by claiming to apply some sort of forum doctrine. Recall, for example, *Griffin v. Department of Veterans Affairs*.⁶⁴ In *Griffin*, the Fourth Circuit held that "[r]equiring the VA to allow the Confederate flag to fly daily over Point Lookout certainly 'garbles [and] distorts' the VA's chosen message."⁶⁵ Purporting to ground its conclusions in forum analysis, the court characterized the VA program at issue as a nonpublic forum, in which government is free to regulate private speech so long as its actions are reasonable and viewpoint-neutral.⁶⁶ Yet an honest assessment of the facts would acknowledge that the VA's decision to fly the American, and not the Confederate, flag over a Civil War cemetery is actually viewpoint-based, rather than viewpoint-neutral. Forum

that a personalized plate is not so very different from a bumper sticker that expresses a social or political message. The evident purpose . . . is to give vent to the personality, and to reveal the character or views, of the plate's holders."), *cert. denied*, 535 U.S. 986 (2001).

⁶¹ *Id.* at 1078, 1080.

⁶² See *supra* notes 43-46 and accompanying text; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377-78 (1992) (striking down city ordinance that banned display of symbols that cause anger, resentment, or alarm on basis of race, religion, or gender as impermissible viewpoint-based discrimination); *Sons of Confederate Veterans, Inc. v. Comm'r, Va. Dep't of Motor Vehicles*, 288 F.3d 610, 616 n.4 (4th Cir. 2002) ("[V]iewpoint-based restrictions of private speech are presumptively unconstitutional.").

⁶³ Judge Luttig, for example, suggests that if speech is both private and governmental, then "at a minimum therefore the government may not engage in viewpoint discrimination." *Sons of Confederate Veterans*, 305 F.3d at 247 (Luttig, J., respecting denial of en banc review). He notes, however, that a different result may be possible in situations where government speech interests are great or where government is merely engaging in content-based discrimination. *Id.*; see also *Wells v. City & County of Denver*, 257 F.3d 1132, 1154-55 (Briscoe, J., dissenting) (arguing that holiday display constituted both private and governmental speech, but failing to identify constitutional analysis triggered by such joint speech).

⁶⁴ 274 F.3d 818 (4th Cir. 2001), *cert. denied*, 537 U.S. 947 (2002).

⁶⁵ *Id.* at 822.

⁶⁶ See *id.* at 820-25 (characterizing Virginia's refusal to fly Confederate flag as "viewpoint-neutral" regulation of nonpublic forum).

analysis, properly applied, would have led the court to strike down the VA's actions. Similarly, many state laws regulating personalized license plates would likely be found unconstitutional under forum analysis because they include what may well be viewpoint-based restrictions.⁶⁷

The better framework is to understand these not as forum cases, but situations in which government itself is speaking — either on its own or jointly with a private speaker — and is thus free to protect the integrity of its own expression by refusing to utter speech with which it disagrees. Indeed, government's own expressive interest offers the only constitutional rationale for its regulation of many messages on personalized and specialty license plates, when clearly government could not regulate similar words and symbols on purely private bumper stickers, license plate frames, billboards, T-shirts, or jackets.⁶⁸

For these reasons, we should think more carefully about the circumstances under which private speech may be mistakenly understood as that of the government. The next Part identifies some factors that may be helpful in determining whether speech is sufficiently attributable to the government to trigger the government's own expressive interests.

III. WHEN AND HOW MAY GOVERNMENT PROTECT ITS OWN EXPRESSION? SOME FACTORS TO CONSIDER

Our commitment to the First Amendment and its prohibition on government censorship⁶⁹ requires that we distinguish between government's impermissible attempts to manipulate unpopular private speech and its legitimate efforts to protect its own expressive integrity. The following government justifications, if sincere, should thus trigger

⁶⁷ See, e.g., CAL. ADMIN. CODE tit. 13, § 170.00(c)(7)(D) (West 2004) ("The department shall refuse any configuration that may carry connotations offensive to good taste and decency, or which would be misleading, based on criteria which includes . . . (2) The configuration is a vulgar term; a term of contempt, prejudice, or hostility; an insulting or degrading term; a racially degrading term; or an ethnically degrading term. . . (4) The configuration has a negative connotation to a specific group."); IOWA ADMIN. CODE § 761-401.6(321)(2)(d) (West 2004) (Department of Transportation will not issue personalized plates that contain any combination of characters "which is . . . defined in dictionaries as a term of vulgarity, contempt, prejudice, hostility, insult, or racial or ethnic degradation.").

⁶⁸ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377-78 (1992) (striking down city ordinance that banned display of symbols that cause anger, resentment, or alarm on basis of race, religion, or gender as impermissible viewpoint-based discrimination); *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding that First Amendment does not permit government to ban wearing of jacket emblazoned with message "Fuck the Draft").

⁶⁹ See, e.g., Farber & Novak, *supra* note 5, at 1235 ("The core command of the [F]irst [A]mendment is a prohibition on censorship.").

quite different constitutional analyses: “We denied the Klan’s application because we hate the Klan and what it stands for” is constitutionally suspect, while “We denied the Klan’s application because we too are speaking in this context and we reasonably feared that the Klan’s speech would be wrongly attributed to us” should better withstand a First Amendment attack.

The challenge, then, is determining whether government actions are a pretext for suppressing private speech or are instead spurred by a sincere and reasonable concern that others’ speech will be mistakenly understood as the government’s own. To allay our suspicions of censorship, a governmental entity seeking to justify actions taken to protect its expressive interests should demonstrate that the government is literally speaking in a given context and that, absent these preventive actions, reasonable onlookers would mistakenly perceive the government to be delivering or endorsing what are really the views of others. This test protects government’s own expressive interests without thwarting First Amendment values. The following inquiries can be particularly helpful in assessing whether government can meet this standard.⁷⁰

⁷⁰ A few courts have recently begun to articulate and apply a four-factor test when charged with characterizing speech as private or governmental. Noting that the Supreme Court has provided very little guidance as to what constitutes government speech, the Tenth, and then the Fourth, Circuits synthesized the following from earlier appellate decisions:

Our sister circuits have examined (1) the central ‘purpose’ of the program in which the speech in question occurs; (2) the degree of ‘editorial control’ exercised by the government or private entities over the content of the speech; (3) the identity of the ‘literal’ speaker; and (4) whether the government or the private entity bears the ‘ultimate responsibility’ for the content of the speech

Sons of Confederate Veterans, Inc. v. Comm’r, Va. Dep’t of Motor Vehicles, 288 F.3d 610, 618-19 (4th Cir. 2002); *see also* Wells v. City & County of Denver, 257 F.3d 1132, 1140-41 (10th Cir. 2001). The courts applying this test have offered no discussion of its underlying rationale. Nevertheless, as discussed *infra* notes 71-93 and accompanying text, I find the identity of the literal speaker and the program’s purposes to be among the factors that are especially helpful when assessing whether government sincerely and reasonably fears that it will wrongly be held accountable as endorsing views that are not its own. Indeed, I find that these two factors help explain whether the government or the private entity ultimately bears responsibility or accountability for the speech, which these courts have identified as a separate factor for consideration. *See infra* note 86. As discussed *infra* note 93, however, I am skeptical that the degree of editorial control exercised by the government is a helpful measure for our purposes.

A. Who Is the "Literal" Speaker?

If government is compelled to utter the views of others, there is a significantly greater likelihood that those opinions will be mistakenly attributed to the government.

For this reason, in situations where the government is the "literal speaker" — i.e., the entity that is actually saying, writing, or otherwise directly delivering the message — it should be permitted to decline to serve as the "dummy" through which a private ventriloquist projects her views.⁷¹

Knights of the Ku Klux Klan v. Curators of the University of Missouri offers a particularly instructive example.⁷² Recall that the Eighth Circuit denied the Klan's First Amendment challenge to a public university radio station's rejection of proffered financial support that would have required on-air acknowledgment. The Klan's local leader sought to underwrite National Public Radio's *All Things Considered* because he "enjoyed the program, wanted to support KMWU, and hoped to attract more highly educated people to his organization."⁷³ The Klan offered to contribute to the show's support, and submitted the following copy to be read by on-air station personnel in acknowledgment: "The Knights of the Ku Klux Klan, a White Christian organization, standing up for the rights and values of White Christian America since 1865. For more information[,] please contact"⁷⁴

The court held that the underwriting acknowledgments constituted the public station's own speech and that the station was thus free to control the content of that expression. In so holding, the court emphasized the fact that station employees would themselves be delivering the Klan's promotion because they read the acknowledgments on-air.⁷⁵

⁷¹ See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000).

⁷² 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000).

⁷³ *Id.* at 1089.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1094. The panel also emphasized that the station was a communications enterprise and that the acknowledgments' central purpose was "not to promote the views of the donors, but to acknowledge" donations, pursuant to federal requirements. *Id.* at 1093. The court was also impressed by the station's consistent assertion of control over the acknowledgments' content (the station had declined donations from Ultimate Fighting Championships, the American Friends Service Committee, and an establishment "known to be a house of ill repute"). *Id.* at 1089. Finally, the court noted that the station was ultimately responsible for the broadcast's content, including its compliance with various FCC regulations and other legal obligations. *Id.* at 1094 n.8.

Underwriting acknowledgments in this way appear akin to a state's Adopt-a-Highway program, in which the state manufactures and erects roadside signs that, explicitly or implicitly, thank private donors or volunteers.⁷⁶ Although private entities that have volunteered their efforts or offered a financial contribution may well feel that they have bought — and thus “own” — the signs' expression, they are not the “literal” speakers when government makes, installs, and maintains the signs. In each of these scenarios, private input or contributions to the government's message should not necessarily strip the government of its ability to control that message. Indeed, the government's role as “literal” speaker strengthens its expressive concerns.

Wells v. City and County of Denver further illustrates the role of the literal speaker in ascribing speech to the government or to private actors.⁷⁷ Denver erected a holiday display on the steps of the City and County Building that depicted a crèche, reindeer, snowmen, Christmas trees, Santa Claus, and elves. The display was accompanied by a large sign with the words “Happy Holidays from the Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building,” followed by a listing of six corporate sponsors.⁷⁸

A private individual whose efforts to add her own sign to the display were rebuffed by Denver challenged her exclusion on First Amendment grounds.⁷⁹ She characterized the display as a collection of private speech and pointed to the sign's literal text, which appeared to identify private sponsors as joining Denver in extending holiday greetings to passers-by. Denver, for its part, claimed the display as entirely its own speech celebrating the holiday season and thanking its financial contributors.

The Tenth Circuit panel quarreled over the identity of the literal speaker. The majority held that the speech belonged to Denver, largely

⁷⁶ See *infra* notes 110-15 and accompanying text.

⁷⁷ 257 F.3d 1132 (10th Cir. 2001), *cert. denied*, 534 U.S. 997 (2001).

⁷⁸ *Id.* at 1140 n.4. The sponsors were identified as News 4, Spirit of Colorado, Coors Light, King Soopers – AAA of Colorado, Denver Rocky Mountain News, and Rock Bottom Brewery. *Id.* at 1154 (Briscoe, J., dissenting).

⁷⁹ *Id.* at 1139-42. The plaintiff sought to post her own sign on the steps with the following message:

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

Id. at 1137.

deferring to the city's assertion of its own expressive purpose and its apparent control over a display that it owned, maintained, and secured.⁸⁰ The dissent argued that the display included both private and government speech, emphasizing the literal text of the sign as communicating a message to the public from private sponsors as well as from Denver.⁸¹ As a result, the dissent maintained, onlookers would likely perceive the display as private speech.⁸²

Wells' holiday display offers an excellent example of joint government and private speech. Denver sought to offer a holiday message of its own, while at the same time providing private entities the opportunity to express (and receive public recognition of) their support for the city's celebration. The private sponsors may have seen the display as communicating their own holiday greetings to the public as well as their commitment to philanthropy — with the added bonus of the government's imprimatur in the form of gratitude, explicit or implicit.⁸³

But truly joint speech requires that both parties agree to the joint expression. Absent such agreement, either party may withhold its voice rather than be compelled to join speech with which it does not want to be associated. In this case, the plaintiff did not seek to join Denver's

⁸⁰ *Id.* at 1139-40.

⁸¹ *Id.* at 1154 (Briscoe, J., dissenting).

⁸² *Id.* at 1155.

⁸³ As written, the sign's literal speakers appear to be both Denver and the private sponsors ("Happy Holidays from the Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building"). Denver's argument that it spoke alone would have been bolstered if the display's sign clearly identified Denver as the sole and literal speaker (e.g., "A Holiday Greeting from the City of Denver. Thanks to the following sponsors for their financial support . . ."). Such a message would more closely parallel that in *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, where the Eighth Circuit upheld the public station's claim that its decision whether to accept and acknowledge underwriter support constituted solely government speech. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-95 (2000).

For a situation where the identity of the literal speaker cuts *against* characterizing the speech as governmental, consider the facts in *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, the Court upheld federal regulations that barred recipients of Title X funding from engaging in abortion counseling or referral activities. *Id.* at 192-200. In so holding, the Court found that the government had essentially contracted its speech to be uttered or performed by health care providers receiving federal funding, and thus could require that its funds be devoted to airing only its own viewpoint. *Id.* at 194. I agree, however, with those critics who argue that in this context patients may mistakenly attribute the government's views to their doctors. As the literal speakers in this context, the doctors may well be misunderstood to be speaking as independent professionals offering their own counsel, rather than as paid federal agents bound to espouse the policy preferences of the government. See, e.g., Bezanson & Buss, *supra* note 4, at 1394-96; Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 172-75 (1996).

message of thanks and celebration, but instead sought to insert her differing views on the appropriate observance of the holiday season.⁸⁴ Denver decided to decline to allow her to join its speech simply because it sought to protect its message from outside appropriation.

B. Why Did Government Create the Program at Issue and Why Do Private Speakers Seek to Participate?

Examining a program's purpose also helps assess the sincerity of a government's assertion that its expressive integrity is imperiled by certain private speakers' participation. Government's expressive interests are particularly strong when it operates programs with primarily communicative purposes – e.g., when it makes decisions about what it will teach or broadcast. When a public entity educates, it expresses the values it seeks to impart. When government acts as journalist or broadcaster, it communicates what it considers newsworthy and of general public interest. Private speakers' efforts to encroach on those communicative choices are likely to be seen as garbling or distorting the government's own speech. For these reasons, courts have generally upheld these particular speakers' advertising or underwriting choices as implicating the government's own speech.⁸⁵

But government may be literally speaking — and may be held responsible for such speech⁸⁶ — even when its primary objective is not necessarily communicative. In those situations, our inquiry into purpose should explore not only why government offers a particular program, but also why private individuals choose to participate. To what degree do private participants seek some sort of government imprimatur for their speech?

⁸⁴ The Tenth Circuit separately addressed, and rejected, the plaintiff's Establishment Clause claims. See *Wells*, 257 F.3d at 1152-53.

⁸⁵ See *Knights of the Ku Klux Klan*, 203 F.3d at 1093-94, *cert. denied*, 531 U.S. 814 (2000); *Planned Parenthood, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 827-29 (9th Cir. 1991); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-72 (1988); see also Schauer, *supra* note 47, at 120 (noting that some government enterprises "are themselves in the business of supplying speech because of its content").

⁸⁶ Those courts adopting the four-factor analysis described *supra* note 70 include an examination of whether the government or the private speaker bears "ultimate responsibility" for the speech. See *Sons of Confederate Veterans, Inc. v. Comm'r, Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002); *Wells*, 257 F.3d at 1140-41. I understand this to ask whom listeners or onlookers will hold accountable for the speech — the government or the private individual. In my opinion, accountability in this context is not independently determined, but depends on the factors identified in the text: the identity of the literal speaker, the purposes to be achieved by government and private speakers, and the effectiveness of government disclaimers.

Why, for example, does the Sons of Confederate Veterans (or any other organization) desire a state-issued license plate with its name and logo, when bumper stickers and license plate frames with the same words and symbols are easily produced and readily available? Indeed, private speakers have plenty of other opportunities to display the identical message right next to, above, or below, the license plate. As one Vermont Supreme Court justice observed, "prohibiting a term on a vanity plate does not prevent vehicle owners from conveying the same message through a bumper sticker affixed to their car. Bumper stickers have historically provided Vermonters with a much more expressive forum than vanity plates, and Vermonters have shown no reluctance to use them to make humorous, political, and religious statements."⁸⁷

By shunning such readily available alternatives for ventilating their own expression, it appears that those private speakers seek the added emphatic or symbolic value of the government's imprimatur for their speech. As an Oregon court observed: "The reason why an individual wants a vanity license plate is that the license plate bears the imprimatur of the state. Petitioner wants the state's endorsement of his message [A] bumper sticker would not satisfy petitioner's desire to have the state endorse the words he chooses to display."⁸⁸ In such situations, government's interest in protecting its speech from being commandeered by others seems especially strong.

Moreover, such government actions do not foreclose other, equally visible, avenues for private speakers to ventilate their views.⁸⁹ As discussed above, when government regulates license plate messages or

⁸⁷ *Martin v. Agency of Transp., Dep't of Motor Vehicles*, 819 A.2d 742, 757 n.7 (Vt. 2003) (Johnson, J., dissenting); see also *Katz v. Dep't of Motor Vehicles*, 32 Cal. App. 3d 679, 682 (Cal. Ct. App. 1973) (noting that driver whose proposed personalized plate message is rejected may still put combination of words and letters on car or in metal frame surrounding license plate).

⁸⁸ *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 541 n.21 (Or. Ct. App. 2000) (en banc), *aff'd*, 72 P.3d 628 (Or. 2003).

⁸⁹ Abner Greene characterizes this as ensuring that government is not monopolizing speech. See Greene, *supra* note 13, at 27-41. Similarly, Leslie Jacobs thoughtfully describes the "non-speech-suppressing impact" she would require of legitimate government speech. Jacobs, *supra* note 5, at 78-88. Indeed, I agree with much of Professor Jacobs' insightful discussion, which also seeks to identify the appropriate boundaries between government and private speech. See *id.* My analysis most diverges from hers in my greater willingness to support government's efforts to protect the integrity of its own expression from private speakers seeking some sort of state imprimatur for their expression. Professor Jacobs recognizes government's affirmative expressive interests, but is less convinced of the strength of any negative or dissociative interest. See *id.* at 66-68. She also more readily trusts disclaimers to protect any such negative expressive interests. See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1398 (2001).

logos, it does not inhibit individuals and groups from displaying the very same messages and logos on bumper stickers and license frames immediately adjacent to the plates themselves. Indeed, the First Amendment does not permit government to limit this clearly private speech.⁹⁰ Regulating the messages conveyed on license plates thus forecloses only a narrow swath of expressive opportunity, and thus appears most likely sincerely motivated by government's expressive interests, rather than an intent to suppress unpopular messages generally.

C. *Will Government Disclaimers Adequately Protect Its Expressive Interests?*

Our inquiry should also assess the availability of disclaimers — i.e., prominent statements that expressly disavow any government endorsement of accompanying private speech. If government can adequately protect the integrity of its expression by disclaiming private speech, then it should do so. Indeed, government's failure to take advantage of such opportunities for rebuttal may fuel suspicions that it is actually motivated by an interest in censoring others, rather than protecting its own speech.⁹¹

Disclaimers, however, are ineffective in some circumstances. License plates, for example, offer no space in which a state may disavow or rebut

⁹⁰ See, e.g., *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131, 1148 (D. Kan. 2002) (holding that city violated First Amendment by prohibiting city employee from displaying Confederate flag on private vehicle parked on city property); *Firefighters Ass'n v. Barry*, 742 F. Supp. 1182, 1198 (D.D.C. 1990) (deciding that city violated First Amendment by disciplining firefighters for displaying bumper stickers on their own cars calling their jobs "jokes"). But see *Etheridge v. Hail*, 56 F.3d 1324, 1327 (11th Cir. 1995) (upholding military base's ban on bumper stickers and other displays on site that "embarrass or disparage" commander-in-chief).

Although government regulation of bumper stickers or similar private displays based on their "offensive" content would likely run afoul of the First Amendment, at least one state continues to do so despite the considerable constitutional vulnerabilities. See TENN. CODE ANN. § 55-8-187 (2003) (prohibiting, inter alia, "patently offensive" bumper stickers "[t]o avoid distracting other drivers and thereby reducing the likelihood of accidents").

⁹¹ Indeed, some commentators argue that disclaimers and disavowals should be the only means available to the government to protect its own negative expressive interests. See *Bezanson & Buss*, *supra* note 4, at 1485 ("Where the expressive message is pervasive or widespread, disavowal may not be perfectly effective. Nevertheless, because 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. Government's escape from unintended attribution, then, would be limited to disclaimer or disavowal only."); *Jacobs*, *supra* note 89, at 1398 (2001) (noting that most justices "acknowledge that the government can often counteract [mistaken imprimatur] by means of an effective disclaimer").

personalized or specialty messages that may be mistakenly attributed to it. Government may then try to disclaim elsewhere, but this effort is likely to fail. For example, even if Virginia issues a press release announcing its neutrality on whether the Confederate flag is a symbol of heritage or hate, the logo's unrebuted display on the state license plate may well undermine that position.⁹²

In sum, an assessment of the factors discussed above — the identity of the “literal” speaker, the purposes sought to be achieved by both government and private speakers, the availability of other avenues for private expression, and the effectiveness of disclaimers⁹³ — helps to

⁹² See Jacobs, *supra* note 89, at 1424 (“Vanity plates do not have the space to explain whether or not the speaker intended to deliver a message of ethnic hate, ethnic pride, or neither.”); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 794 n.2 (1995) (Souter, J., concurring) (noting that disclaimer may be ineffective if “other indicia of endorsement outweigh the mitigating effect of the disclaimer, or where the disclaimer itself does not sufficiently disclaim government support.”) (citations omitted); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 806 n.13 (1995) (Stevens, J., dissenting) (arguing that disclaimers may not dispel implied government endorsement of religious displays where display is considerably more visible than government’s disclaimer).

⁹³ Some courts have also looked to whether a governmental speaker has consistently asserted editorial control over certain speech in assessing its claim that it seeks only to protect its own expression from distortion or mistaken attribution. See *Sons of Confederate Veterans, Inc. v. Comm’r, Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002); *Wells v. City & County of Denver*, 257 F.3d 1132, 1140-41 (10th Cir. 2001).

For example, in rejecting Virginia’s claim that its specialty plate program constituted the commonwealth’s affirmative speech honoring various organizations with a state-sponsored license plate, the Fourth Circuit found little evidence to suggest that the state actually screened applicants for merit. See *Sons of Confederate Veterans*, 288 F.3d at 620-21 (noting that “the record reveals that little, if any, [editorial] control ordinarily is exercised.”).

Similarly, a federal district court found Louisiana’s claim that it employs specialty license plates to communicate official state messages undermined by the absence of evidence indicating that Louisiana consistently asserted editorial control over plates’ content. See *Henderson v. Stalder*, 265 F. Supp. 2d 699, 717-20 (E.D. La. 2003) (finding state’s argument that it issues “Choose Life” and not “Pro-Choice” specialty license plates because it chooses to adopt former view as official state message to be undermined by issuance of Wild Turkey Federation and other specialty plates that do not further state purposes).

Under this analysis, the more control government asserts over the content of joint speech, the greater the likelihood that the surviving content will be perceived as carrying the government’s imprimatur. The less selective, the less likely government will be perceived as endorsing the private elements of its joint speech and the weaker its claims of concern for its expressive integrity. This suggests, however, that the more speech the government screens, the more speech it will be allowed to screen — a proposition that seems inimical to the First Amendment. It also downplays the role of government’s negative expressive interests that may require only occasional or limited editorial action. For these reasons, I find an assessment of editorial control of limited value to our inquiry. The better approach, in my view, is to identify those situations in which government legitimately declines to serve as a dummy delivering what are really the views of a private

determine whether government's asserted expressive interests are sufficiently sincere and reasonable to justify its protective actions.

IV. APPLYING THESE PRINCIPLES: SOME HARD CASES

The foregoing discussion offers a framework for sifting through cases, separating those in which government seeks to protect the integrity of its own expression from those in which government seeks impermissibly to stifle others' speech. If we conclude that government is not speaking at all, then "traditional" First Amendment principles, such as forum analysis, should apply.⁹⁴ On the other hand, if we conclude that a public entity is itself speaking (either solely, or jointly with others), the First Amendment permits government to control and protect the content of its speech.

Governmental entities have some options for avoiding constitutional problems in this context altogether. First, government need not share its speech at all. For example, a state could decline to offer specialty license plates and simply issue plates that deliver only its chosen message — e.g., New Hampshire's state motto, "Choose Life or Die" (so long as, consistent with *Wooley v. Maynard*,⁹⁵ the state does not penalize individuals who refuse to display the message). Similarly, states could abandon their personalized license plate programs altogether and return to randomly generating identifying characters on a background with no logo or message. That choice, however, would require them to forego a potentially lucrative revenue source in times of ever-dwindling government resources.⁹⁶

ventriloquist. As discussed *supra* notes 71-93 and accompanying text, I argue that these circumstances are best identified by assessing the identity of the literal speaker and the resulting likelihood that the speech will be attributed to the government, the purposes underlying government and private participation in the program's expressive opportunities, and the availability of other avenues for private speakers to air their views and for government to protect its expressive integrity.

⁹⁴ See *supra* notes 43-50 and accompanying text.

⁹⁵ See *supra* notes 23-25 and accompanying text.

⁹⁶ See, e.g., Johnny Diaz, *You're So Vain with Vanity Plates*, BOSTON GLOBE, June 29, 2003, at City Weekly 1 (noting that Massachusetts vanity plates generate \$4.2 million each year in revenue for state); Amy Hsuan, *Drivers Use Plates to Communicate*, SYRACUSE POST-STANDARD, July 20, 2003, at B3 (noting that New York generates about \$9 million annually from custom and personalized plates); Theo Helm, *Plate Checks a Ray of Light for Hatteras Museum*, WINTON-SALEM JOURNAL, Aug. 7, 2002, at B1 (noting that North Carolina collected more than \$5 million in 2001 from specialty and vanity license plates); Jack Kilpatrick, *Vanity Plate Law Taking a Well-Deserved Beating*, DESERT NEWS, Jan. 22, 2002, at A07 (stating that vanity tags account for estimated \$100 million in easy revenue for states). *But see* John Commins, *Tennessee Lawmakers Plan Another Look at Specialty License Plates*,

Second, government is free to decline to defend their own expressive interests. It could accept all applicants to a particular program and simply disavow any association with any private speech. This choice, however, requires it to shoulder the risk that it will be mistakenly perceived as — and wrongly held politically accountable for — endorsing others' speech.

The tough cases arise where government declines these options, permitting some, but not other, private input into governmental expression. Specialty license plate programs — where state initiatives authorize the issuance of special license plates to members and supporters of various organizations, groups, or ideas — appear to raise particularly thorny questions in this regard. So far, lower courts have generally ruled that state governments violate the First Amendment when they exclude certain messages or logos from those programs.⁹⁷ In so holding, however, these courts too often underestimate the government's legitimate interest in its expressive integrity.

In *Sons of Confederate Veterans*, for example, the Fourth Circuit rejected Virginia's argument that the state would be mistakenly understood as endorsing the Confederate flag if the logo appeared on state-issued specialty plates emblazoned with "VIRGINIA" across the top.⁹⁸ The court concluded instead that organizations' names and logos constitute purely private speech.⁹⁹

An examination of the factors discussed above, however, supports a different outcome. The court failed to acknowledge the state's role as "literal speaker" where it requires, owns, manufactures, issues, and is prominently identified on the plates. The court ignored the likelihood that reasonable onlookers would thus see the state as, and hold it accountable for, endorsing the flag.¹⁰⁰ The court also failed to address the

CHATTANOOGA TIMES FREE PRESS, June 22, 2003, at A1 (quoting various public officials suggesting that political controversy over "Choose Life" license plates supports dropping specialty license plate program altogether).

⁹⁷ See *Sons of Confederate Veterans*, 288 F.3d at 622; *Henderson*, 265 F. Supp. 2d at 718; *Planned Parenthood, Inc. v. Rose*, 236 F. Supp. 2d 564, 571 (D.S.C. 2002).

⁹⁸ *Sons of Confederate Veterans*, 288 F.3d at 621-22.

⁹⁹ *Id.* at 621.

¹⁰⁰ The court may well have been distracted from this inquiry by Virginia's hard-to-swallow assertion that the specialty plate program was intended as a vehicle for the state's affirmative expression — i.e., its selection of especially worthy organizations that deserved to be honored publicly. Virginia maintained that any expressive content on a Virginia specialty plate is "a statement by the Commonwealth about the group represented on the plate" — i.e., a way for the state to "honor an organization." See *Sons of Confederate Veterans*, 288 F.3d at 616. But as the court observed, "[i]f the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of

ready availability of alternative avenues for the Sons of Confederate Veterans to celebrate their organization without the government's imprimatur (through, for example, bumper stickers and license plate frames), nor did it consider the limits on the state's ability to disclaim any endorsement of the Confederate flag logo. Had the court considered these factors, it should have concluded that license plates are best understood as the state's own speech, informed in part by input from private speakers. As Judge Niemeyer forcefully explained in dissenting from the denial of rehearing en banc:

I respectfully submit that because Virginia owns the license plates it issues and rightfully controls what appears on them, it can, as part of its control, designate their content as its own speech. . . . I respectfully submit that it is impossible to avoid the conclusion that the Commonwealth of Virginia, 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, even though the message may have been adopted by the State pursuant to an application submitted by a licensee.¹⁰¹

For a different twist on the expressive interests at stake, consider Louisiana's position in *Henderson v. Stalder*.¹⁰² While Virginia sought to protect a position of neutrality on the Confederate flag, Louisiana claimed to be defending its affirmative views from distortion when it issued, as part of its specialty license plate programs, a "Choose Life" plate while declining to issue a "Pro-Choice" plate.¹⁰³ Acknowledging only the significant private expression at stake, the district court downplayed the state's role as literal speaker in delivering the message.¹⁰⁴

Specialty and personalized license plate programs exemplify a situation where both parties' input is key to the speech: the expression's

money from private persons before its 'speech' is triggered." *Id.* at 620. Virginia's position would have been stronger if it had focused on its negative expressive interest in remaining neutral on the symbolic value of the Confederate flag.

¹⁰¹ *Sons of Confederate Veterans, Inc. v. Comm'r, Va. Dep't of Motor Vehicles*, 305 F.3d 241, 250-51 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of rehearing en banc); see also *id.* at 252 (Gregory, J., dissenting from denial of rehearing en banc) ("[T]here will [undeniably] be a perception of government endorsement of the Confederate flag [T]he display of the Confederate flag will be attributed to Virginia.") (emphasis in original).

¹⁰² 265 F. Supp. 2d 699 (E.D. La. 2003).

¹⁰³ See *id.* at 714.

¹⁰⁴ See *id.* at 716-17 ("[T]he Louisiana legislature does not always control the editorial process and that indeed in actuality, the process is a group effort with the organization seeking the plate.").

delivery depends on a message proposed by an individual or group, to be approved and manufactured by the government and displayed under the government's name on plates required and owned by the government.¹⁰⁵ Personalized and specialty license plate programs thus offer another example of joint speech in which government appears to be the literal speaker of a message proposed in part by private actors. As explained above,¹⁰⁶ truly joint speech requires that both parties agree to the joint expression. Absent such agreement, either party may withhold its voice, rather than be compelled to join speech with which it does not want to be associated. Just as the Wooleys could decline to display New Hampshire's "Live Free or Die" plate on their private vehicle, so too can Virginia and Louisiana decline to issue state plates displaying messages with which they disagree.

For this reason, Louisiana should be free to issue only a "Choose Life" plate without producing plates featuring counter-messages — just as New Hampshire remains free to issue only "Live Free or Die" and the District of Columbia only "Taxation Without Representation" license plates.¹⁰⁷ The outcome should be no different if, instead of a single state message (like "Live Free or Die"), the state agrees to allow individuals who so desire to select from a number of messages the state chooses to deliver, even if some or all of those messages are generated after considering public input.¹⁰⁸

¹⁰⁵ In contrast, Professor Jacobs would characterize license plates as conveying only private expression, because she sees little opportunity for an identifiable government message, either affirmative or dissociative, and places relatively little weight on government concerns about mistaken attribution. See Jacobs, *supra* note 5, at 98.

¹⁰⁶ See *supra* notes 83-84 and accompanying text.

¹⁰⁷ Of course, as the Supreme Court made clear to New Hampshire, the First Amendment would not permit Louisiana to compel dissenting individual drivers to display plates with such messages. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

While I think that government may generally control the content of what is at least partly its own expression, that power is not limitless. For example, decisions to approve some partisan license plates but not others (e.g., if Vermont were to reject "BUSH4PREZ" but not "DEAN4PREZ" plates) may raise legal concerns apart from any First Amendment problems. Such decisions may violate federal or state laws prohibiting the use of government facilities for electioneering, raise equal protection concerns, or run afoul of the Constitution's structural commitment to prevent the entrenchment of the prevailing political leadership. See e.g., 5 U.S.C. § 732(a) (2000) (prohibiting use of official authority or influence to affect results of election and prohibiting use of government property or facilities for partisan activities); ME. STAT. tit. 5, § 7056-A(3)(B) (2002) (barring state employees from engaging in political activity while using state facilities or services); Greene, *supra* note 13, at 37-38.

¹⁰⁸ See *Higgins v. Driver & Motor Vehicle Servs.*, 13 P.3d 531, 537 n.13 (Or. Ct. App. 2000) ("To forestall any misunderstanding, we emphasize that our decision addresses only the narrow situation presented in this case in which private individuals or entities are

In other words, government may announce: “We’ll print up some license plates that we like and you can buy and display them if you like them too. Some messages may even be based on your suggestions.” Under this view, a government may decide to adopt either “Choose Life” or “Pro-Choice” — or both or neither — as its official state message and issue license plates displaying such messages to those willing to display them. Similarly, a government could choose to display the Confederate flag — or not — on its plates or over its capitol dome. Of course, government should be held politically accountable for such decisions about the content of its own expression, but those choices are not constrained by the First Amendment.¹⁰⁹

Reconsider another scenario. In *Cuffley v. Mickes*, the Eighth Circuit held unconstitutional Missouri’s rejection of the Klan’s application to participate in the state Adopt-A-Highway roadside clean-up program that would trigger acknowledgment of the Klan’s services in a state highway sign.¹¹⁰ Perhaps because Missouri did not appear to raise its own expressive interests at the beginning stages of the litigation, the court instead decided the case on unconstitutional conditions grounds, and did not consider whether the signs’ views were attributable to the state, the Klan, or both.¹¹¹

given the opportunity to recommend to the state what *it* will communicate or to select any messages chosen by the state for *its* communication. Our resolution of that issue does not necessarily control the result in all situations in which the state and others are jointly involved in communication.”) (emphasis in original), *aff’d*, 335 Or. 481 (2003). Holding that vanity license plates do not lose their governmental character simply because their content may be informed or influenced by private input, the Oregon Court of Appeals offered the following analogy: “Assume that the state solicits the submission of communicative material to be placed in display cases at the State Capitol, with detailed standards for the content of the submissions and a commission to screen the submissions for compliance with the standards.” *Id.* at 537.

¹⁰⁹ See *Sons of Confederate Veterans, Inc. v. Comm’r, Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (“[W]here the government itself is responsible, and therefore accountable, for the message that its speech sends, the danger ordinarily involved in governmental viewpoint-based choices is not present.”); *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (identifying “traditional political controls” as appropriate vehicle for “ensur[ing] responsible government action”).

¹¹⁰ *Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001).

¹¹¹ Applying unconstitutional conditions doctrine, the panel concluded that Missouri penalized the Klan (by excluding it from the Adopt-a-Highway Program) because the Klan refused to forsake its constitutionally protected freedom of association. *Cuffley*, 208 F.3d at 707-09. Not only does unconstitutional conditions analysis fail to consider the parties’ competing expressive interests, but, as the subject of significant criticism, the “doctrine itself has all but disappeared from Supreme Court’s arsenal.” See Schauer, *supra* note 47, at 102-03 (discussing “decreasingly useful doctrine of unconstitutional conditions” and noting that Court’s most recent government speech cases have not invoked such analysis); see also Steven D. Hinkley, *Your Money or Your Speech: The Children’s Internet Protection Act and the*

A different analysis, and outcome, would have been appropriate had the state vigorously defended its action on the grounds that it sought to prevent its own speech from being commandeered by the Klan. Because the government manufactures, erects, owns, and maintains the signs, the state can be seen as the literal speaker, and thus endorser, of the signs' content. Indeed, the Adopt-A-Highway program was intended to encourage volunteer participation by offering government recognition of the volunteers' efforts in a highway sign.¹¹² In this manner, the Missouri Highway Department's concerns parallel those of its public radio station. It wishes to exercise its own expressive choices about from whom to accept contributions (whether of effort or cash) and whom it will publicly acknowledge. In both situations, the Klan appears to seek some sort of government imprimatur for its action.

The Klan, however, remains free to seek publicity for its good citizenship in other ways that do not suggest the state's blessing. Whether equally attractive alternative avenues for expression remain available, of course, depends on how broadly or narrowly one defines the message and the market at issue.¹¹³ Consider, for example, what the Klan seeks to express — and to whom — through a state highway sign's acknowledgment of the Klan's roadside clean-up efforts. If we define the Klan's message narrowly as "advertis[ing] good citizenship of this particular kind to the specific audience of motor vehicle operations driving on the specific highway,"¹¹⁴ then the state's rejection of the Klan has completely shut down that particular expression.¹¹⁵ If, on the other hand, we understand the Klan as motivated by the desire to persuade the public of its good citizenship, then surely that message can be effectively conveyed by the Klan's visible engagement in any number of

Congressional Assault on the First Amendment in Public Libraries, 80 WASH. U. L.Q. 1025, 1070, 1073 (2002) (criticizing Supreme Court's unconstitutional conditions analysis as result-oriented, often drawing "inexplicably fine distinctions": "In cases where the Court concludes that funding conditions are so coercive that they leave recipients with no choice but to forego constitutionally protected activity, the Court is able to declare the condition to be a penalty and invoke the unconstitutional conditions doctrine to reject it.... In contrast, when the Court finds that a funding condition merely structures a program to support federally encouraged activities without precluding recipients' exercise of constitutionally protected activity on their own time and with their own money, the Court can uphold the challenged conditions as a mere nonsubsidy.").

¹¹² See Jacobs, *supra* note 5, at 93 (concluding that highway signs constitute government speech).

¹¹³ See Greene, *supra* note 13, at 29.

¹¹⁴ Bezanson & Buss, *supra* note 4, at 1491.

¹¹⁵ See Jacobs, *supra* note 5, at 80 (emphasizing that government action must not preclude opportunities for ventilation of private expression).

other charitable and volunteer activities. First Amendment values are not frustrated by government efforts to protect its expression that deprive a private speaker of only the opportunity to speak in a setting that mistakenly conveys the government's endorsement of his or her speech, while leaving the speaker free to deliver the same message elsewhere.

Of course there are circumstances where government claims to its own expressive interests fail to pass constitutional muster. Could a city refuse to sell the Klan subway advertising to protect its own expressive integrity?¹¹⁶ Probably not. Unlike government educators and broadcasters, transit agencies are not the "literal" speakers of advertising copy; instead, they allow private copy to be posted on government property. Moreover, because transit agencies are primarily in the business of moving people rather than communicating with them, advertising content is considerably less likely to be mistakenly attributed to the transit agencies. Private speakers seeking to purchase advertising space are motivated chiefly by an interest in capturing not the government's endorsement, but the attention of as many onlookers as possible in a busy location. Furthermore, the available space is much greater, and thus more conducive to disclaimers and rebuttals. For these reasons, transit agencies and similar government entities that offer advertising space have considerably weaker claims to their own expressive interests.¹¹⁷ Such cases are more appropriately decided under

¹¹⁶ Governments have rarely so defended transit advertising decisions, which are usually grounded in some sort of forum analysis. See, e.g., *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp.*, 148 F.3d 242, 249 (3d Cir. 1998) (noting that government did not seek to justify restrictions on transit advertising based on its own expressive interest and conceded appropriateness of applying some type of forum analysis), *cert. denied*, 525 U.S. 1068 (1999); *Air Line Pilots Ass'n v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1152-53 (7th Cir. 1995) (same). The resulting forum analysis has generated mixed results. See Irene Segal Ayers, *What Rudy Hasn't Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property*, 42 ARIZ. L. REV. 607, 608 (2000) (discussing split in authority addressing government efforts to regulate transit advertising).

¹¹⁷ The court in *Knights of the Ku Klux Klan v. Curators of University of Missouri* distinguished underwriting acknowledgments from paid advertisements, arguing that the public understands that advertisements do not necessarily reflect the endorsement of their publisher, while underwriting acknowledgments trigger different public perceptions. *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1095-96 (8th Cir. 2000). Whether listeners attribute advertisements' content to their publishers is the topic of some disagreement. Compare *Lehman v. City of Shaker Heights*, 418 U.S. 298, 321 (1974) (Brennan, J., dissenting) ("The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administrator or the tenets of an organization using school property for meetings is to the local school board." The city has introduced no evidence demonstrating that its rapid transit passengers would naively think otherwise.") (quoting

forum analysis.

Consider another case in which government's expressive interests fall short. Private plaintiffs who sought to hang anti-war banners challenged California's policy of prohibiting displays on state highway overpasses except those featuring the American flag. California argued that this policy was constitutionally permissible because it reflected its own expressive choice to honor the flag.¹¹⁸ The Ninth Circuit rejected the state's expressive claim, emphasizing that "the government neither hung the flag itself nor delegated that authority nor funded the project — private citizens spontaneously expressed their message of patriotism by hanging their flags."¹¹⁹ A review of the factors discussed above confirms this result. California was not in any way the literal speaker. Because the Transportation Department's purpose is highway safety and maintenance, rather than communication, it was especially unlikely to be understood as endorsing displays spontaneously draped on public property. In addition, the private speakers did not appear to seek any state imprimatur for their message — they sought simply to have their banner viewed by as many people as possible. The state's expressive interests, if any, certainly did not require protection from mistaken attribution. Any other government interests in regulating overpass displays (e.g., highway safety) could be addressed under forum analysis.

Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 61 (1967)), and *Planned Parenthood, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 841 n.14 (9th Cir. 1991) (Norris, J., dissenting) ("The idea that readers of the district's publications will assume that a paid advertisement bears the imprimatur of the school district is preposterous. Readers are no more likely to assume that Planned Parenthood's ad bears the district's imprimatur than ads from political candidates, casinos, churches, or lounges and bars."), with *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 801 n.6 (1995) (Stevens, J., dissenting) ("A commercial message displayed on a billboard, for example, usually will not be taken to represent the views of the billboard's owner because every reasonable observer is aware that billboards are rented as advertising space. On the other hand, the observer may reasonably infer that the owner of the billboard is not inalterably opposed to the message presented thereon; for the owner has the right to exclude messages with which he disagrees, and he might be expected to exercise that right if his disagreement is sufficiently profound."). The *New York Times* and other advertisers seem to indicate some concern that advertisements will be imputed to the publisher. See *New York Times Guidelines on Advertising Acceptability*, (Sept. 3, 2003), available at www.nytimes.com/adinfo/rate_accept.html ("[T]he confidence of readers in a news website, its news, editorial, and advertising, depends on its integrity. . . . Generally speaking, any advertising that may cause financial loss or loss of the readers' confidence in respectable advertising and ethical business practices is unacceptable.").

¹¹⁸ *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1224 (9th Cir. 2003).

¹¹⁹ *Id.*

CONCLUSION

Without question, government should be held politically accountable for the views it chooses to espouse. A fair corollary of this principle, however, would enable government to ensure that it is held responsible only for its own speech, and not that of others. The First Amendment should thus be understood to permit government to refuse to utter speech with which it does not want to be associated, mirroring private speakers' right to be free from governments' efforts to compel speech with which they disagree. Cases that appear to involve elements of both government and private speech are especially challenging given current constitutional doctrine that appears to demand a choice between one or the other. Too often, courts fail or refuse to acknowledge that government itself is speaking in a particular context, and thus has an interest in protecting the integrity of its own expression. Although there may be no simple solution to these challenges, denying that government and private entities sometimes speak jointly generates confusing and inconsistent results.

The handful of courts that have acknowledged even the possibility of joint government/private speech have offered little guidance on the standards for evaluating government action in this context. Even those courts that acknowledge the legitimacy of government's interest in protecting its own expressive integrity too often muddy the waters by claiming to apply some sort of forum doctrine.

The better framework is to understand these not as forum cases, but situations in which government itself is speaking — either on its own or jointly with a private speaker — and is thus free to protect the integrity of its own expression by refusing to utter speech with which it disagrees. For these reasons, we should think more carefully about the circumstances under which private speech may be mistakenly understood as that of the government. Particularly helpful factors in assessing competing private and governmental claims to the same expression include the identity of the literal speaker, the reasons for governmental and private participation in the program at issue, the availability of alternative avenues for ventilating the private expression, and the effectiveness of government disclaimers or rebuttals.

While government should have the latitude to protect what is truly its own speech from being appropriated by others, we still need to ensure that its actions do not frustrate First Amendment values. Our commitment to free speech requires that we remain skeptical of government's assertions unless and until it can persuade us that its efforts are not a pretext for squelching unpopular or inconvenient

private speech. I have suggested that government can do so by demonstrating that it is itself speaking and that it reasonably fears that, absent preventive action, its speech will be mistakenly perceived to endorse others' expression.