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87 Denver University Law Review 899 2010).

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GOVERNMENT SPEECH 2.0

HELEN NORTON[†] & DANIELLE KEATS CITRON[‡]

ABSTRACT

New expressive technologies continue to transform the ways in which members of the public speak to one another. Not surprisingly, emerging technologies have changed the ways in which government speaks as well. Despite substantial shifts in how the government and other parties actually communicate, however, the Supreme Court to date has developed its government speech doctrine—which recognizes “government speech” as a defense to First Amendment challenges by plaintiffs who claim that the government has impermissibly excluded their expression based on viewpoint—only in the context of disputes involving fairly traditional forms of expression. In none of these decisions, moreover, has the Court required government publicly to identify itself as the source of a contested message to satisfy the government speech defense to a First Amendment claim. The Court’s failure to condition the government speech defense on the message’s transparent identification as governmental is especially mystifying because the costs of such a requirement are so small when compared to its considerable benefits in ensuring that government remains politically accountable for its expressive choices.

This Article seeks to start a conversation about how courts—and the rest of us—might re-think our expectations about government speech in light of government’s increasing reliance on emerging technologies that have dramatically altered expression’s speed, audience, collaborative nature, and anonymity. It anticipates the next generation of government speech disputes in which certain associations and entanglements between government and private speakers complicate the government speech question. By adding to these challenges, government’s increasing use of newer technologies that vary in their interactivity and transparency may give the Court additional reason to re-examine its government

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speech jurisprudence. "Government Speech 2.0" thus refers not only to the next generation of government speech, but also to the possibility that government's increasing reliance on emerging expressive technologies may help inspire the next generation of government speech doctrine: one more appropriately focused on ensuring government's meaningful political accountability for its expressive choices.

INTRODUCTION

New expressive technologies continue to transform the ways in which members of the public speak to one another. Not surprisingly, emerging technologies have changed the ways in which government speaks as well. For example, the Obama Administration has instructed executive agencies to maximize opportunities for using such technologies to enhance its provision of services to, and its interaction with, the public.¹ The White House has an official blog where it discusses policy and embeds YouTube videos.² The State Department runs a social network site that facilitates discussions about cultural exchange programs;³ it also maintains an embassy in Second Life designed to "inform, influence, and engage the world."⁴ The Federal Emergency Management Agency allows its YouTube subscribers to learn about its operations in communities across America and comment on its disaster response and recovery.⁵ The Center for Disease Control provides alerts to the public through social media sites like Facebook and Twitter.⁶ The Pentagon uses these tools to "spread the military's message,"⁷ and the Army's website includes a virtual recruiter.⁸

State and local governments also increasingly rely on networked technologies to communicate with the public. To cite just a few examples, the city of Portland, Oregon publishes its crime statistics on its "Crimemapper" website, and the Kansas State Highway Patrol similarly

1. See, e.g., Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) (exhorting executive departments and agencies to "use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector"); see also Press Release, White House Press Secretary, White House Announces Open Government Website, Initiative (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/White-House-Announces-Open-Government-Website-Initiative/ (announcing plan for engaging public through White House blog, wiki, and website).

2. The White House Blog, <http://www.whitehouse.gov/blog> (last visited Apr. 1, 2010).

3. ExchangesConnect, <http://connect.state.gov> (last visited Apr. 1, 2010).

4. Victor E. Riche, Presentation to the U.S. Dep't of Homeland Sec., Government 2.0: Privacy and Best Practices Workshop (June 22, 2009); L. Gordon Crovitz, *Information Age: From Wikinomics to Government 2.0*, WALL ST. J., May 12, 2008, at A13.

5. The Federal Emergency Management Agency, FEMA's YouTube Channel, <http://www.youtube.com/user/fema?blend=1&ob=4> (last visited Apr. 1, 2010).

6. See Chris Snyder, Government Agencies Make Friends with New Media, Epicenter (Mar. 25, 2009), <http://www.wired.com/epicenter/2009/03/government-agen/>.

7. Gregory S. Williams, Pentagon Using Social Network Sites to Recruit, Medianews (May 4, 2009), <http://www.mail-archive.com/medianews@etskywarn.net/msg03766.html>.

8. *Id.*

posts information about traffic accidents, injuries, and fatalities online.⁹ The Governor of California sends messages to followers and responds to their suggestions via Twitter.¹⁰

For a sense of what we might shortly expect, consider the following scenario posed by Dan Froomkin:

Imagine a White House Web site where the home page isn't just a static collection of transcripts and press releases, but a window into the roiling intellectual foment of the West Wing. Imagine a White House Web site where staffers maintain blogs in which they write about who they are and what they are working on; where some meetings are streamed in live video; where the president's daily calendar is posted online; where major policy proposals have public collaborative workspaces, or wikis; where progress towards campaign promises is tracked on a daily basis; and where anyone can sign up for customized updates by e-mail, text message, RSS feed, Twitter, or the social network of their choice.¹¹

Despite these substantial shifts in how the government and other parties actually communicate, however, the Supreme Court to date has developed its "recently minted"¹² government speech doctrine only in the context of disputes involving fairly traditional forms of expression: the spoken¹³ and written¹⁴ word, advertisements in print and electronic form,¹⁵ and public monuments.¹⁶ This doctrine recognizes "government speech" as a defense to First Amendment challenges by plaintiffs who claim that the government has impermissibly excluded their expression based on viewpoint. In none of these decisions has the Court required government to identify itself publicly as the source of a contested mes-

9. Daniel Castro & Robert Atkinson, *The Next Wave of E-Government*, State Tech, <http://www.statetechmag.com/events/updates/the-next-wave-of-e-government.html> (last visited May 19, 2010).

10. See Emily Montandon, *Do Twitter and Other Social Networks Shield Anonymous Complainers on Topics like Health Care Reform?*, GOV'T TECH., Nov. 2, 2009, at 6.

11. Dan Froomkin, *It's Time for a Wiki White House*, Nieman Watchdog Nov. 25, 2008, <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00307>. For more extensive discussion of the benefits as well as the dangers of government's use of Web 2.0 and similar expressive technologies, see Danielle Keats Citron, *Fulfilling Government 2.0's Promise With Robust Privacy Protections*, 78 GEO. WASH. L. REV. (forthcoming 2010) (describing government's increasing use of social network sites and urging government to treat Facebook, Twitter, and similar sites "as one-way mirrors, where individuals can see government's activities and engage in policy discussions but where government cannot use, collect, or distribute individuals' social media information").

12. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

13. See *Rust v. Sullivan*, 500 U.S. 173, 202-03 (1991) (health care providers' discussions with patients at family planning clinics).

14. See *Garcetti v. Ceballos*, 547 U.S. 410, 413-14, 425-26 (2006) (prosecutor's memorandum criticizing the police).

15. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (television and print campaign promoting beef products).

16. See *Summum*, 129 S. Ct. at 1131 (monuments donated by private party for display by government in public park).

sage to satisfy the government speech defense to a First Amendment claim.

The Court's current approach thus fails to recognize that government expression's value springs primarily from its capacity to inform the public of its government's principles and priorities. The public can assess government's positions *only* when the public can tell that the government is speaking. The Court's failure to condition the government speech defense on the message's transparent identification as governmental is especially mystifying because the costs of such a requirement are so small when compared to its considerable benefits in ensuring that government remains politically accountable for its expressive choices. Deference to government, more than any other principle, seems to explain the Court's decisions.

The Court's government speech doctrine—already slow to develop—has yet to grapple with the constitutional significance of government's increasing use of Web 2.0 technologies and other substantial developments that may obscure government's political accountability for its expressive choices. This Article seeks to start a conversation about how courts—and the rest of us—might re-think our expectations about government speech in light of government's increasing reliance on emerging technologies that have dramatically altered expression's speed, audience, collaborative nature,¹⁷ and anonymity.¹⁸

To this end, Part I describes the brief history of government speech as a matter of constitutional law, critiquing the Supreme Court's jurisprudence in this area as too often failing to recognize that government expression's constitutional value turns on its ability to enhance, rather than frustrate, government's accountability to its electorate. It then anticipates the next generation of government speech disputes and predicts that emerging challenges might—and, indeed, should—create pressure on the Court to reconsider its current doctrine. More specifically, it describes how certain associations and entanglements between government and private speakers complicate the government speech question. Government's increasing use of newer technologies that vary in their interactivity and transparency will only add to these challenges, and thus may give the Court additional reason to re-examine its government speech jurisprudence.

17. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1504 (“[T]he Internet as a tool of mass communication [has] become only better, quicker, and more empowering for the ordinary individual. . . . [O]rdinary people [are enabled] to participate in the marketplace of ideas, potentially reaching audiences never imaginable before.”).

18. See, e.g., Carlisle George & Jackie Scerri, *Web 2.0 and User-Generated Content: Legal Challenges in the New Frontier*, J. INFO. L. & TECH (2007), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2007_2/george_scerri/george_scerri.pdf (“Discovering the identity of an online publisher . . . can sometimes be difficult. . . . [T]here may be situations where an IP address cannot be traced to an individual, such as where a person logs on using a roaming IP, or where a person logs on from an Internet Café.”).

Part II first identifies a typology of the different information-age technologies that the government now uses to communicate with the public. It then recommends adjustments to the government speech doctrine that would require government to identify itself affirmatively as the source of contested expression as a condition of claiming the government speech defense to First Amendment challenges. Because this principle is equally true for both offline and online communicative technologies, the form of expressive technology should not affect this analysis.¹⁹ “Government Speech 2.0” thus refers not only to the next generation of government speech, but also to the possibility that government’s increasing reliance on emerging expressive technologies may help inspire the next generation of government speech doctrine: one more appropriately focused on ensuring government’s meaningful political accountability for its expressive choices.

PART I: THE SUPREME COURT’S BRIEF AND CHECKERED HISTORY WITH GOVERNMENT SPEECH

Because government must speak to govern effectively,²⁰ it has engaged in expressive activity since its inception.²¹ The U.S. Supreme

19. For a sampling of views on the longstanding question of whether First Amendment doctrine should vary according to the type of expressive technologies involved, see *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 891 (2010) (“We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”); *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997) (describing the Court’s “special justifications for the regulation of the broadcast media that are not applicable to other speakers” and concluding that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied” to the Internet); Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1633–34 (1995) (calling for fundamental change in First Amendment doctrine in response to the “revolutionary” nature of emerging expressive technologies); Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1647 (1995) (“The critical question is whether ‘new wine can be poured successfully into an old bottle,’ or whether new legal norms must be devised for the governance of the Network.”) (citation omitted); Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1720 (1995) (urging courts to discard the notion of special rules for broadcasters and instead realize “that traditional First Amendment principles—not yet another set of unique rules—are quite well suited to guide and constrain public regulation of these new technologies”); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1743 (1995) (discussing the debate over whether “this new space, cyberspace, [should] be regulated by analogy to the regulation of other space, not quite cyber, or should we give up analogy and start anew”); Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1167 (1999) (“*Reno*’s one rule for the entire Internet may begin to lose its luster and perhaps feel ridiculous. The great variation among Internet applications is hard to fit into one First Amendment box.”).

20. See 2 ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 723 (1947) (“Now it is evident that government must itself talk and write and even listen.”); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 698 (1970) (“Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources.”); 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

Court did not recognize “government speech” as a constitutional law doctrine, however, until quite recently. In a series of decisions beginning in 1991 with *Rust v. Sullivan*,²² the Court has, in fits and starts, sketched out its emerging doctrine, which insulates the government’s own speech from First Amendment challenges by plaintiffs who seek to alter or join that expression.²³ Political accountability mechanisms such as voting and lobbying then provide the sole recourse for those displeased by their government’s expressive choices.²⁴

A. *The Doctrine’s Beginnings*

The Supreme Court identifies *Rust v. Sullivan* as the beginning of its government speech jurisprudence.²⁵ After considering a First Amendment challenge to federal regulations that barred federally funded family planning clinics from engaging in abortion counseling, referral, or other expression related to abortion, the majority found no constitutional violation:

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing

conclude that government organizations would grind to a halt were the Court seriously to prohibit viewpoint discrimination in the internal management of speech.”).

21. See generally JOSEPH TUSSMAN, *GOVERNMENT AND THE MIND* (1977); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

22. 500 U.S. 173 (1991).

23. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (explaining that the government’s own speech is “exempt” from free speech clause scrutiny); *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1131 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to ‘speak for itself.’ Indeed it is not easy to imagine how government could function if it lacked this freedom.”) (citations omitted).

24. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view 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.”). Note, however, that constitutional constraints other than the free speech clause may also apply to government’s own expression. See *Sumnum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (“For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”).

25. See *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”). Some Justices earlier signaled their growing recognition of the doctrine’s possibility. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 140 n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990) (noting that “[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed”).

those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.²⁶

The dissent, in contrast, characterized the regulations as the government's impermissibly viewpoint-based regulation of doctor-patient speech: "[T]he majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy."²⁷

Nowhere in *Rust* does the term "government speech" appear. In a series of First Amendment disputes over the next decade in which government did *not* claim the contested speech as its own, however, the Court contrasted what it characterized as the government's role as speaker in *Rust* from its role as a funder of private speech in other contexts.

First, in *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁸ the Court cited *Rust* in distinguishing the government's own speech from a government program that provided financial support for private speech in the form of student organizations' publications:

[I]n *Rust v. Sullivan*, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.²⁹

Similarly, in *Board of Regents of the University of Wisconsin System v. Southworth*,³⁰ the Court again relied on *Rust* in distinguishing the government's own speech from government programs that instead encourage diverse private speech, such as a public university's fund for extracurricular student speech:

Our decision ought not 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

26. *Rust*, 500 U.S. at 194.

27. *Id.* at 204 (Blackmun, J., dissenting).

28. 515 U.S. 819 (1995).

29. *Id.* at 833; *see also id.* ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

30. 529 U.S. 217 (2000).

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. When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.³¹

In *Legal Services Corp. v. Velazquez*,³² the Court offered more detail in identifying *Rust* as the genesis of its government speech doctrine, once again distinguishing government speech from government programs intended to fund private speech:

The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government “used private speakers to transmit specific information pertaining to its own program.”³³

In contrast, as the Court observed, the Legal Services program:

was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients. . . . The LSC lawyer, however, speaks on the behalf of his or her private, indigent client. . . . The advice from the attorney to the client and the advocacy

31. *Id.* at 234–35 (citations omitted). Justice Souter further explained this distinction in his dissenting opinion in *Nat’l Endowment for the Arts v. Finley*, where he distinguished government as patron of private art from government as speaker and buyer:

[T]he government is of course entitled to engage in viewpoint discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page; and if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third.

Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 610–11 (1998) (Souter, J., dissenting); see also *id.* at 611 (“The Government freely admits, however, that it neither speaks through the expression subsidized by the NEA, nor buys anything for itself with its NEA grants.”). Although the *Finley* majority did not characterize the NEA grants program as the government’s own speech, it concluded that different and more deferential rules may apply to arts funding decisions that require government to assess quality in allocating scarce resources from those that apply to government programs that “indiscriminately” encourage a diversity of views from private speakers. See *id.* at 586 (“In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately ‘encourage a diversity of views from private speakers.’ The NEA’s mandate is to make esthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* . . .”) (citation omitted).

32. 531 U.S. 533 (2001).

33. *Id.* at 541 (quoting *Rosenberger*, 515 U.S. at 833) (citation omitted).

by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.³⁴

Firmly rooting the origins of the Court's government speech doctrine in *Rust*, these later decisions also cast additional light on what is, and is not, government speech. The Court suggested in dicta, for example, that a public university's curricular decisions and faculty speech constitute government's own expression,³⁵ as does military recruiters' speech³⁶ and the speech of a lawyer who represents the government.³⁷

B. A Simple Question Remains Unanswered

The Court next characterized contested expression as "government speech" in *Johanns v. Livestock Marketing Association*,³⁸ where it considered a First Amendment challenge to a generic beef promotion campaign implemented by the Department of Agriculture and funded by taxes targeted at beef producers.³⁹ A number of beef producers objected to the government's requirement that they fund the program because they felt that the campaign undermined their efforts to promote their own specialty beef products.⁴⁰ The ads bore only the attribution, "Funded by America's Beef Producers,"⁴¹ generating a dispute over whether reasonable onlookers would understand the speech as the government's.⁴²

34. *Id.* at 542–43.

35. *See Southworth*, 529 U.S. at 235 ("In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.")

36. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 n. 4 (2006) ("The military recruiters' speech is clearly Government speech.")

37. *See Velazquez*, 531 U.S. at 542 ("The attorney defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client."). The Court's characterization of government editors' and public libraries' selection decisions has been more opaque, emphasizing such decisions' expressive character, but falling short of characterizing them as government speech entirely exempt from speech clause scrutiny. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity. Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.") (citations omitted); *United States v. Am. Library Ass'n*, 539 U.S. 194, 209 n.4 (2003) ("A library's decision to use filtering software is a collection decision, not a restraint on private speech.")

38. 544 U.S. 550 (2005).

39. *Id.* at 562.

40. *Id.* at 556.

41. *Id.* at 555.

42. *Compare id.* at 566 ("We have only the funding tagline itself, a trademarked term that, standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad."), *with id.* at 577–78 (Souter, J., dissenting) ("[R]eaders would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?")

All of the Justices agreed that private speakers *can* be compelled to pay for government speech with which they disagree, emphasizing that an effective government requires that taxpayers frequently fund government speech with which they quarrel.⁴³ The majority and dissent differed vigorously, however, on the question whether government must identify itself as the source of that speech in order successfully to assert the government speech defense to the plaintiffs' free speech claim. Their disagreement largely turned on their varying assessments of the demands of meaningful political accountability.

The *Johanns* majority found that government had no affirmative duty to make clear its role as the message's source as a condition of claiming the government speech defense. Instead, it highlighted two factors as key to its characterization of the advertisements as government speech exempt from free speech clause scrutiny: whether the government established the overall message to be communicated, and whether the government approved, and thus controlled, the message ultimately disseminated.⁴⁴ It thus found the promotional campaign to be government speech based simply on the government's formal authorization and control of the message at the time of its creation:

[T]he beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.⁴⁵

In contrast, dissenting Justice Souter would have required the government affirmatively to disclose its authorship to ensure that political accountability remains a meaningful check on the government's compelled subsidies of such speech:

It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. The po-

43. See *id.* at 562 (majority opinion); *id.* at 574 (Souter, J., dissenting) ("The first point of certainty is the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard. To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

44. *Id.* at 562 (majority opinion).

45. *Id.* at 563-64.

litical accountability of the officials with control is insufficient, in other words, just because those officials are allowed to use their control (and in fact are deliberately using it) to conceal their role from the voters with the power to hold them accountable. Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.⁴⁶

Indeed, nowhere did the *Johanns* majority respond to Justice Souter's simple and key question: why *not* require government to identify itself as the message's source—especially because labeling the familiar “Beef, It's What's for Dinner” ads as “A Message of the U.S. Department of Agriculture” rather than with the misleading “Funded by America's Beef Producers” demands very little from the government as a practical matter while providing considerable value in ensuring political accountability. As Justice Souter stated:

Notably, the Court nowhere addresses how, or even whether, the benefits of allowing government to mislead taxpayers by concealing its sponsorship of expression outweigh the additional imposition on First Amendment rights that results from it. Indeed, the Court describes no benefits from its approach and gives no reason to think First Amendment doctrine should accommodate the Government's subterfuge.⁴⁷

This remains the great unanswered question in the Court's government speech doctrine. This doctrine recognizes the inevitability of government speech: government must express itself to govern effectively. Such government expression, moreover, serves valuable First Amendment interests in enabling members of the public to identify and assess their governments' priorities and thus inform their participation in self-governance. But because government has no individual autonomy interest in self-expression,⁴⁸ government's expressive interests do not include an interest in speaking without identifying itself as the speaker. If a message's governmental source is obscured, moreover, political accountability mechanisms provide no meaningful safeguard.

Recall that the majority in *Rust* displayed a similar disinterest in requiring government to reveal itself as the speaker as a condition of claim-

46. *Id.* at 578–79 (Souter, J., dissenting).

47. *Id.* at 579 n.8; *see also id.* (“The Court merely observes that no precedent requires the Government to show its hand when it seeks to defend a targeted assessment by claiming government speech. That is of course to be expected, since the government-speech doctrine is so new”) (citation omitted).

48. *See* Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 816 (2010) (“[G]overnment is a speaker that enjoys no individual liberty or free will, and whose need to express itself is limited by a different constitutional role and duty.”). In contrast, the Court has recognized the First Amendment value of anonymous speech by private actors. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336, 357 (1995) (striking down state ban on the distribution of unsigned political leaflets).

ing the government speech defense, as the contested regulations there did not insist on the disclosure of the expression's governmental origins.⁴⁹ Instead, the doctors, nurses, and other clinic employees who provided the counseling were advised to respond to abortion-related requests simply by stating that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."⁵⁰ Because patients may view health professionals as more credible than the government on these matters, some may have been misled into evaluating the counseling differently than they would have if the speakers had made clear its governmental source.⁵¹

As in *Johanns*, the *Rust* majority also displayed a reluctance to conclude that listeners will mistakenly attribute what is actually the government's own speech to a private party, noting only that nothing in the regulations "require[d] a doctor to represent as his own any opinion that he does not in fact hold. . . . [A] doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her."⁵² Resisting any requirement that the government affirmatively identify itself as the source of contested expression as a condition of claiming the government speech defense, the Court in *Rust* thus started down a troubling path that it continues to follow to this day.

C. A Doctrine Increasingly Untethered From Its Theoretical Foundations

The Court compounded this flaw in *Garcetti v. Ceballos*,⁵³ where it dramatically expanded government's ability to claim speech as its own. There the Court considered a First Amendment challenge by a prosecutor disciplined for his internal memorandum that criticized a police department affidavit as including serious misrepresentations.⁵⁴ Citing earlier cases in which it had distinguished government's own speech from that of private parties, the Court held that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the

49. *Rust v. Sullivan*, 500 U.S. 173, 180 (1991) (explaining that employees of clinics receiving federal funding were "expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.>").

50. *Id.* (citation omitted). Although the regulations did not require that the government be identified as the message's source, the majority observed that "[n]othing in [the Title X regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200.

51. See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1394-96 (2001) (arguing that patients could mistakenly attribute the government's views to their doctors); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 174 (1996) (same).

52. See *Rust*, 500 U.S. at 200.

53. 547 U.S. 410 (2006).

54. *Id.* at 413-14.

employer itself has commissioned or created.”⁵⁵ The Court thus created a bright-line rule that essentially treats public employees’ speech delivered pursuant to their official duties as the government’s own speech that it has bought with a salary and thus may control free from First Amendment scrutiny.⁵⁶ Justice Souter’s dissent, in contrast, resisted the majority’s bright-line rule as “portend[ing] a bloated notion of controllable government speech.”⁵⁷

As discussed extensively elsewhere,⁵⁸ *Garcetti* empowers the government to punish public employees simply for doing their jobs when those workers have been hired to flag hazards and improprieties. For this reason, *Garcetti* has had the most real-world impact of the Court’s government speech decisions to date, as lower courts now routinely rely on it to dispose of the constitutional claims of government workers fired after making job-required reports of illegal or dangerous conditions despite the great value of such speech to the public.⁵⁹ The outcomes in these cases now turn not on the public’s interest in the expression, nor on any injury to the government employer, but instead simply on whether the contested speech falls within the plaintiff’s job duties.

Consider, as just one example, the Ninth Circuit’s decision in *Hupert v. City of Pittsburg*.⁶⁰ The court there applied *Garcetti* to hold that the First Amendment does not protect police officers from punishment based on their truthful testimony before a grand jury investigating possible police department corruption because such testimony occurs pursuant to their official duties and is thus subject to their government employer’s control.⁶¹

55. *Id.* at 421–22 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”)).

56. *See Garcetti*, 547 U.S. at 421–22. The *Garcetti* majority left open the possibility that public educators’ speech that raises issues of academic freedom might be subject to a different standard. *Id.* at 425 (“We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

57. *Id.* at 438 (Souter, J., dissenting).

58. Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009) (arguing that the First Amendment should be understood to permit government to claim as its own—and thus control as government speech free from First Amendment scrutiny—only the speech of public employees that it has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to the public’s meaningful credibility and accountability check).

59. *See id.* at 14–15 (canvassing examples).

60. 574 F.3d 696 (9th Cir. 2009).

61. *Id.* at 708–09. The circuits are currently split on this issue. The Third Circuit held that the First Amendment still protects police officers’ truthful testimony even after *Garcetti* on the grounds that such testimony is their duty as citizens as well as police officers. *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008) (“[T]he act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one’s status as a public employee.”).

The Seventh Circuit's decision in *Fairley v. Andrews*⁶² further demonstrates the point. There the plaintiff prison guards alleged that they had suffered threats and assaults because of their reports that other guards regularly beat prisoners without justification.⁶³ After *Garcetti*, Judge Easterbrook concluded, the First Amendment offers the plaintiffs no protection because their jobs required them to flag prisoner maltreatment: "Since the General Orders require guards to report misconduct by their colleagues, the guards' reports are not part of the freedom of speech—and how the sheriff responds is a question for statutes, regulations, and wise management rather than the Constitution."⁶⁴ Just as unsuccessful were the plaintiffs' efforts to escape *Garcetti* by arguing that their jobs actually—although unofficially—required a code of silence, which they broke with their reports of misconduct:

Garcetti applies to job requirements that limit, as well as those that require, speech. Suppose the Jail put a guard in charge of maintaining a bulletin board, instructing him to post only materials that relate to workplace safety. If the guard puts up something on a different topic, or fails to put up anything, the management may discipline the guard without encountering an objection under the first amendment. . . . And *Garcetti* can't be limited to 'good' workplace requirements. . . . The purported code of silence is a ban on filing complaints about guard-on-inmate violence. Such a policy might be foolish; it might expose the County to other lawsuits; but it does not offend the first amendment. . . .⁶⁵

In short, *Garcetti* operates to the detriment of public employees who challenge government corruption or otherwise speak out on matters of significant public interest. It thus illustrates the absurd results generated by the Court's doctrine—a doctrine now increasingly unmoored from its theoretical underpinnings, as it fails to recognize the constitutional value of government speech as rooted entirely in its ability to enhance, rather than frustrate, government's accountability to its electorate.

D. Finally, An Easy Government Speech Case—But Questions Remain

This brings us to *Pleasant Grove City v. Summum*,⁶⁶ the first case in which the Court was unanimous in characterizing contested speech as the government's. The City of Pleasant Grove's Pioneer Park contained "15 permanent displays, at least 11 of which were donated by private" parties and which included "an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments

62. 578 F.3d 518 (7th Cir. 2009).

63. *Id.* at 520–21.

64. *Id.* at 522.

65. *Id.* at 523 (citations omitted).

66. 129 S. Ct. 1125 (2009).

monument donated by the Fraternal Order of Eagles in 1971.”⁶⁷ Summum, a religious organization, requested permission to donate and erect a stone monument in the park similar in size to the Ten Commandments monument but instead featuring the Seven Aphorisms of Summum (a series of statements that Summum adherents believe that God gave to Moses).⁶⁸ The City denied the request, claiming that it had made the expressive choice to accept only monuments that either directly related to the town’s history or were donated by groups with longstanding ties to the community.⁶⁹ The plaintiffs asserted that the various park monuments instead represented the expression of the private speakers who donated them.⁷⁰ Government and private parties thus both lay expressive claim to the same speech. When the City denied its request, Summum sued, alleging that the City’s rejection of its monument violated the U.S. Constitution’s free speech clause.⁷¹

A unanimous Court found this easily characterized as government speech: “There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.”⁷² Although the Justices continued to divide over whether government *must* affirmatively identify itself as a message’s source to claim the government speech defense, all agreed that the expression at issue satisfied their various tests for government speech.

Justice Alito’s majority opinion, for example, relied on a number of rationales in characterizing the contested speech as the government’s. At times, he focused on the *Johanns* “establishment and control” factors:

[T]he City has ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over

67. *Id.* at 1129.

68. *Id.* at 1129–30.

69. *Id.* at 1130.

70. *See id.* at 1131.

71. *Id.* Summum also alleged that the City violated the Free Speech and Establishment Clauses of the Utah Constitution. Complaint ¶¶ 31–39, *Summum v. Pleasant Grove City*, No. 2:05CV00638 DB, 2005 WL 2918243, (D. Utah July 29, 2005). However, neither of these claims were raised on appeal. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 n.3 (10th Cir. 2007). Although the plaintiff had a number of strategic motivations, this decision can be explained in large part by the fact that prevailing on an establishment clause claim would result in the removal of the Ten Commandments monument, rather than requiring the inclusion of Summum’s monument. *See* Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95, 95 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/32/LRColl2009n32Meyler.pdf>; Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70, 73 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/30/LRColl2009n30Tebbe.pdf>. Although the Court thus considered only the free speech clause claim, the potential establishment clause issues proved distracting to many. Indeed, Justice Scalia concurred separately to emphasize his view that the city’s display of the Ten Commandments did not violate the Establishment Clause. *Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring).

72. *Summum*, 129 S. Ct. at 1132.

their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.⁷³

The majority, however, also noted that observers would likely attribute the expression to the city,⁷⁴ thus satisfying the test preferred by a number of the concurring justices.⁷⁵ More specifically, the majority noted that historical context,⁷⁶ longstanding government practice,⁷⁷ and the monuments' location on the city's own property⁷⁸ served as cues⁷⁹ that signaled the expression's governmental source to onlookers.⁸⁰ In so doing, however, the majority again failed to tie its rationale to any discussion of the value of government speech in informing the public about its

73. *Id.* at 1134 (quoting *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 560–61 (2005)) (citation omitted).

74. *Sumnum*, 129 S. Ct. at 1134 (“[T]he City took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf.”).

75. *See id.* at 1142 (Souter, J., concurring) (“[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”).

76. *See id.* at 1132–33 (majority opinion) (“Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance.”).

77. *See id.* at 1133 (“We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity.”).

78. *See id.* (“Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker.”).

79. *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 607–09 (2008) (describing how onlookers use a variety of “source cues” to determine a message's origins).

80. Although concurring Justices Stevens, Souter, Ginsburg, and Breyer made clear their resistance to a bright-line rule that public monuments always constitute government speech, they agreed that, under these particular circumstances, reasonable observers would understand the monuments to reflect the city's own expression. *See Sumnum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (“Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.”); *id.* at 1141 (Souter, J., concurring) (“And although the government should lose when the character of the speech is at issue and its governmental nature has not been made clear, I also agree with the Court that the city need not satisfy the particular formality urged by *Sumnum* . . .”) (citation omitted).

government in a way that enhances political accountability, even as it acknowledged—but declined to address—the “legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”⁸¹

Perhaps *Summum* was unanimous because the objectionable consequences of a contrary ruling were so clear as a pragmatic matter.⁸² New York City, as just one example, would otherwise face a choice of declining France’s offer of the Statue of Liberty or instead accepting it so long as it accepted all other offers of statues of a similar size and nature.⁸³ To be sure, pragmatism often drives the Court’s First Amendment doctrine.⁸⁴ It has done so very inconsistently, however, in the government speech context. For example, the *Johanns* majority’s refusal to require the disclosure of expression’s governmental origins as a condition of claiming the defense makes no pragmatic sense, in that such transparency demands very little from the government as a practical matter while providing considerable value in ensuring meaningful political accountability. And although the *Garcetti* decision is fueled by pragmatic con-

81. *Id.* at 1134 (majority opinion); see also Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 426–27 (2009) (expressing concern that *Summum* will permit governments to adopt demonstrations as their own on the basis of viewpoint and thus engage in “blatantly unconstitutional form[s] of viewpoint discrimination. . . . Perhaps a distinction could be drawn between permanent monuments, as in *Summum*, and transitory speech, such as demonstrations. It is impossible to explain, though, why this is a distinction that would matter under the First Amendment.”).

82. See *Summum*, 129 S. Ct. at 1134 (“Requiring all of these jurisdictions [that have accepted monuments without such formal declarations] to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.”); *id.* at 1138 (describing how government entities required to maintain viewpoint neutrality in their selection of donated monuments must either “‘brace themselves for an influx of clutter’ or face the pressure to remove longstanding and cherished monuments”) (citation omitted).

83. See *id.* at 1137–38. For a powerful example of the pragmatic effects of a ruling to the contrary, see Mary Jean Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 10 & n.18 (2008) (detailing efforts by opponents of gay rights to donate a monument to hate crime victim Matthew Shepard to the city of Laramie, proclaiming that Matthew “[e]ntered hell October 12, 1998, in defiance of God’s Warning”).

84. See Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 415 (1992) (“Pragmatism further advocates solutions to First Amendment problems through careful, contextual, pragmatic reasoning.”); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002) (“[T]he constitutional law of free speech seems on the whole, though certainly not in every respect, to be a product of the judges’ (mainly they are United States Supreme Court Justices) trying to reach results that are reasonable in light of their consequences.”); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech* 10 (Chapman Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 09-36, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481478## (“[I]n First Amendment jurisprudence, pragmatic balancing is inescapable.”). But see Eugene Volokh, *Pragmatism v. Ideology in Free Speech Cases*, 99 NW. U. L. REV. 33, 34 (2004) (discussing “the weakness of the turn from principle to pragmatism”); R. George Wright, *Pragmatism and Freedom of Speech*, 80 N.D. L. REV. 103, 104 (2004) (stating that pragmatic approaches “ultimately tend to drain the life from our most adequate and circumstantially appropriate moral vocabularies and cannot properly account for virtually all the class free speech values, aims, and purposes”).

cerns related to public agency governance,⁸⁵ it also imposes disastrous pragmatic consequences with respect to public access to government workers' reports of corruption and threats to health and safety.⁸⁶ The Court's government speech doctrine thus seems unmoored not only from a principled commitment to the role of government speech in enhancing government's accountability to the public, but also from pragmatic concerns as well. The majority simply appears to defer to the government, as it has yet to deny government's claim to contested speech as its own.⁸⁷

Rather than simply acquiesce to government's claim to speech as its own, the Court should instead require a government entity seeking to claim the government speech defense to establish that it expressly claimed the speech as its own when it authorized the communication and that onlookers understood the speech to be the government's at the time of its delivery, thus maximizing the public's ability to engage in meaningful political accountability measures as well as in undeceived assessments of the message's credibility.⁸⁸ This is a relatively easy problem to solve, both doctrinally and technologically, should the Court have the will to do so. The next Subpart explores the possibility that emerging government speech challenges will place additional pressure on the Court to reconsider and perhaps refine its approach to government speech disputes.

E. What's Next: Increasing Pressure for Doctrinal Change

Because the Supreme Court has yet to articulate a clear rule for parsing government from private speech—much less one that insists on meaningful political accountability to check the government's expressive choices—lower courts continue to indicate frustration with the Court's doctrine in this area. Indeed, a number of circuit courts of appeal have declined to take the easy bait offered by the Court simply to defer to government claims to contested speech as its own. Moreover, they appear reluctant to embrace the Court's focus on government's establish-

85. See Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 38 (2008).

86. See Norton, *supra* note 58, at 14–15, 30–34.

87. In the four decisions characterized to date by the Court as involving competing governmental and private claims to the same speech—*Rust*, *Johanns*, *Garcetti*, and *Summum*—the Court characterized contested speech as the government's own speech so that government could control its content free from First Amendment scrutiny.

88. See Norton, *supra* note 79, at 599; see also *id.* (“[G]overnment can establish its entitlement to the government speech defense only when it establishes itself as the source of that expression both as a *formal* and as a *functional* matter. In other words, government must expressly claim the speech as its own when it authorizes or creates a communication *and* onlookers must understand the message to be the government's at the time of its delivery.”) (emphasis added). For other commentators' thoughtful discussion of these and related issues, see, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 *IOWA L. REV.* 1377 (2001); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 *N.Y.U. L. REV.* 605 (2008); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 *U. MICH. J.L. REFORM* 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *HASTINGS L.J.* 983 (2005).

ment and control of contested expression largely because of its troubling implications that the more government controls speech, the more speech it will be permitted to control—a proposition that seems inimical to First Amendment values.⁸⁹

For example, several circuit courts continue to apply a four-factor test for parsing government from private speech—a test cobbled together before the Court’s more recent government speech cases. Under this approach, courts examine the purpose of the contested program, the degree of editorial control exercised by public or private entities, the identity of the “literal” speaker, and whether public or private entities bear “ultimate responsibility” for the expression.⁹⁰ Although circuit courts long failed to identify the theoretical justification underlying this test,⁹¹ they now more helpfully explain these factors as proxies for determining a reasonable onlooker’s attribution of the speech to the government or private parties, and thus for the public’s meaningful ability to hold the government accountable for its expression.

Consider, more specifically, the ongoing controversy over whether certain specialty license plates—such as those featuring the message “Choose Life”—reflect the speech of the state (and thus entirely within the government’s control) or of the car owners (and thus subject to First Amendment protections).⁹² Such disputes continue to trouble lower courts, which increasingly suggest the need for a government speech doctrine that attends to government’s meaningful accountability to the public for its expressive choices. Indeed, a number of circuit courts largely ignore the “establishment and control” factors emphasized by the Supreme Court majority in *Johanns*,⁹³ preferring instead a test that appears more akin to Justice Souter’s dissent in *Johanns* and his concurring

89. See *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 337 (1st Cir. 2009) (Torruella, J., dissenting) (“The majority’s position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact. What is to stop a governmental entity from applying the doctrine to a parade? Or official events? It is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as ‘government speech.’”) (citations omitted).

90. See *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 792–800 (4th Cir. 2004) (applying a four-factor test to conclude that specialty license plates were better characterized as private, rather than governmental speech; thus, the First Amendment did not permit government to exclude messages based on viewpoint); see also *Wells v. City and County of Denver*, 257 F.3d 1132, 1141–44 (10th Cir. 2001) (applying a four-factor test to conclude that a specific holiday display on public property constituted government speech; thus, Plaintiff had no First Amendment right to add to the display).

91. See Norton, *supra* note 79, at 597–99.

92. Adam Liptak, *Is That Plate Speaking For the Driver Or the State?*, N.Y. TIMES, April 28, 2009, at A12, available at <http://www.nytimes.com/2009/04/28/us/28bar.html> (“[T]he volume of litigation on this question and the doctrinal free-for-all it has given rise to in the lower courts have convinced many legal scholars that the court must soon step in.”).

93. See Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum’s Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315 (discussing lower courts’ resistance to the Supreme Court’s emphasis on establishment and control in *Summum* and *Johanns*).

opinion in *Summum*⁹⁴ that focuses on the perceptions of reasonable onlookers. The Seventh Circuit, for example, applied a four-factor test, urging that it “be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”⁹⁵ The court then concluded that onlookers would attribute specialty license plate messages to private, rather than public, speakers.⁹⁶

More recently, the Eighth Circuit summarily distinguished the Supreme Court’s decision in *Summum*⁹⁷ and instead emphasized: “Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party.”⁹⁸ In “concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate,”⁹⁹ it thus joined the Fourth, Seventh, and Ninth Circuits in stressing the importance of government’s transparent identification of speech as its own to ensure the government’s meaningful political accountability for its expressive choices.¹⁰⁰ Only the Sixth Circuit has yet applied the *Johanns* establishment and control factors to conclude that “Choose Life” specialty plates are the government’s own speech exempt from First Amendment scrutiny.¹⁰¹

As the foregoing illustrates, the most difficult government speech cases generally involve some forms of collaboration or interaction between government and private speakers in contexts that create doubt about the source of contested expression.¹⁰² These controversies will

94. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1142 (Souter, J., concurring) (“[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”).

95. *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

96. *Id.* at 863–64.

97. *Roach v. Stouffer*, 560 F.3d 860, 868 n.3 (8th Cir. 2009) (“We deal here with a much different issue [than that in *Summum*]: whether specialty license plates on privately-owned vehicles communicate government speech. Unlike monuments displayed in public parks, specialty license plates that advertise the name or motto of a private organization facilitate expressive conduct on the part of the organization and its supporters, not the government.”).

98. *Id.* at 867.

99. *Id.*

100. See *White*, 547 F.3d at 863; *Ariz. Life Coalition Inc. v. Stanton*, 515 F.3d 956, 964–65 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 795–96 (4th Cir. 2004) (“The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.”).

101. *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006). For a discussion of circumstances under which specialty license plates might accurately be characterized as the government’s own speech, see Helen Norton, *Shining a Light on Democracy’s Dark Lagoon*, 61 S. CAR. L. REV. 535, 537–42 (2010).

102. Similar disputes involve determinations of whether the government’s decision to accept and recognize services from some private entities and not others reflects the government’s own expressive act, or whether such discretionary recognition is better understood as viewpoint-based

likely increase in number with government's growing use of Web 2.0 networked technologies that facilitate interactivity and collaboration at speeds and scales heretofore unimagined.¹⁰³ Emerging challenges involving government's use of contemporary expressive technologies may thus put additional pressure on the Court to reconsider its resistance to a requirement that the government affirmatively identify itself as the source of contested expression as a condition of claiming the government speech defense.¹⁰⁴ The next Part explores the contexts in which such disputes may arise, and offers suggestions for their resolution.

PART II: A NEW GOVERNMENT SPEECH DOCTRINE FOR THE NEW GOVERNMENT SPEECH

A. A Typology of Emerging Expressive Technologies Used by Government

In our information age, governmental use of networked technologies to express its views is as valuable as it is necessary. Today, the efficacy of government expression depends upon government's use of networked technologies, such as websites, links, social network sites, blogs, virtual worlds, video-sharing sites, and other online platforms.¹⁰⁵ The public spends much of its time online and often expects government to interact with it through a variety of social media.¹⁰⁶ Through its online

discrimination against private speakers. See, e.g., Michael Cooper, *In Missouri, a Free Speech Fight Over a Highway Adoption*, N.Y. TIMES, June 21, 2009, at A14, available at <http://www.nytimes.com/2009/06/21/us/21highway.html> (describing controversy over neo-Nazi groups' efforts to adopt a stretch of state highway with recognition in a state adopt-a-highway sign); Posting of Robert Mackey & Ashley Southall to The Lede Blog, <http://thelede.blogs.nytimes.com/2009/03/31/kfc-and-peta-vie-to-fix-potholes/> (March 31, 2009, 4:58 EST) (describing Louisville's willingness to accept pothole paving funded by and featuring advertising of Kentucky Fried Chicken but rejecting similar offer by People for the Ethical Treatment of Animals).

103. As discussed more extensively *infra*, at least one circuit court judge has resisted the application of the Court's current approach to disputes involving government's use of networked technologies. See *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 337–38 (1st Cir. 2009) (Torruella, J., dissenting) (“What is lacking in this ‘recently minted’ area of the law are any limiting principles. The majority extends the discrimination-as-government-speech doctrine to links on a government website. . . . [I]n the present case the majority extends the doctrine to a situation where, in my view, it was not clear that the government was engaging in speech at the time it was acting, and only justified its actions after the fact.”) (citations omitted).

104. That the Court has now recognized the great instrumental value of requiring the disclosure of a message's author in the campaign finance context further suggests the possibility that it may be open to the possibility of such a requirement in the government speech context as well. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010) (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

105. For a thoughtful discussion of the value of such speech, see Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 132–34 (2004).

106. Pew Internet & American Life Project recently reported that “37% of social network site users expect . . . updates” from the Obama Administration via social network sites and 34% expect to hear from the Administration via email. AARON SMITH, PEW INTERNET & AMERICAN LIFE PROJECT MEMO, POST-ELECTION VOTER ENGAGEMENT 1 (2008), <http://www.pewinternet.org/~/>

expression, government provides the public with valuable information about government opinions. Not only might members of the public find these views helpful in developing their own positions, but they also learn much more about their elected officials' values and priorities. This helps inform the public's views on whether those officials should be re-elected or replaced.

In recognition of this reality, governments increasingly embrace a wide variety of networked technologies to communicate with the public. These include the static communicative technologies of Web 1.0 as well as more interactive platforms characteristic of Web 2.0.¹⁰⁷ By mapping such technologies' transparency and interactivity,¹⁰⁸ this section offers a typology that may be helpful in identifying when government speaks for itself and when it instead should be understood as providing a forum for others' speech—determinations that trigger very different First Amendment consequences.

1. Transparent Non-Interactive Technologies

Governments use the Internet and related technologies to express themselves in a wide range of non-interactive ways. All or parts of most governmental websites provide the public with information authored solely by the government with no means for the public to contribute ideas. Certain government blogs do the same, informing the public about policy and recent news without permitting anyone to comment on posts.¹⁰⁹ Government officials use micro blogging services such as Twitter to provide information to interested readers, who cannot respond directly to governmental Tweets directly,¹¹⁰ and agencies similarly send text messages to interested members of the public.¹¹¹

media//Files/Reports/2008/PIP_Voter_Engagement_2008.pdf.pdf; see also AARON SMITH, THE INTERNET'S ROLE IN CAMPAIGN 2008 (2009), http://www.pewinternet.org/~media/Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf (documenting the public's avid involvement in the 2008 campaign).

107. See, e.g., Tim O'Reilly, Web 2.0: A Compact Definition, <http://radar.oreilly.com/2005/10/web-20-compact-definition.html> (Oct. 1, 2005) ("Web 2.0 is the network as platform, spanning all connected devices; Web 2.0 applications are those that make the most of the intrinsic advantages of that platform: delivering software as a continually-updated service that gets better the more people use it, consuming and remixing data from multiple sources, including individual users, while providing their own data and services in a form that allows remixing by others, creating network effects through an 'architecture of participation,' and going beyond the page metaphor of Web 1.0 to deliver rich use experiences.").

108. As Timothy Wu observes, Internet "applications can and do vary dramatically. To the user, the Internet comes in many incarnations—email, the World Wide Web, ICQ, and more. A singular model of Internet usage has become too small to capture the dramatic diversity of today's Internet." Wu, *supra* note 19, at 1163.

109. Steve Towns, *Four Questions for Beth Noveck*, GOVERNMENT TECHNOLOGY, July 2009, at 12, available at http://digitalmag.govtech.com/GT/GT_Mag_Jul09.pdf.

110. Interview by Scott Simon with Justin Cohen, U.S. State Dep't (Oct. 17, 2009) (transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=113876776>). Twitter "[u]sers . . . can create . . . account[s] to send messages of up to 140 characters to other Twitter subscribers." Helle C. Dale, *Public Diplomacy 2.0: Where the U.S. Government Meets "New Media,"* BACKGROUND (The Heritage Found.), Dec. 8, 2009, at 9. "Tweets are usually received as

Consider some examples. The Department of Homeland Security's (DHS) website provides the public with a plethora of information about its work and policies.¹¹² It provides hyperlinks¹¹³ to other websites and allows readers to subscribe to its news feeds and receive emails concerning updates to the site.¹¹⁴ It does not, however, permit the public to comment on posted stories or to interact with DHS officials online. The website features the DHS's views only.

The White House website similarly publishes a dizzying array of information, from the membership of Federal advisory committees to the names of everyone who visits the White House offices.¹¹⁵ It hosts live webcasts of the President's speeches.¹¹⁶ It sponsors eight blogs, including the Open Government Blog, the Office of Public Engagement Blog, and the White House Blog.¹¹⁷ While the blogs update the public on news, policy discussions, and other matters, nearly all omit a comment function.¹¹⁸ The website thus does not permit public interaction, and the online messages are clearly the White House's alone.

Such non-interactive Web 1.0 technologies—which constitute the majority of online government speech—permit readers to identify a message's governmental source. Governmental websites and blogs use the “.gov” top-level domain name, which is available only to governmental entities and thus makes clear the government's authorship of the online expression.¹¹⁹ When governments use micro-blogging services such as Twitter, they use “verified” accounts, which authenticate that they emanate from government.¹²⁰ Such technologies' transparency is enhanced

text messages on cell phones, often directing followers to lengthier content viewable on the sender's Twitter Web page.” *Id.*

111. See Dale, *supra* note 110, at 4 (explaining that State Department sent out text messages of President Obama's speech in Cairo to U.S. and non-U.S. citizens); *id.* at 9 (“The Food and Drug Administration, for instance, issues food recalls via Twitter.”).

112. See Department of Homeland Security, About the Department, <http://www.dhs.gov/xabout/index.shtm> (last visited June 1, 2010).

113. A hyperlink is a “reference to a document that the reader can directly follow” via the World Wide Web. Wikipedia, Hyperlink, <http://en.wikipedia.org/wiki/Hyperlink> (last visited June 1, 2010).

114. Department of Homeland Security, Preparedness, Response & Recovery, <http://www.dhs.gov/files/prepresprecovery.shtm> (last visited June 1, 2010).

115. The White House, <http://www.whitehouse.gov> (last visited June 1, 2010).

116. Dale, *supra* note 110, at 4.

117. See, e.g., The White House Blog, <http://www.whitehouse.gov/blog> (last visited June 1, 2010).

118. The White House-sponsored Office of Science and Technology policy has a blog that has comments, thus falling in the moderately interactive/highly transparent category.

119. Wikipedia, *.gov*, <http://en.wikipedia.org/wiki/.gov> (last visited June 1, 2010) (explaining that the domain name “[.]gov is a sponsored top-level domain (sTLD) in the Domain Name System of the Internet. The name is derived from *government*, indicating its restricted use by government entities in the United States”). The General Services Administration (GSA), an independent agency of the United States federal government, administers the .gov domain name. *Id.*

120. For instance, Governor Schwarzenegger's Twitter account includes his picture and explains that it is a verified account, which links to the Governor's official .gov website. Gov. Schwarzenegger (Schwarzenegger) on Twitter, http://twitter.com/Schwarzenegger?utm_medium=email&

both because they offer the technical means for clearly identifying the message's governmental source and because their non-interactive nature avoids the complications in identifying expression's source often created when multiple speakers participate.

2. Transparent Interactive Technologies

Governments also employ various Web 2.0 platforms that allow the public to interact with them. Government officials and agencies use micro blogging services that permit government users to send messages to subscribers while allowing subscribers to respond to government users' posts. Government officials and agencies also interact with the public through social network sites,¹²¹ exchanging information through wall postings, photographs, videos, and the like.¹²² They host blogs that permit the public to post comments.¹²³ They sponsor channels on video-sharing sites such as YouTube where they post videos and invite subscribers to comment on those videos and post their own content. They use virtual worlds like Second Life to interact with the public.¹²⁴

Although these platforms are interactive, they facilitate transparency in two important ways: they identify the government as the speaker, and, at the same time, they verify the identities of government speakers

First, the various sites' architecture clearly signals that expression has been authored by the government. A social network profile, for instance, appears like a virtual office (or home), where one can click various pages to gain access to a governmental subscriber's photographs, wall postings, videos, and the like. When perusing a government agency's Facebook Fan Page,¹²⁵ one can view the agency's videos, join live chats with a government official, and see links to websites that the

utm_source=follow&utm_campaign=twitter20080331162631 (last visited June 1, 2010). This is not to suggest that Twitter accounts can never be spoofed, but instead that the public can have some assurance that the government is indeed speaking.

121. Dale, *supra* note 110, at 7 (explaining that the top five government Facebook pages frequented by the public are The White House, U.S. Marine Corps, U.S. Army, U.S. Centers for Disease Control, and the State Department).

122. Citron, *supra* note 11, at 6.

123. As defined by Wikipedia:

A blog . . . is a type of website or part of a website. Blogs are usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order. . . . The ability of readers to leave comments in an interactive format is an important part of many blogs.

Wikipedia, Blog, <http://en.wikipedia.org/wiki/Blog> (last visited June 1, 2010).

124. U.S. Department of Commerce, Earth System Research Laboratory, Outreach at ESRL, <http://www.esrl.noaa.gov/outreach/> (last visited June 1, 2010) (explaining that National Oceanic and Atmospheric Administration officials interact with the public on a virtual island in Second Life).

125. Facebook permits government officials, agencies, and corporations to set up fan sites, which permit "fans" to see the content on a government speaker's page but prevents government subscribers from seeing its fans' profiles. In contrast, other social network sites, such as MySpace, allow government users to generate "friends," which permits them to see everything included on a friend's profile. Although this capacity has profound implications for privacy, it does not affect the government speech issues that we address here. See Citron, *supra* note 11, at 5-7.

agency endorses. If government fans or friends post comments, videos, or photographs, fans' or friends' names and icon-sized images¹²⁶ appear alongside their messages.¹²⁷ Given the design of such social network sites, blogs, and video-sharing sites, readers can easily identify the government as the author of its wall musings, videos, posts, photographs, and links.

Second, these platforms either purport to verify or actually do authenticate the identity of government speakers.¹²⁸ Third-party platforms build identity verification into their design for sites used by government actors. For instance, a government actor's Twitter account explicitly notes that the governmental author of the micro blogging site had been "verified," providing links to the government party's official website (i.e., one with a .gov domain name). Facebook explains that when organizations, such as government agencies, create "Fan Pages," they do so *as official representatives* of the organization.¹²⁹ Although third-party platforms like Twitter and Facebook do not necessarily check to see whether those setting up the accounts actually hail from government, they at least signal to the public that those creating the sites hold themselves out as government speakers. Moreover, government blogs actually verify their governmental character by using a .gov domain name. In either case, readers can identify the speakers as governmental.¹³⁰

Consider these examples. The White House's Facebook Fan Page permits "two-way interaction between the government and its citizens" through online comments, live chats, and message threads.¹³¹ It asks fans: "Watch & Discuss through Facebook at 1:30: Obama Awards National Medals of Science and National Medals of Technology and Inno-

126. In using the term "name" here, we refer to the name or identity provided by the person writing the comment. The name may reflect their true identity or may be a pseudonym.

127. Similarly, government agencies using video-sharing sites, such as YouTube, employ channels that make clear that the videos have been posted by the government agency as host. Much like Facebook and MySpace, a government user's video channel is its virtual room with videos posted under its profile. If subscribers comment on the government user's videos or post videos of their own, their name and image appear alongside those expressions. To be sure, the identity of those subscribers typically cannot be verified as many write anonymously or under pseudonyms. But discussion of the potential need for and value of verifying the identity of subscribers is beyond the scope of this Article, which focuses on whether the governmental host's identity is clear and verifiable, and that appears to be the case.

128. We use the term "verify" to mean that the social network user, blogger, or video-sharing site holds itself out as governmental in ways that third party services suggest is true. We, of course, acknowledge that an impersonator could set up a video-sharing site or social network site in the government's name. Our discussion focuses on government's actual use of Web 2.0 platforms and its significance for free speech doctrine and theory. We leave the broader concerns about impersonation for another day.

129. Facebook, Create a Page, <http://www.facebook.com/pages/create.php> (last visited June 1, 2010). Fan Pages created on behalf of government agencies list their "Type" of Fan Page as "Governmental" or "Politician."

130. This is not necessarily true of a blog's commentators or a social network site's friends, whose identities have not been authenticated in some manner.

131. Posting of Saul Hansell to Bits Blog, <http://bits.blogs.nytimes.com/2009/03/05/nations-new-chief-information-officer-speaks/> (Mar. 5, 2009, 2:57 PM).

vation.”¹³² It has twenty-seven videos of official White House business on its Video page; its eight photo albums permit fans to peruse pictures of the President and his family.¹³³ When fans comment on postings, post videos, or engage in live chats, their Facebook pictures appear next to their communications. Facebook provides visual cues as to the identity of speakers, helping readers distinguish between the White House’s postings and those of its fans. Furthermore, the White House’s Fan Page verifies its governmental nature. It states: “This is the White House page on Facebook. Comments posted on and messages received through White House pages are subject to the Presidential Records Act and may be archived. Learn more at WhiteHouse.gov/privacy.”¹³⁴

The Transportation Safety Administration (TSA) maintains a blog called *The TSA Blog*.¹³⁵ Five TSA employees run the site, posting on various issues related to air safety. They post under their blogging names, making clear that their posts reflect TSA-sanctioned ideas. The TSA Blog has a page introducing its bloggers and the names under which they write.¹³⁶ The official who runs the site writes his posts under the following byline: “Blogger Bob, TSA Blog Team.”¹³⁷ The tag “TSA Blog Team” follows the postings of the rest of the TSA bloggers.¹³⁸ When the TSA Blog features guest bloggers, their names and designation as “Guest TSA Blogger” appear underneath their posts.¹³⁹ When individuals comment on a TSA blogger’s posts, their names (real or imagined) sit alongside their comments.¹⁴⁰ Given these design features, the

132. Facebook, The White House, <http://www.facebook.com/WhiteHouse> (Oct. 7, 2009, 11:19 EST).

133. Facebook, The White House, The White House’s Videos, http://www.facebook.com/WhiteHouse#!/WhiteHouse?v=app_2392950137 (last visited June 1, 2010); *see also* Facebook, The White House, The White House’s Albums, <http://www.facebook.com/WhiteHouse#!/WhiteHouse?v=photos> (last visited June 1, 2010).

134. Facebook, The White House, <http://www.facebook.com/WhiteHouse> (last visited June 1, 2010).

135. The TSA Blog, <http://blog.tsa.gov> (last visited June 1, 2010).

136. The TSA Blog, Meet Our Bloggers, http://blog.tsa.gov/2008/01/meet-our-bloggers_29.html (Jan. 30, 2008).

137. *See, e.g.*, Posting of Blogger Bob to the TSA Blog, <http://blog.tsa.gov/2010/02/four-year-old-boy-in-philly-told-to.html> (Feb. 22, 2010).

138. *See, e.g.*, The TSA Blog, Meet Our Bloggers, http://blog.tsa.gov/2008/01/meet-our-bloggers_29.html (Jan. 30, 2008).

139. *See, e.g.*, Posting of John Daly to The TSA Blog, <http://blog.tsa.gov/2010/02/tsa-haiti-evacuation-effort-federal.html> (Feb. 4, 2010).

140. The TSA Blog moderates comments under the following policy:

The purpose of this blog is to facilitate an ongoing dialogue on innovations in security, technology and the checkpoint screening process. We encourage your comments; your ideas and concerns are important to ensure that a broad range of travelers are active and informed participants in the discussion. TSA reserves the right to modify this policy at any time. This is a moderated blog. That means all comments will be reviewed before posting. In addition, we expect that participants will treat each other, as well as our agency and our employees, with respect. We will not post comments that contain vulgar or abusive language; personal attacks of any kind; or offensive terms that target specific ethnic or racial groups. We will not post comments that are spam, are clearly "off topic" or that promote services or products. Comments that make unsupported accusations will also not be posted.

blog provides clear signals about the identities of governmental authors.¹⁴¹ And because only official TSA bloggers are identified as such on the website, readers can easily differentiate between official posts and unsanctioned comments from private individuals. Much like governmental social network sites, the TSA Blog remains transparent about the governmental source of its expression despite its interactivity.

3. Opaque Interactive Technologies

Governments also increasingly use interactive platforms where government speakers' identities may be both difficult to discern and to authenticate. Web 2.0 platforms, such as wikis, permit users to develop content collectively and often anonymously. As Wikipedia explains of its efforts: "Anyone with internet access can write and make changes to Wikipedia articles Users can contribute anonymously, under a pseudonym, or with their real identity" ¹⁴² Wikis routinely refuse to verify the identity of contributors. Indeed, Wikipedia explicitly *discourages* contributors from using their real names "for safety reasons."¹⁴³ Wikis do, however, record a history of edits and contributions by authors, even though those authors' identities are not verified.¹⁴⁴ Governments' use of interactive technologies built along this model would not reliably indicate to readers whether and when speech emanates from government participants.

Consider some examples of government's use of opaque interactive technologies. At the 2007 National Environmental Information Symposium, the Environmental Protection Agency (EPA) unveiled a wiki devoted to pooling collective knowledge on issues related to the Puget Sound, such as "Puget Sound species and the web of life," the "quality of human life sustained by a healthy Puget Sound," and the protection and restoration of Puget Sound habitat.¹⁴⁵ EPA invited symposium participants and their "networks of knowledgeable people" to participate in the online collaboration, which took place over a 48-hour period.¹⁴⁶ It ex-

The TSA Blog, Comment Policy, <http://blog.tsa.gov/2008/01/comment-policy.html> (Jan. 30, 2008).

141. The blog does not verify the identity of its commentators as non-governmental actors. Because the commentators typically write anonymously or via pseudonyms, the identities of those commentators are neither clear nor verified.

142. Wikipedia, Wikipedia:About, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited June 1, 2010).

143. *Id.*

144. The emerging Googlewave platform shares some similarities with wiki technology. On the one hand, Gmail users need only pick an email account name and password and Google does not authenticate their identity in any way. On the other, when Googlewave participants collaborate on a document, they own their work. When someone is editing something, the reader sees their edits shaded in a bright color; their names are affixed next to their edits. Readers may thus perhaps more easily identify the speaker on Googlewave than on Wikipedia's history page.

145. PugetSoundMashup, Main Page, http://pugetsound.epageo.org/index.php5?title=Main_Page (last visited June 1, 2010).

146. *See id.*

plained that “[t]ogether, we can explore what works and what doesn’t work in accessing environmental information.”¹⁴⁷

The symposium’s wiki project sought participants from state governments, local governments, Indian tribes, and industry.¹⁴⁸ To participate, individuals needed to provide names and email addresses. It is unclear if the EPA checked to make sure that those names and email addresses were true.¹⁴⁹ If so, particular entries and edits could not be attributed to particular speakers, at least not in any authenticated way. As EPA’s Chief Information Officer Molly O’Neill explained, the wiki generated “175 good contributions.”¹⁵⁰

Similarly, in 2007, the United States Patent and Trademark Office (USPTO) launched a program called *Peer to Patent*, which uses collaborative software to facilitate participation in patent applications.¹⁵¹ The project allows individuals (who participate in groups) to discuss and provide intelligence on selected patent applications.¹⁵² Aided by collaborative software, participants evaluate patent applications, discuss their independent research, and evaluate each others’ work.¹⁵³ At the end of the process, participants submit their findings to the USPTO examiner.¹⁵⁴

Individuals join this endeavor by registering on the *Peer to Patent* website. Registration requires that individuals provide names and email addresses.¹⁵⁵ As Beth Noveck explains, “though [individuals’] information is not authenticated (a participant need not provide a credit card to corroborate his identity and may use a pseudonym to preserve anonymity), a first name and last name rather than only a ‘handle’ are required in an effort to elevate the level of discourse.”¹⁵⁶ Although the project identified the content provider’s name, its design left readers unable to know with certainty the actual identity of the speakers who participate, even though those speakers may have reputational incentives to use their actual names. The *Peer to Patent* site thus provided no way for the audience to differentiate governmental speakers from non-governmental ones.

147. *Id.*

148. Joab Jackson, *Molly O’Neill: EPA the Web 2.0 Way*, GOV’T COMPUTER NEWS, Jan. 29, 2008, http://gcn.com/articles/2008/01/29/molly-oneill--epa-the-web-20-way.aspx?sc_lang=en.

149. *Id.*

150. *Id.*

151. BETH SIMONE NOVECK, *WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* 73 (2009).

152. *Id.* at 74.

153. *Id.* at 83.

154. *Id.* at 78.

155. *Id.* at 73.

156. *Id.*

B. Doctrinal Implications of Government's Use of Transparent Technologies

As Government 2.0 proceeds apace, private parties' free speech clause claims will increasingly require courts to determine when government is speaking for itself and when it simply provides a means for individuals to express themselves. To that end, courts must assess government's purpose and context in using online platforms to determine if contested expression is its own, and thus exempt from free speech clause scrutiny.

This should be a relatively simple task when government expressly identifies postings, links, videos, photographs, and other expression as evincing and supporting its own positions. Transparent technologies—both non-interactive and interactive—fall in this category as they provide the means for the audience to identify governmental speakers.¹⁵⁷

Consider, for example, *Page v. Lexington County School District One*.¹⁵⁸ There, a public school board passed a resolution expressing its opposition to pending school voucher legislation, and authorized public communication of that position on the school district's website as well as in emails and letters to parents and school employees.¹⁵⁹ Voucher proponent Randall Page then requested, among other things, that the district permit him to post his pro-voucher materials on its website.¹⁶⁰

When the district rejected his request, he filed a First Amendment suit, alleging (among other things) that the board's decision to link its website to private organizations that shared the district's opposition to the legislation had opened up its website as a type of forum for private parties' speech from which he could not be excluded on the basis of viewpoint.¹⁶¹ The Fourth Circuit rejected Mr. Page's claim, agreeing with the school district that the government speech doctrine permits it to communicate its own viewpoint through websites (and other means) without any obligation to allow others to alter that expression.¹⁶²

The facts in *Page* should make for a relatively easy decision because the design and context of the government's website made clear to onlookers the government's viewpoint and its identity as source of that particular viewpoint.¹⁶³ So long as the government speaker makes clear

157. For a more detailed discussion of how speakers can expressly identify themselves as the source of a message, see Norton, *supra* note 79, at 604–06.

158. 531 F.3d 275 (4th Cir. 2008).

159. *Id.* at 278–79.

160. *Id.* at 277.

161. *Id.* at 277–78.

162. *Id.* at 285 (“The School District included every link to other websites *on its own initiative*, and it did so only insofar as the link would *buttress its own message*. It thus retained *sole control* over its message.”).

163. In so holding, the Fourth Circuit relied primarily on the school board's “establishment” and “control” of the message. *See id.* at 281–85. But the court also attended to the government's

that it links to other speakers' websites to support communication of its *own* position, those links should not transform our understanding of the government's website as communicating anything other than the government's own views. For example, we might think of websites and hyperlinks as electronic versions of the bulletin board in *Downs v. Los Angeles Unified School District*.¹⁶⁴ There, after a school district established a bulletin board inviting faculty and staff submissions to promote its celebration of Gay and Lesbian Awareness Month, a teacher sought to post materials on that bulletin board questioning the morality of homosexuality.¹⁶⁵ When the district refused his request, he filed suit and argued that the refusal constituted viewpoint discrimination impermissible under the First Amendment.¹⁶⁶ The Ninth Circuit held that the school district's choice to dedicate its bulletin board to a celebration of tolerance and diversity reflected the government's own speech that it was entirely free to control.¹⁶⁷

As the Fourth Circuit noted in *Page*, moreover, a posting on a school district's website reflects a situation very different from that in which a government agency uses interactive technologies for the express purpose of facilitating public discussion on a topic. Government could enable such discussions through live chats, chat rooms, or other platforms designed to facilitate the ventilation of private views.¹⁶⁸ There, First Amendment principles bar government from excluding or censoring participants on the basis of viewpoint.¹⁶⁹ This would be true if, for example, a government agency deleted an individual's comments on its blog based on the person's policy preferences. Nor, of course, could the government prevent private speakers from starting their own websites expressing their contrary views.

To be sure, determining if the government is speaking for itself or if it is instead censoring viewpoints is sometimes difficult. For example, when a government formalizes its linking policy only after denying a hyperlink requested by a government critic, its actions may create doubt as to whether the government's website policy is driven by an interest in communicating its own message or instead by a desire to muffle private

transparent claim to the expression as its own. *See id.* at 284 (“[T]he School District continuously and unambiguously communicated a consistent message—its opposition to the Put Parents in Charge Act—and its providing references to others who shared that position was consistent with and supported the message, much as would a bibliography, a citation, or a footnote.”).

164. 228 F.3d 1003 (9th Cir. 2000).

165. *Id.* at 1005–06.

166. *See id.* at 1013.

167. *See id.*

168. *See Page*, 531 F.3d at 284–85; *see also Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 334–35 (1st Cir. 2009) (“It is possible there may be cases in which a government entity might open its website to private speech in such a way that its decisions on which links to allow on its website would be more aptly analyzed as government regulation of private speech.”).

169. Aden Fine, ACLU, Presentation at the U.S. Dep’t of Homeland Security: Government 2.0: Privacy and Best Practices (June 23, 2009).

parties' dissent.¹⁷⁰ For this reason, the government speech doctrine should create incentives for government to identify itself as the source of a particular message by requiring such transparency as a condition of claiming the defense.

Consider the facts in *Sutcliffe v. Epping School District*.¹⁷¹ The organizational plaintiff there described itself as “a perennial thorn in [the Town’s] side” that had been “engaged in a longstanding effort to curb what it [saw] as ‘profligate spending’ by the Town and its school district.”¹⁷² The plaintiff filed a First Amendment claim after the town rejected its request to include its hyperlink on the town’s website, arguing (as in *Page*) that the town’s decision to link to certain other private websites created a designated public forum from which the plaintiff could not be excluded on the basis of viewpoint.¹⁷³

There, the town had long owned and maintained a website that provided information on various town boards and commissions, town meetings, and other government activities. The town’s Board of Selectmen determined which materials—including which hyperlinks to other websites—would appear on the website.¹⁷⁴ It had no written or other formal policy to guide or explain its linking decisions.¹⁷⁵ The town argued, however, that its practice in making such decisions “was always to ‘provide information to the citizenry of the Town on Town business.’ The only links that were permitted were ones that ‘would promote providing information about the Town,’ and any links that were ‘political or advocate[d] for certain candidates’ were not allowed.”¹⁷⁶ After rejecting the plaintiff’s request, the town then established, for the first time, a written policy that limited hyperlinks on its website to sites either operated by other government agencies or that described “‘events and programs that are coordinated and/or sponsored by the Town of Epping.’”¹⁷⁷

Focusing primarily on the town’s establishment of the website and its control over the choice of hyperlinks to be included,¹⁷⁸ the federal

170. For an example of the latter, see R. Johan Conrod, *Linking Public Websites to the Public Forum*, 87 VA. L. REV. 1007, 1007 (2001) (describing a Virginia city as “remov[ing] an online newspaper’s link to its official city website because it was unhappy with critical coverage it had received in the newspaper” while links to other newspapers and other media were allowed to remain).

171. 584 F.3d 314 (1st Cir. 2009).

172. *Id.* at 318 (first alteration in original).

173. *See id.* at 324.

174. *Id.* at 331. These included hyperlinks to the websites of “‘governmental agencies and certain civic organizations,’ such as the New Hampshire Municipal Association, the Epping Middle High School, and the Exeter Area Chamber of Commerce” as well as to the website for “‘Speak Up, Epping!’,” an event endorsed and supported by the town. *Id.* at 322.

175. *See id.* at 322.

176. *Id.* (alteration in original).

177. *Id.*

178. *Id.* at 331.

appellate court held that the town's decision reflected government's own expression free from First Amendment scrutiny:

[I]n this case, the Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website. The Town created a website to convey information about the Town to its citizens and the outside world and, by choosing only certain hyperlinks to place on that website, communicated an important message about itself.¹⁷⁹

But here the government's lack of a clear website policy invites suspicion that the town's rejection of a linking request by a longtime and vocal critic might be motivated by distaste for dissent, rather than by a sincere interest in protecting its own message from distortion.¹⁸⁰ Dissenting Judge Torruella, for example, expressed concern that the town's government speech defense might be a subterfuge manufactured after the fact to justify what was really viewpoint discrimination against a private speaker. Distinguishing *Page* as a case in which "it was clear that the government was engaging in its own speech activity,"¹⁸¹ he contrasted *Sutcliffe* as a case in which:

[T]he majority extends the doctrine to a situation where, in my view, it was not clear that the government was engaging in speech at the time it was acting, and only justified its actions after the fact. The majority's position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact.¹⁸²

He urged instead that the inquiry focus on whether the public would understand the choice of hyperlinks to reflect the government's own expression.¹⁸³

The Sixth Circuit's decision in *Putnam Pit, Inc. v. City of Cookeville*¹⁸⁴ presents a similarly challenging situation. The plaintiff—"a

179. *Id.*

180. *See id.* at 340 n.20 (Torruella, J., dissenting) (noting that counsel for the town at oral argument "struggled to justify the Town's inclusion of a Chamber of Commerce link on the Town's website, but not the plaintiffs' website").

181. *See id.* at 337.

182. *Id.*

183. *Id.* at 338 n.16 ("In my view, the better course is to adopt the test proposed by Justice Souter in his concurrence to *Sumnum*. . . Justice Souter's test has the benefit of preventing ex post rationalization of viewpoint discrimination as government speech to avoid First Amendment scrutiny. Rather, the actions of the government would be evaluated from the perspective of a reasonable observer, and, as I note below, it is an open question whether a reasonable observer would construe the Town's actions as government speech, as opposed to the designation of a public forum or simple run-of-the-mill viewpoint discrimination.")

184. (*Putnam I*), 221 F.3d 834 (6th Cir. 2000).

self-appointed eye on government corruption for the City”¹⁸⁵—claimed that the city’s refusal to add a hyperlink to his website constituted impermissible viewpoint discrimination. For several years, the city’s website included a “local links” page, to which local businesses were invited to add a link.¹⁸⁶ At the time of the plaintiff’s request, the City had “no stated policy on who could be linked” to the city’s website, and had linked to a number of for-profit and non-profit entities based on decisions made by the city’s computer operations manager.¹⁸⁷ That manager recognized the controversial nature of the plaintiff’s request for a hyperlink, and for the first time referred such a request to the city manager. The city manager initially decided to limit hyperlinks to non-profit organizations, but then (after the plaintiff informed him of his plans to convert to nonprofit status) decided to limit links to those organizations that “promote the economic welfare, industry, commerce, and tourism” of the city.¹⁸⁸

In a decision that preceded the Supreme Court’s more detailed government speech decisions in *Johanns* and *Sumnum* by several years, the *Putnam* court never considered the possibility of government speech (and apparently the city did not raise such a defense). Characterizing the city’s website as a nonpublic forum,¹⁸⁹ the court denied the city’s motion for summary judgment on whether its decision to exclude the plaintiff from such a forum was reasonable and viewpoint-neutral.¹⁹⁰ A jury later ruled for the city, concluding that the plaintiff did not meet the defendant’s newly-established eligibility requirements for receiving a hyperlink in that his website did not promote economic development and tourism.¹⁹¹

Sutcliffe and *Putnam* illustrate the Internet-age dangers of undue deference to government’s claims that speech is its own. Certainly government should be able to control its own transparently-chosen messages on its website (or elsewhere), as in *Page*. But governments’ lack of transparency in *Sutcliffe* and *Putnam* invites the “legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”¹⁹² By insisting that the government be clear about when it is speaking, on the one hand, and when it intends instead to create an opportunity for private speech on

185. *Id.* at 838; *see also Putnam Pit, Inc. v. City of Cookeville (Putnam II)*, 76 F. App’x 607, 610–11 (6th Cir. 2003).

186. *Putnam II*, 76 F. App’x at 610.

187. *Putnam I*, 221 F.3d at 841; *see also Putnam II*, 76 F. App’x at 610–11.

188. *Putnam II*, 76 F. App’x at 610–11.

189. *Putnam I*, 221 F.3d at 845.

190. *Id.* at 846.

191. *See Putnam II*, 76 F. App’x at 609 (declining to overturn the jury’s verdict that the plaintiff did not meet the defendant’s eligibility requirements for receiving a hyperlink).

192. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1134 (2009).

the other, courts can generate a principled and relatively easy solution from both a doctrinal and a technical perspective.

These problems can generally be solved by government's design choices. Government, in other words, can and should decide whether it plans to claim the speech as its own and affirmatively signal its authorship, or disclaim the speech and prepare to comply with traditional First Amendment principles. It can generally do so cheaply and easily.

Indeed, some government actors already have done so as a matter of policy. As an example, USA.gov, an interagency initiative administered by the U.S. General Services Administration, has developed policies for federal agency websites that require transparent identification of government websites as the government's own speech:

Showing U.S. government sponsorship is one of the requirements for managing your agency's website You should clearly display the name of your agency or organization on every web page to show visitors who sponsors the website. Be sure it's clear on every page that the site is maintained by the U.S. government. . . . By clearly displaying your agency's name and sponsorship on every page of your website, you're clearly telling the public that your agency is accountable for the website's content.¹⁹³

At the same time, governments at all levels can—and should—be equally transparent in *disclaiming* certain speech as its own. As a specific example:

USA.gov can add a link to any government website that is publicly available unless directed not to by the agency that owns the site. . . . In rare instances, USA.gov links to websites that are not government-owned or government-sponsored if these websites provide government information and/or services in a way that is not available on an official government website. . . . The U.S. government . . . neither endorses nor guarantees in any way the external organizations, services, advice, or products included in these website links. Furthermore, the U.S. government neither controls nor guarantees the accuracy, relevance, timeliness or completeness of the information contained in non-government website links.¹⁹⁴

193. USA.gov, Showing U.S. Sponsorship, http://www.usa.gov/webcontent/getting_started/naming/sponsorship.shtml (last visited June 1, 2010); *see also* Department of Energy, Non-Government Domains, <http://cio.energy.gov/services/682.htm> (last visited June 1, 2010) ("This requirement recognizes the proper performance of agency functions includes an obligation for clear and unambiguous public notification of the agency's involvement in or sponsorship of its information dissemination products including public websites.").

194. USA.gov, Linking Policy, http://www.usa.gov/About/Linking_Policy.shtml (last visited June 1, 2010).

This policy makes clear the communicative function served by the government's linking decisions in these specific contexts: to provide information in a way that does not express government's views.¹⁹⁵

As described above, courts have sometimes been befuddled by the significance of government's links to third-party sites in the government speech context. The technology should not, however, make the issue a difficult one. Indeed, links may serve the same expressive function as the government speaker's citation to a supportive reference in a policy paper. Instead, the challenge is whether the *context* of the link (or embedded YouTube video and the like) makes clear that the government has used online technologies to project its own views.

Government can, and should, make its purpose transparent. The Office of Management and Budget, for example, has set forth policies requiring federal agencies to establish and enforce agency-wide linking practices:

You must also post a clear and comprehensive linking policy that explains your agency's criteria for choosing external sites. . . . Linking to other websites is valuable since it brings additional visitors to those sites and can provide additional information and resources to your visitors. However, you *need to have clear and fair criteria for deciding which links to use*, particularly when another website owner asks you to link to them or trade links.¹⁹⁶

Consider, too, the TSA Blog that provides information related to the TSA's mission and then invites members of the public to comment on the agency's activities. The TSA's own postings are clearly identified as government speech, and TSA retains complete power to control the expression of its own views. Postings by government employees appear beneath their names and affiliation with the TSA Blog, making clear that the TSA is the source of the expression.

Where it enables public comments, however, TSA has created a designated public forum for the expression of private views, and has limited discussion to TSA matters. For instance, the TSA Blog explains that this feature's purpose is to "facilitate an ongoing dialogue on innovations

195. If the government is not itself speaking, recall that traditional First Amendment principles then apply. For a discussion of how government might sell its choice of hyperlinks as a form of advertising, thus producing a revenue stream, see Pearson Liddell, Jr. et al., *Government-Owned Web Sites and Free Enterprise: First Amendment Implications*, 10 No. 4 J. INTERNET L. 1 (2006). Government's sale of advertising space in brick-and-mortar facilities has been variously characterized as a designated public forum, a limited public forum, or a nonpublic forum. 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); Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 338–43 (2009) (discussing mixed results in transit-advertising cases).

196. USA.gov, Establishing a Linking Policy, http://www.usa.gov/webcontent/managing_content/organizing/links/policy.shtml (last visited June 1, 2010) (emphasis added).

in security, technology and the checkpoint screening process.”¹⁹⁷ The First Amendment does not permit TSA to edit comments based on viewpoint—for example, by deleting posts critical of the government’s efforts on those topics. The Court’s limited public forum doctrine, however, does permit TSA to regulate public comments that fall outside the limits of the forum—by deleting posts on health care reform, or the World Series, or any other matter unrelated to TSA activities.¹⁹⁸ As the TSA Blog explains, the TSA reviews all comments prior to posting and “will not post comments that are spam, are clearly ‘off topic’ or that promote services or products.”¹⁹⁹

The TSA Blog demonstrates networked technologies’ great potential for facilitating government’s identification of itself as speaker as opposed to its decision to fashion a forum for private speech. Both non-interactive and interactive technologies generally offer cheap and easy means to identify government’s own speech and that of private speakers engaged in a public forum. Significantly, digital technologies are often designed in ways that nudge government speakers to claim their expression. This is a great benefit of Government 2.0: networked technologies offer an inexpensive way to get government’s message to the public and to garner its feedback while clarifying when government is speaking.

In short, government should, and inexpensively can, take care to ensure that the public knows whether and when the government intends to use its website to express itself or if it instead intends to create a designated public forum for the expression of ideas generally (or a limited public forum for expression on certain topics, or perhaps a nonpublic forum). Government should thus keep in mind—and plan for—this key question when designing policies for the use of websites, linking, and 2.0 platforms: Do we (government) seek to engage in our own expressive conduct? Or are we providing some sort of opportunity for private speech?

As Jack Balkin thoughtfully explains, design choices are crucial to the protection of free speech values in the twenty-first century.²⁰⁰ Gov-

197. The TSA Blog, <http://blog.tsa.gov/> (last visited June 1, 2010).

198. Some courts and commentators have urged that public forum doctrine additionally be understood to permit government to regulate private speech in various forums that is vulgar, odious, or otherwise particularly obnoxious. See, e.g., Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833 (2010); Paul D. Wilson & Jennifer K. Alcaez, *But it’s My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?*, 41 URB. LAW. 579, 585–87 (2009) (discussing decisions in which courts did or did not permit regulation on such grounds).

199. The TSA Blog, Comment Policy, <http://blog.tsa.gov/2008/01/comment-policy.html> (last visited June 1, 2010). It also “expect[s] that all participants will treat each other, as well as our agency and employees, with respect” and will “not post comments that contain vulgar or abusive language; personal attacks of any kind; or offensive terms that target specific ethnic or racial groups.” *Id.*

200. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 443–44 (2009) (“In the digital age, judicial protection of First Amendment rights will remain quite important; but if I am correct about the trajectory of future policy debates, our attention will increas-

ernment should thus coordinate with technologists to ensure that its on-line presence explicitly informs the public when the hosted communications are its own. Governments can forestall subterfuge concerns by deliberating over, and establishing, a transparent policy that explains when it intends its website, blog, or social network site to express its own views and when it instead intends to create a public, designated, limited, or nonpublic forum.²⁰¹

C. Doctrinal Implications and Challenges of Government's Use of Opaque Technologies

Government's increasing use of certain interactive technologies creates opportunities for greater government transparency and fewer anonymous bureaucrats, as government officials increasingly communicate with the public by blog, YouTube, or podcasts that transparently indicate their governmental source.²⁰² On the other hand, government's reliance on technologies that obscure speakers' identity carries the potential to frustrate government speech values by undermining the transparency, and thus the accountability, of government speech. This vulnerability is most notably true of opaque interactive technologies that *can* hinder or prevent verification of the government as a message's source—e.g., when the government participates in anonymous or unauthenticated collaboration, such as the *Peer to Patent* groups and the Puget Sound wiki.²⁰³

In our view, a commitment to the values appropriately protected by the government speech doctrine would preclude government from claiming the government speech defense when it participates in opaque interactive technologies without clearly identifying itself as the speaker. Such a doctrinal adjustment should encourage government to be more transparent when it is speaking and less likely to regulate based on viewpoint when it is not.²⁰⁴

ingly shift to questions of design—both of institutions and technology—that are largely beyond judicial competence. The key players in ensuring free speech values in the digital age will be legislatures, administrative agencies, and technologists.”).

201. Although the rules for assessing government's permissible regulation of private speech vary with the forum designation, in none of them may government discriminate on the basis of viewpoint. *See* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

202. *See* *Business 3.0, Obama's Transparent and Connected Government*, <http://mybusiness-network.blogspot.com/2009/01/transparent-and-connected-government.html> (Jan. 6, 2009, 6:16 AM). Indeed, similar parallels have emerged in the field of journalism, where previously faceless and often unreachable columnists and reporters are now readily accessible via e-mail, frequent blogging, etc. *See* Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 690 (2007) (“[B]logs sponsored by daily newspapers . . . serve as fora for interactive discussions between journalists, editors, and the public.”).

203. *See supra* notes 145–57 and accompanying text.

204. To be sure, many other transparency-forcing mechanisms remain available that we also support. *See, e.g.*, Consolidated Appropriations Resolution, Pub. L. No. 108-7, tit. VI, § 626, 117 Stat. 11, 470 (2003) (prohibiting expenditure of federal funds to pay third parties to engage in gov-

Consider, as just one example, government's use of wiki technologies.²⁰⁵ As Jason Miller and Hannah Murray emphasize, "Wikipedia's greatest weakness—that anybody can edit an article—is also its greatest strength."²⁰⁶ This is because wikis and other opaque interactive technologies provide a cheap and easy way to facilitate peer production, a process by which often-anonymous individuals, whose actions are not coordinated either by managers or by market price signals, jointly produce information.²⁰⁷ Peer production facilitates collaboration among radically diverse groups.²⁰⁸ Such diversity has enabled Wikipedia's accuracy to rival that of the Encyclopedia Britannica.²⁰⁹ As social media scholar Clay Shirky explains, Wikipedia is "the product not of collectivism but of unending argumentation. The articles grow not from harmonious thought but from constant scrutiny and emendation."²¹⁰

No matter how effective opaque interactive technologies like wikis may be, however, they may prevent readers from identifying speakers' *actual* identity.²¹¹ Government's use of such technologies is troubling if government officials participate without identifying themselves: unidentified authors prevent readers from using a message's governmental source as a cue to its credibility.²¹²

ernment propaganda efforts without disclosing the messages' governmental source); Leslie Gielow Jacobs, *Bush, Obama and Beyond—Observations on the Prospect for Fact Checking Executive Department Threat Claims Before the Use of Force* (Mar. 2010) (unpublished manuscript, on file with the *Denver University Law Review*) (discussing possible means for encouraging greater accountability by Article II speakers on national security issues).

205. The National Institute for Health (NIH), for example, is "encouraging its scientists and science writers to edit and even initiate Wikipedia articles in their fields" in response to the reality that many individuals turn to the web for health-related information. Iby Caputo, *NIH Staffers Get Into the Wiki World*, WASH. POST, July 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/27/AR2009072701912.html>.

206. Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate*, 84 ST. JOHN'S L. REV. (forthcoming 2010).

207. Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1256 (2003).

208. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 232 (2006).

209. See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 141 (2008).

210. *Id.* at 139. To be sure, diverse groups may sometimes produce better information and decisions than even experts. Nonetheless, Wikipedia shows that anonymous crowds can also be destructive. Consider journalist John Seigenthaler, Sr.'s struggles. In 2005, Seigenthaler discovered that one or more persons had created a Wikipedia biography for him that included false accusations of his involvement in the Kennedy assassination. *Id.* at 138. The entry was edited to strike out the false material, but by that time the false material had circulated for over half a year and thus "much of the damage had been done." *Id.* Wikipedia now invokes editorial control to combat vandalism, often locking pages and editing. *Id.*

211. Although in this Article we focus on the dangers of anonymous government speech, private parties' use of emerging technologies to engage in anonymous cyber harassment and similar behavior may inflict substantial harms of a very different type. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 61 (2009) (describing use of internet technologies to threaten, defame, and harass women and other members of subordinated groups).

212. See Norton, *supra* note 79, at 592 (recounting evidence from cognitive psychology and related fields indicating that onlookers often use a message's source as a heuristic for evaluating its quality); see also *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 946 n.47 (2010) (Ste-

Moreover, opaque interactive technologies also create possibilities for a type of deception known as “sock puppeting”—the creation of a “fake online identity to praise, defend or create the illusion of support for one’s self, allies or company.”²¹³ When online collaborations guarantee anonymity, interested individuals, including government actors, can rig the “crowd,” ensuring the prominence of a particular view. To use an example from the private sector, John Mackey, the former chief executive of Whole Foods Market, used a fictional identity on the Yahoo message boards for eight years to assail competition and promote his supermarket chain’s stock.²¹⁴

Indeed, Gia Lee has documented government’s efforts in more traditional expressive contexts to shape and thus manipulate public opinion by attributing government views to private actors—perceived as more credible or less self-interested on certain issues—through means such as government-produced “news” segments or op-eds distributed to and printed or aired by the media without acknowledgment of their governmental source.²¹⁵ As another example, recall the government’s production of beef advertisements accompanied only by the label “Funded by America’s Beef Producers.”²¹⁶ Government’s participation in opaque interactive technologies substantially increases opportunities for such manipulation at the expense of government accountability, as sock pup-

vens, J., concurring in part and dissenting in part) (quoting ARISTOTLE, *POETICS* 43–44 (M. Heath trans., Penguin Books 1996) (“In evaluating any utterance or action, one must take into account not just the moral qualities of what is actually done or said, but also the identity of the agent or speaker, the addressee, the occasion, the means, and the motive.”)).

213. Brad Stone & Matt Richtel, *The Hand that Controls the Sock Puppet Could Get Slapped*, N.Y. TIMES, July 16, 2007, available at http://www.nytimes.com/2007/07/16/technology/16blog.html?_r=1&oref=slogin.

214. *Id.* Mr. Mackey used the online handle “Rahodeb” (an anagram of his wife’s name, Deborah). *Id.*

215. *See* Lee, *supra* note 88, at 990.

216. *See* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 577–78 (Souter, J., dissenting) (“[R]eaders would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi’s thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?”). Although unwilling to require government affirmatively to identify itself as the author of the message as a condition of claiming the government speech defense, the Supreme Court noted in *Johanns* the possibility of a different outcome if there were evidence that viewers actually misunderstood the message to be attributed to private parties—although it seemed quite unwilling to find such evidence:

Whether the *individual* respondents who are beef producers would be associated with speech labeled as coming from ‘America’s Beef Producers’ is a question on which the trial record is altogether silent. We have only the funding tagline itself, a trademarked term that, standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad.

Id. at 566 (majority opinion); *see also* Greene, *supra* note 198, at 834–836.

petry powerfully demonstrates how government might manipulate opaque interactive technologies in unaccountable ways.²¹⁷

The sock puppetry concern provides further justification for insisting that government clearly identify itself as a message's source if it wishes to claim the government speech defense. Government thus should not be allowed to claim the government speech defense when it participates in anonymous wikis and other opaque technologies that prevent its identification as speaker. For example, the government speech defense should not be available to a governmental body that anonymously edits wiki entries to tone down criticism of the government's agenda because such speech is not transparently governmental. Indeed, such governmental censoring of private speech based on viewpoint violates the First Amendment.

Even though participation in such technologies is typically anonymous, government can often choose to participate transparently in wikis. In a particularly promising development, perhaps one made in response to their prior efforts,²¹⁸ the EPA issued "Interim Guidance Representing EPA Online Using Social Media" on January 26, 2010.²¹⁹ In its Interim Guidance document, the EPA addressed the manner in which EPA employees and contractors working for the agency represent the agency online.²²⁰ As the guidance document explains, the "line between public and private, personal and professional can sometimes get blurred in online social networks."²²¹ As a result, employees and contractors must remember that they are participating in their official capacity, not their personal one.²²² Under the heading "Be transparent and honest," the guidance document instructs:

Do not comment or edit anonymously. Because you are working in your official EPA capacity, you can make reference to your EPA position and title. If you are a contractor, name your company and be clear that you are a contractor working on behalf of EPA and not an EPA employee.²²³

It notes that in writing posts or commenting on non-EPA blogs or in editing a non-EPA wiki, employees and contractors must identify their EPA affiliation by identifying their title and by using their work email

217. For thoughtful discussion of the possibility that government may sometimes act as "ventriloquist," deliberately masking its role as a message's source in order to enhance the message's credibility, see Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 49-52 (2000).

218. See *supra* notes 145-148 and accompanying text (describing EPA's Puget Sound project).

219. Representing EPA Online Using Social Media, Web Guide, Jan. 26, 2010, http://yosemite.epa.gov/OEI/webguide.nsf/socialmedia/representing_epa_online.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

address.²²⁴ Here the government has taken clear responsibility for its expression. This enables meaningful political accountability, and provides valuable information to the public consistent with the purposes of the government speech doctrine.

Some may object that such a transparency-forcing doctrine unwisely discourages government from contributing to wikis and related opaque technologies that facilitate the production of valuable and more accurate information precisely *because* they permit anonymous contributions. That argument might be persuasive if we value government speech as simply a means to the end of information accuracy. Although government speech may further the discovery of truth and dissemination of knowledge,²²⁵ its primary importance lies in another key First Amendment value: facilitating democratic self-governance. In other words, “valuable” government speech in this context does not necessarily mean good, wise, or accurate speech.²²⁶

In our view, government expression is valuable primarily because it gives the public more information with which to assess their government. For this reason, government speech is most valuable and least dangerous to the public—thus meriting exemption from First Amendment scrutiny—*only* when members of the public can identify the government as a message’s source, thus enabling them to more accurately assess the message’s credibility and to take accountability measures as appropriate. This is true even if—and perhaps especially if—the public finds the government’s expression inaccurate or disagreeable. In short, the accountability harms of nontransparent government speech outweigh its accuracy-enhancing benefits.

Of course, the more successful the government is at non-transparent behavior, the less likely we will learn of such activity. But sometimes we *do* find out—thanks to whistleblowers, intrepid public watchdogs, the government’s own indiscretion, or some other means.²²⁷ In any event,

224. *Id.*

225. For a discussion of the primary values to be served by the First Amendment, see Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980) (“Over the years, we have come to view freedom of expression as essential to: (1) individual self-fulfillment; (2) the advance of knowledge and the discovery of truth; (3) participation in decision-making by all members of society; and (4) maintenance of the proper balance between stability and change.”).

226. For a different view, see Bezanson, *supra* note 48 (characterizing government speech as constitutionally valuable only when it is cognitive and reasoned, rather than aesthetic or emotional).

227. See Lee, *supra* note 88, at 983–88 (describing exposure of several instances of government’s covert efforts to disseminate its policy agenda through nontransparent means); William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1461 (2008) (describing “the importance of leaks in the democratic dialogue”); Mary-Rose Pappadrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 233 (2008) (describing the government’s communication of information to the public through leaks); Letter from Anthony H. Gamboa, General Counsel, U.S. Government Accountability Office, to Senators Frank R. Lautenberg & Edward M. Kennedy (Sept. 30, 2005) (on file with Denver University Law Review) (describing Bush Administration Department of Education’s violation

such a doctrinal change may more generally shape the norms for, and expectations of, government actors when they think through how and when they speak in social media contexts. Law has an expressive character aside from its coercive one.²²⁸ It creates a public set of meanings and shared understandings between the state and the public.²²⁹ It signals appropriate behavior, creating and sustaining norms.²³⁰ Law also clarifies government's commitments: "Because law creates and shapes social mores, it has an important cultural impact that differs from its more direct coercive effects."²³¹

Reconsidering the government speech doctrine could change the way that government actors conduct themselves online. By emphasizing the importance of transparency in government expression, it could make clear to government actors that their online activities play a crucially important role in government's larger effort in creating an informed and responsive citizenry.

Doctrinal change can also influence the efforts of government officials. It might convince government decision-makers to adopt clear policies regarding government expression and private speech on their own blogs, websites, and social network sites. It might press them to do the same for employees using non-governmental social media in the manner that EPA did in its Interim Guidance document. It could convince government officials to devote resources to training personnel about the proper use of social media and means to enhance government transparency online.

Law's insistence upon transparency in the government speech doctrine would have a positive impact upon the public. Because individuals would see government making clear its policies and claiming its expression, the public would see the government owning its own words without subterfuge. By enhancing the public's faith in government, individuals might be encouraged to participate in policy discussions. Indeed, President Obama ordered executive agencies and departments to use innovative technologies precisely to invigorate public participation and collaboration.

of the covert propaganda ban by contracting with columnist Armstrong Williams "to comment regularly on the No Child Left Behind Act without assuring that the Department's role was disclosed to the targeted audiences.").

228. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3 & n.10 (2000); see generally Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407-414 (2009) (exploring law's expressive value in addressing cyber gender harassment).

229. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1571 (2000).

230. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

231. Citron, *supra* note 228, at 407.

CONCLUSION

This Article seeks to start a conversation about whether our expectations of government speech, and of government,²³² should remain the same in light of changes in the way that government speaks. For now, we raise more questions than we answer. And those questions are many.

For example, emerging technologies generate new controversies about government's responsibility for the accessibility of its expression. In other words, how understandable must government expression be, and to what segment of the population? Considering this question requires that we weigh the availability (volume) of government speech against its accessibility (quality). Some take the view that the more government speech the better, and that government efforts to manage its raw data and other expression for quality or readability unacceptably slow the speed and reduce the volume of information received by the public.²³³ Others, in contrast, urge government to invest in greater accessibility and readability of its data and other expression.²³⁴

Note too that we may need to reconsider certain understandings of government speech. For example, in light of the dangers of closed source code when used by government programmers, should we consider government code a form of government speech—or instead as simply government decision-making, rather than expression, for which it remains constitutionally accountable?²³⁵

This Article begins this conversation with a focus on ensuring that government remains meaningfully politically accountable to the public

232. For a thoughtful discussion of how the controversy over government speech reflects a controversy over the appropriate role of government more generally, see Steven D. Smith, *Why is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945 (2010). For an equally thoughtful response, see Alan Chen, *Right Labels, Wrong Categories: Some Comments on Steven D. Smith's Why is Government Speech Problematic?*, 87 DENV. U. L. REV. ONLINE (2010), http://denverlawreview.org/storage/Chen_Right_Labels.pdf.

233. David Robinson, Harlan Yu, William P. Zeller, & Edward W. Felten, *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160, 160 (2009) ("If President Barack Obama's new administration really wants to embrace the potential of Internet-enabled government transparency, it should follow a counter-intuitive but ultimately compelling strategy: *reduce* the federal role in presenting important government information to citizens. Today, government bodies consider their own Web sites to be a higher priority than technical infrastructures that open up their data for others to use. We argue that this understanding is a mistake. It would be preferable for government to understand providing reusable data, rather than providing Web sites, as the core of its online publishing responsibility.")

234. Jerry Brito, *Hack, Mash, & Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI. & TECH. L. REV. 119 (2008) ("In order to hold government accountable for its actions, citizens must know what those actions are. To that end, they must insist that government act openly and transparently to the greatest extent possible. In the twenty-first century, this entails making its data available online and easy to access.")

235. See generally Danielle Keats Citron, *Open Code Governance*, 2008 U. CHI. LEGAL F. 355 (2008); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L.R. 1249, 1250 (2008) (urging that such government systems ought to be transparent to the public to promote accuracy, security, and privacy, among other values).

for its expressive choices, regardless of the form of communicative technology involved. It thus urges the revision of government speech doctrine to require that government make clear when it is speaking as a condition of asserting the government speech defense. This requires government to make deliberate and transparent choices when designing websites and engaging in other newer technologies to identify itself as a message's source when it seeks to speak, and to disclaim or otherwise make clear when it instead intends to create an expressive opportunity for others.

To be sure, the Court's reluctance to require such transparency signals the possibility that it will respond to such challenges with continuing deference to government in the face of what might seem to it as difficult technological problems in identifying expression's source. In addition to advancing key First Amendment interests in facilitating democratic self-governance, however, revising the government speech doctrine as proposed here may help generate some technological benefits as well. If the government speech doctrine is understood to bar government from using opaque technologies (at least as a condition of claiming the government speech defense), then we might see increased investments in technologies that would enhance transparency for expressive vehicles. Indeed, many are already working on identification technologies that facilitate communication with individuals whose identities have been authenticated.²³⁶

Ideally, technological innovation would foster greater transparency in several ways. It would permit us to confirm when government speaks and to prevent government from masking its identity as that of a private speaker. It would also permit us to discern when some other speaker is actually masquerading as the government.²³⁷ And it would permit us to demarcate particular portions and contributions of mixed public and private speech—as in wikis—and to link them directly and transparently to government contributors.

This is not to say that we have unfailing faith that this will happen. But as Paul Schwartz observed in a different context: "One of the extraordinary aspects of the Internet . . . is its rapid rate of change. It is commonplace that each year online represents the equivalent of seven years of change in the normal, offline world."²³⁸ Technical solutions that

236. See Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. (forthcoming 2010) (describing fake posts and other techniques by imposters seeking to create confusion about the source of information about particular corporate brands).

237. Note, for example, that some individuals with no governmental affiliation may create official-looking platforms, such as social network profiles, that purport to convey governmental messages—perhaps to besmirch governmental actors whose election (or re-election) efforts they want to undermine.

238. Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1446 (2009).

facilitate the transparency of government expression may be around the corner.