Government Speech and Circumvention of the First Amendment

by MARK STRASSER*

Introduction

The First Amendment severely limits the government's ability to prohibit disfavored speech, but does not impose similar constraints on the government's ability to craft its own message. Such a distinction makes sense. One of the purposes of the First Amendment is to prevent the government from muzzling those who are critical of it.[1] However, the government is not required to be neutral on all matters of concern merely because it must permit others to be critical.[2] Prohibiting the government as a speaker from favoring one message over another would, as a practical matter, preclude the government from speaking at all—an untenable result.[3] Regrettably, the United States Supreme Court has not offered helpful criteria to determine when the government is acting as speaker rather than as regulator. Unless the Court clarifies this matter, we can only expect a more confused jurisprudence and an increasing number of instances in which the circuit courts will treat relevantly similar cases differently.

Part II of this Article describes the evolution of the government speech doctrine, noting the ways in which the Court has left the doctrine uncabined. Part III examines an understandable attempt by a circuit court

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1. *Cf.* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 897 (1979) ("One purpose of the first amendment is to prevent government censorship of private speech, *particularly political speech*, through the operation of laws.") (emphasis added).

2. *Cf.* W. Bradley Wendel, *"Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, 65 L. & CONTEMP. PROBS. 33, 42–43 (2002) ("The government can fund a public education campaign that says, 'Wear your seatbelt,' or 'Quit smoking now,' or 'Don't have unprotected sex.' It doesn't have to remain agnostic in public about whether or not wearing a seatbelt is a good idea.").

3. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("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.").

to limit the government speech doctrine, and explains both that the limitation offered ignores controlling precedent and that another circuit has illustrated some of the dangers posed by the current doctrine. This Article concludes that the Court must offer meaningful limitations on what can be characterized as government speech before that exception swallows up many of the protections offered by the First Amendment.

I. Government Speech Doctrine

The government speech jurisprudence is underdeveloped, because it is of recent vintage and there are relatively few cases relying on or explicating that doctrine.[4] Nonetheless, the United States Supreme Court has upheld particular practices as government speech in a few different cases without offering an account of the conditions under which the government may claim particular expression as its own and thereby avoiding First Amendment speech limitations. Precisely because the government is subject to substantial constraint when regulating speech, but very little constraint when acting as speaker,[5] the Court must clearly articulate the conditions under which the government is entitled to the greater freedoms associated with its acting as speaker rather than regulator.

A. *Rust* and the Government Speech Doctrine

Rust v. Sullivan[6] is characterized as one of the first government speech cases,[7] although the case was not so understood at the time it was issued[8] and, indeed, the term "government speech" was not contained in the

4. *See id.* at 574 (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."); Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (discussing the "recently minted government speech doctrine").

5. *First Amendment—Freedom of Speech—Government Speech*—Walker v. Texas Div., Sons of Confederate Veterans, Inc., 129 HARV. L. REV. 221 (2015) ("The Supreme Court's government speech doctrine offers a constitutional escape hatch—a means by which government and courts may disregard the boundaries that the Free Speech Clause of the First Amendment would otherwise impose.").

6. Rust v. Sullivan, 500 U.S. 173 (1991).

7. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612 (2008) ("The 1991 *Rust v. Sullivan* decision is now heralded as one of the first government speech cases.").

8. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 33 n.162 (2011) ("While the *Rust* Court did not use the term government speech in its analysis, the Court has subsequently pointed to *Rust* as the genesis of the government speech doctrine."); Alana C. Hake, *The States, a Plate, and the First Amendment: The "Choose Life" Specialty License Plate as Government Speech*, 85 WASH. U. L. REV. 409, 422 (2007) ("Although the decision did not contain the words 'government speech,' *Rust v. Sullivan* has been recognized subsequently as the 'fountainhead' of that doctrine.").

opinion.[9] In *Rust*, the Court upheld the constitutionality of a controversial federal statute preventing clinics from receiving certain federal funds from engaging in abortion-related activities.[10] The prohibited activities included both discussing abortion and providing abortion referrals.[11] If a patient were to ask for such a referral, she could be told that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[12] The physician was prohibited from making this referral.[13]

When holding that the regulation did not violate constitutional guarantees, the *Rust* Court was less clear than might have been desired about why the limitation passed constitutional muster.[14] The Court explained that "the Government [was] not denying a benefit to anyone, but . . . instead simply insisting that public funds be spent for the purposes for which they were authorized."[15] That explanation suggested that the government has great discretion with respect to the projects that it chooses to fund. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[16] The government's choosing one way rather than another to address a particular problem does not entail that the government has "discriminated on the basis of viewpoint."[17] Instead, the Court explained that the government "has merely chosen to fund one activity to the exclusion of the other."[18]

Rust might be thought to stand for the proposition that the government may impose whatever conditions it desires on government-funded

9. Corbin, *supra* note 7, at 612 ("[T]he term 'government speech' appeared nowhere in the decision.").

10. *See Rust*, 500 U.S. at 178–80.

11. *Id.* at 179.

12. *Id.* at 180 (citing FTC Credit Practices Rule, 42 C.F.R. § 59.8(b)(5) (2016)).

13. Elliot Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 HASTINGS L.J. 871, 878 (1993) ("Doctors could refer women to pre-natal services, or to gynecological services, but could not refer them to abortion-related services, indicating the improper viewpoint-based nature of the *Rust* rule.").

14. *See* R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347, 348 (2016) ("The importance of the government speech versus private party speech distinction has not, however, been matched by its clarity.").

15. Rust v. Sullivan, 500 U.S. 173, 196 (1991).

16. *Id.* at 193.

17. *Id.*

18. *Id.*

projects.[19] However, the Supreme Court has clarified that the government does not have unfettered discretion when imposing limitations on those whom it funds.[20] In addition, the Court has offered a different way to understand *Rust*.[21]

In *Rosenberger v. Rector & Visitors of University of Virginia*,[22] the Court explained that "the government [is permitted] 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."[23] Focusing on *Rust* in particular, the *Rosenberger* Court noted that It had "upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling,"[24] and then explained that "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."[25] *Rosenberger*'s suggestion that *Rust* was a government speech rather than a government funding case was echoed in *Board of Regents of University of Wisconsin System v. Southworth*,[26] where the Court suggested that *Rust* involved "the government's right . . . to use its own funds to advance a particular message."[27]

Merely because government speech is not subject to First Amendment restrictions,[28]other than those provided by the Establishment Clause,[29] does not mean that citizens disagreeing with the government's message are without recourse. "When the government speaks . . . to promote its own

19. *See* Joel Gora, *The Calm After the Storm: First Amendment Cases in the Supreme Court's 2000-2001 Term*, 18 TOURO L. REV. 29, 45 (2001) ("The Supreme Court upheld the restriction in *Rust* in a five-to-four decision on the theory that 'he who pays the piper calls the tune.'").

20. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (striking down limitations on the arguments that Legal Services Corporation attorneys could make on behalf of their clients).

21. *Cf.* Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 231 (2013) ("[I]n *Rust v. Sullivan*, which is commonly described as the first major government speech case, the government regulated what doctors could say to patients in family planning programs via a Spending Clause restriction.").

22. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

23. *Id.* at 833.

24. *Id.*

25. *Id.*

26. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

27. *Id.* at 229.

28. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

29. Pleasant Grove City v. Summum, 555 U.S. 460, 460–61 (2009) ("[G]overnment speech must comport with the Establishment Clause.").

policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."[30] Thus, the electorate can articulate its favored position by electing individuals whose views are closer to its own, assuming that the electorate believes the point of disagreement is sufficiently important.[31] "If the citizenry objects, newly elected officials later could espouse some different or contrary position."[32]

Yet, the citizenry will not even know to object if it does not realize that the government is speaking. Consider the doctors who were working at the clinics receiving the Title X funds at issue in *Rust*.[33] While the Court treated the doctors as if they had been hired to deliver the government's approved message,[34] it is not at all clear that the doctors could reasonably be characterized as speaking for the government. The doctors had a professional obligation to serve their patients' interests,[35] and it would not be difficult to imagine cases in which abortion was medically indicated.[36] But the physicians might then be in the position of offering medical advice that was contra-indicated.[37] Further, the patients would not have understood that the doctors were offering the government's position.[38]

30. *Southworth*, 529 U.S. at 235.

31. *Cf.* Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 LOY. L.A. L. REV. 1089, 1108 (2001) (discussing the "disproportionate influence for single-issue voters who care about that issue").

32. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

33. Rust v. Sullivan, 500 U.S. 173, 177–78 (1991). ("These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities.").

34. Hake, *supra* note 8, at 423 ("[T]he Court treated the doctors as agents of the federal government, private speakers conveying a governmental message.").

35. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 554 (2001) ("[T]he doctors in *Rust* had a professional obligation to serve the interests of their patients.").

36. Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View from Without and Within*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 529, 536 (1998) (discussing "some circumstances where an abortion was 'medically indicated,' such as where it was necessary to protect the pregnant woman's health").

37. That said, it is not as if the physicians continuing to work in the clinics would have been unaware of this potential dilemma. *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1392 (2001) ("[T]he doctors in the Title X clinics were hired agents of the federal government, knew what they were hired to do, and knew that the job required speaking the prescribed message which implemented the government's Title X policy.").

38. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1050 (2005) ("[A] fundamental problem with the *Rust* decision is that the patients themselves did not necessarily understand the doctors or other family planning counselors to be delivering a governmental message."); Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1166 (1999) ("[C]ounseling and referral are both offered and understood as services for the benefit of the client, rather than as mere opportunities for the government or the clinic to present their views.").

Instead, the patients would likely believe that the doctors were offering advice that was consistent with the doctors' professional obligation to promote patient welfare.[39]

The Court's finding that the doctors were speaking for the government might have important implications for other kinds of cases. Justice Scalia noted, "If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech."[40] Indeed, unpaid volunteers might speak for an organization,[41] so it is not even clear that payment would be required for an individual to be viewed as speaking for the government.[42]

The Court not only failed to specify criteria that would limit the times when the government might claim certain speech as its own,[43] but the very way that *Rust* came to be seen as a government speech case underscores that doctrine's indeterminacy. When *Rust* was issued, commentators tended to view it as a government funding case,[44] (i.e., a case specifying the

39. Lee, *supra* note 38, at 1050 ("[I]t was highly likely that the patients understood the doctors and counselors to be speaking independently, in accord with their professional training and expertise.").

40. Legal Servs. Corp. v. Velazquez, 531 U.S. 553, 554 (2001) (Scalia, J., dissenting).

41. *Cf.* Mark E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOC. 289, 331 (1993) ("If the minister, employee, or volunteer is acting in the name of the religious community and is addressing matters on which that person is expected to speak, liability often 'ascends' against the organization.").

42. *Cf.* Kyle Langvardt, *The Doctrinal Toll of "Information as Speech"*, 47 LOY. U. CHI. L.J. 761, 789–90 (2016) ("At worst, the government could adopt essentially any private message spoken in a public forum as its own 'government speech,' and thereby acquire the right to suppress the private expression of any conflicting viewpoint in the same space.").

43. Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 95 (2011) ("[T]he *Rust-Velazquez* line of cases provides no clear criteria to determine when the First Amendment immunization of government speech has been triggered.").

44. *See* Lackland H. Bloom, Jr., NEA v. Finley*: A Decision in Search of a Rationale,* 77 WASH. U. L.Q. 1, 15 (1999) ("Citing *Regan v. Taxation with Representation of Washington*, *Rust v. Sullivan*, and *Maher v. Roe*, the majority explained that the Government has wide discretion to choose spending priorities or to engage in selective funding without discriminating on the basis of viewpoint."); *see also* Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1580 n.349 (1994) ("*Rust* speaks generally to the lack of constitutional restraints on the government's selective use of its spending power."); Byron V. Olsen, Rust *in the Laboratory: When Science Is Censored*, 58 ALB. L. REV. 299, 339 (1994) ("Courts must choose between making free speech interests the hostage of federal conditional spending power, as brought forward with *Rust* and its predecessors, or protecting speech from Congressional power, with the politically untenable necessity of invalidating government sponsored attempts to control content through the public treasury."); Lisa J. Allegrucci & Paul E. Kunz, *The Future of* Roe v. Wade *in the Supreme Court: Devolution of the Right of Abortion and Resurgence of State Control*, 7 ST. JOHN'S J. LEGAL COMMENT. 295,

conditions the government was permitted to impose if paying a program's bills). After *Rosenberger*, *Rust* was understood differently[45]—it was retroactively changed into a government speech case[46] (i.e., a case about the constitutional limitations imposed on the Government when speaking).

This retroactive recharacterization is problematic in that it emphasizes how easily particular communications can be characterized or, perhaps, transformed into government speech. The ease with which this might occur is underscored by the facts of *Rust*. The clinics were private.[47] There were no signs indicating that the medical advice given in the clinic was government speech,[48] which meant that individuals receiving the medical advice were not even on notice that the government was speaking.[49]

Rust illustrates some of the dangers associated with government speech doctrine. It is difficult to cabin what counts as government speech

303 (1991) ("[I]n *Rust v. Sullivan*, the Supreme Court allowed the federal government to further restrict a woman's right of abortion through its formidable spending power.").

45. Arthur N. Eisenberg, *The Brooklyn Museum Controversy and the Issue of Government-Funded Expression*, 66 BROOK. L. REV. 275, 291 (2000) ("[T]he Court re-characterized the *Rust* decision."); *Cf.* Bowman, *supra* note 21, at 263 (discussing "the seminal government speech case *Rust v. Sullivan*").

46. *See* David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 589 (2002) ("The *Rosenberger* Court explained that the leeway accorded the government in *Rust* does not apply to all government funding of speech, but only to 'government speech,' that is, only where the government is hiring others to express an official message."); *see also* David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895, 912 (1998) ("[T]he *Rosenberger* Court made clear that, in *Rust*, the conditions on speech were permissible only because the government was the 'speaker,' and the role of the clinic physicians was merely to transmit the government's message."); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 137 (1996) ("The Supreme Court in *Rosenberger* . . . distinguished *Rust v. Sullivan* . . . as a case concerned only with the government's speech."); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 257 n.68 (1996) ("Justice Kennedy in *Rosenberger* interprets *Rust* to have permitted even viewpoint discrimination so long as it takes place in the context of government speech—either directly or through a private agent."); Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 L. & INEQ. 1, 25 n.89 (1995) ("The Court in *Rosenberger* attempted to distinguish *Rust* on the ground that in *Rust* the government was subsidizing speech to promote its own point of view and therefore could make content based restrictions.").

47. Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 125 (2010) ("What made *Rust* significant was that the agents were not government employees but private clinics that merely received money from the government.").

48. *Cf.* Lee, *supra* note 38, at 1050 ("[N]othing in the regulations required the doctors to disclose the government's role in restricting the scope of their counseling.").

49. *Cf.* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 709 (2011) ("So long as government's use of these mechanisms is transparent, any harm to the market may be minimized—people can identify the government's voice and, if they disagree with its message, vote out the governmental actors responsible.").

without articulated criteria,[50] and the remedy the electorate possesses—voting in a new government[51]—cannot be effective when the electorate does not even know that the disapproved speech comes from the government rather than a private party.

B. Government as Stealth Speaker

The possibility that the government would speak without identifying itself as the speaker was again illustrated in *Johanns v. Livestock Marketing Association*.[52] In that case, the constitutionality of a requirement that certain meat producers contribute monies to a beef promotion campaign was at issue. The challengers did not want to support the generic campaign promoting beef consumption because they believed such a program undermined their attempts to establish the superiority of their beef products in particular.[53]

The Court explained that it had "sustained First Amendment challenges to allegedly compelled expression . . . [where] an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity," although the Court had "not . . . considered the First Amendment consequences of government-compelled subsidy of the government's own speech." But to frame the issue this way was to resolve it. "'Compelled support of government'—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position."[54]

The Beef Promotion and Research Act of 1985 required the Secretary of Agriculture "to appoint a Cattlemen's Beef Promotion and Research Board."[55] Monies would be raised "to fund beef-related projects, including promotional campaigns"[56] by "impos[ing] a $1–per–head assessment (or

50. Bezanson & Buss, *supra* note 37, at 1442 ("If government may be treated as a First Amendment speaker, virtually every regulatory act of government could be transformed into an act of government expression, and then sheltered from attack under the shield of the First Amendment.").

51. *See supra* notes 26–27 and accompanying text.

52. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

53. *Id.* at 556 ("Respondents noted that the advertising promotes beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef.").

54. *Id.* at 559.

55. *Id.* at 553.

56. *Id.* at 554.

'checkoff') on all sales or importation of cattle and a comparable assessment on imported beef products."[57]

Most, but not all, of the promotional messages would "bear the attribution 'Funded by America's Beef Producers,'"[58] which might lead consumers to believe that a private group, rather than the government, was behind the advertising.[59] While it is true that consumers willing to do some research might have been able to learn who was behind the advertising,[60] there would have been nothing to alert anyone that such research was necessary.[61]

The *Johanns* Court made clear that the government's control over the message was dispositive. "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."[62] But if the fact of control is a sufficient condition and there is no additional requirement that non-insiders know that the speech is the government's, then the check on government speech that is provided by potential electoral backlash is, at the very least, weakened.[63]

In his dissent, Justice Souter suggested that "a compelled subsidy should not be justifiable by [claiming that the support is for government] speech unless the government . . . put[s] that speech forward as its own."[64]

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57. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 554 (2005) (citing 7 U.S.C. § 2904(8)).

58. *Id.* at 555.

59. Rita Cain, *Uncle Sam Wants You - To Eat Beef?*, 11 DRAKE J. AGRIC. L. 165, 165 (2006) ("Consumers might be surprised to discover that ads touting 'Beef, it's what's for dinner' actually are messages from the federal government, rather than the beef industry."). *But see* Edward L. Carter et al., *"Executing the Powers with Which It Is Intrusted": Justifications, Definitions and Limitations of Government Speech*, 14 COMM. L. & POL'Y 453, 470 (2009) ("[T]he Supreme Court noted that the factual question of whether consumers would attribute the advertisements to private beef producers or the government could not be considered in the facial challenge and would instead have to be brought in an as-applied challenge."). *See also Johanns*, 544 U.S. at 565 ("On some set of facts, this second theory might (again, we express no view on the point) form the basis for an as-applied challenge—if it were established, that is, that individual beef advertisements were attributed to respondents.").

60. *See Johanns*, 544 U.S. at 579 (Souter, J., dissenting) ("[A] taxpayer could discover the facts by looking hard enough . . . .").

61. *Id.* (Souter, J., dissenting) ("[B]ut what would tip off the taxpayer to look?").

62. *Id.* at 562.

63. *See* Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61 (2015) ("[T]he public can only hold government accountable for its expressive choices when the public can attribute contested speech *to* the government.").

64. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 571 (2005) (Souter, J., dissenting).

He feared that, "[o]therwise[,] there is no check whatever [sic] on government's power to compel special speech subsidies"[65] and noted that "the ads [were] not required to show any sign of being speech by the Government, and experience under the Act demonstrate[d] how effectively the Government ha[d] masked its role in producing the ads."[66] Justice Souter observed that those seeing the ads "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."[67]

While Justice Souter's focus was on whether those objecting to the speech should be forced to subsidize it, Justice Ginsburg took a differing approach when rejecting that "the familiar trademarked slogan 'Beef. It's What's for Dinner[]'"[68] was appropriately characterized as government speech. She noted that a government agency had publicly recommended reducing beef intake,[69] so imputing the pro-beef message to the government would have undermined one of the government's own positions.

Commentators can debate whether forcing the government to publicly identify its own speech would be good as a matter of public policy.[70] Such a requirement might undermine the efficacy of the government's message, e.g., in situations or among groups where the government is not viewed as particularly credible or trustworthy.[71] In any event, the Court has consistently refused to hold that the government speech doctrine is only triggered when the government takes ownership of its speech.[72]

The Court has had opportunities to clarify the government speech doctrine and instead has only made it more opaque. Consider the *Pleasant Grove City, Utah v. Summum*[73] resolution that further complicated the doctrine. At issue was the refusal of Pleasant Grove City to accept a

65. *Id.* (Souter, J., dissenting).

66. *Id.* at 577 (Souter, J., dissenting).

67. *Id.* (Souter, J., dissenting).

68. *Id.* at 554.

69. *Id.* at 569–70 (Ginsburg concurring in the judgment).

70. *See* Norton, *supra* note 63, at 62 ("[T]the Court should instead require a government entity that asserts the government speech defense to establish that it expressly claimed the speech as its own when it initially authorized the communication.").

71. *Cf.* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 592–93 (2008) ("Because speakers perceived as unpopular and/or unreliable will have more difficulty persuading listeners, they may be wise to seek the imprimatur of more trustworthy sources, which may include the government.").

72. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 901–02 (2010) ("In none of these decisions has the Court required government to identify itself publicly as the source of a contested message to satisfy the government speech defense to a First Amendment claim.").

73. Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

donation of a stone monument containing the Seven Aphorisms of Summum for installation in Pioneer Park.[74] The park already contained several other monuments,[75] including one of the Ten Commandments.[76] Summum, a religious organization,[77] wanted to donate a monument spelling out its basic beliefs, which would "be similar in size and nature to the Ten Commandments monument."[78] On three separate occasions, the president of Summum wrote a letter to the town council expressing the organization's desire to donate the monument, but the offer was rejected each time.[79]

There was some difficulty in figuring out the best legal approach to the issue presented in *Summum*. Parks are traditional public fora,[80] so it might seem that the city's willingness to open up the park to certain kinds of expression—as manifested through accepted donations—would obligate the city to accept other donations representing differing points of view.[81] But prohibiting a city from refusing donations representing differing viewpoints would prove unworkable, because "public parks can accommodate only a limited number of permanent monuments."[82] As the *Summum* Court noted, "The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations."[83]

The Court began its analysis by pointing out that the "Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[84] The Court explained that "monuments that are accepted . . . are meant to convey and have the effect of conveying a

74. *Id.* at 464–65.

75. *Id.* at 465 ("These include an historic granary, a wishing well, the City's first fire station, a September 11 monument . . . .").

76. *Id.* ("Th[is] include[s] . . . a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.").

77. *Id.*

78. *Id.*

79. Pleasant Grove City v. Summum, 555 U.S. 460, 465–66 (2009).

80. *Id.* at 464 ("[A] park is a traditional public forum.").

81. *See id.* at 469 ("[G]overnment entities are strictly limited in their ability to regulate private speech in such 'traditional public fora.'") (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985)); *see also id.* ("[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.") (citing *Cornelius,* 473 U.S. at 800); *id.* ("[R]estrictions based on viewpoint are prohibited.") (citing Carey v. Brown, 447 U.S. 455, 463 (1980)).

82. *Id.* at 478.

83. *Id.* at 480.

84. *Id.* at 467 (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)).

government message, and they thus constitute government speech."[85] Because the monument was government speech, the government was not required to adopt a position of neutrality with respect to the message conveyed; instead, the only restriction on the government was that it could not violate Establishment Clause guarantees.[86]

What was the message at issue? The *Summum* Court spent much time discussing the content of the messages conveyed by monuments, rejecting both that "a monument can convey only one 'message'—which is, presumably, the message intended by the donor"[87] and that "if a government entity that accepts a monument for placement on its property does not formally embrace *that* message [i.e., the donor's message], then the government has not engaged in expressive conduct."[88] For example, even if a donation of a Ten Commandments monument was intended by the donor to communicate a religious message, such a monument in a park need not communicate that same message.

After noting that the message a government wishes to convey need not coincide with the message the donor wishes to convey, the Court then explained that determining a monument's message may be no easy task. "The meaning conveyed by a monument is generally not a simple one like 'Beef. It's What's for Dinner.'"[89] Not only might the message not be a simple one, but there might be no single (simple or complex) message conveyed by the monument. For example, what "is 'the message' of the Greco–Roman mosaic of the word 'Imagine' that was donated to New York City's Central Park in memory of John Lennon?"[90] By the same token, one might ask, "what is 'the message' of the 'large bronze statue displaying the word "peace" in many world languages' that is displayed in Fayetteville, Arkansas?"[91]

In addition to the difficulties associated with discerning the message of a monument at the time of its installation, further difficulties are posed because the "message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity."[92] The Court's point is well-taken that subsequent actions might affect or alter a message.

85. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009).

86. *Id.* at 460–61 ("[G]overnment speech must comport with the Establishment Clause.").

87. *Id.* at 474.

88. *Id.*

89. *Id.* (citing *Johanns*, 544 U.S. at 554).

90. *Id.* at 474.

91. Pleasant Grove City v. Summum, 555 U.S. 460, 475 (2009).

92. *Id.* at 477.

However, the Court might also have considered whether the refusal to accept an additional religious monument might itself alter a previous message of non-endorsement of religion to one of endorsement.[93]

The focus here is not on whether Establishment Clause guarantees were violated by refusing the Summum monument,[94] but simply on the criteria used by the Court to determine that the government speech doctrine was triggered. The *Summum* Court implied that it was often difficult to determine the content of the government's message when monuments installed in public parks were at issue, so it seems hard to imagine that the government exercised control of the message itself.

In *Summum*, the governmental control was over which monuments were installed[95] in a park owned and managed by the City.[96] But the Court itself illustrated why ownership and maintenance of a monument should not be conflated with controlling the monument's message.[97] Indeed, the respondent had complained that the City had not adequately controlled the message conveyed by the Ten Commandments.[98] Instead, in *Summum*, "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection."[99] But the final approval did not go into deciding what the content would be; instead, the approval was simply about which monuments were selected for installation.

Consider how this criterion might be used in other context in which the state must decide between competing entries. In *National Endowment for the Arts v. Finley*, the Court addressed the constitutionality of a requirement that the "Chairperson of the National Endowment for the Arts

93. Patrick M. Garry, Pleasant Grove City v. Summum*: The Supreme Court Finds a Public Display of the Ten Commandments to Be Permissible Government Speech*, 2009 CATO SUP. CT. REV. 271, 285 (2008-2009) ("Such a refusal might be judged under the endorsement test to convey to the reasonable observer a message of establishment of the religion (or religions) associated with the Ten Commandments.").

94. Mary Jean Dolan, *Why Monuments Are Government Speech: The Hard Case of* Pleasant Grove City v. Summum, 58 CATH. U. L. REV. 7, 49 (2008) ("Pleasant Grove's continued display of the Ten Commandments—in juxtaposition with its refusal to display the monument offered by a small religion—arguably sends a message of exclusion.").

95. *See Summum*, 555 U.S. at 472 ("[T]he City decided to accept those donations and to display them in the Park.").

96. Pleasant Grove City v. Summum, 555 U.S. 460, 473–74 (2009) ("[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.").

97. *Id.* at 474–75.

98. *Id.* at 473 ("[R]espondent argues that Pleasant Grove City has not adequately 'controll[ed] the message' of the Ten Commandments monument.") (citing Brief for Respondent at 31).

99. *Id.* (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005)).

(NEA) . . . ensure that 'artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.'"[100] The respondents claimed that the decency and respect requirement was "impermissibly viewpoint based,"[101] because that requirement had been adopted to decrease the likelihood that artwork with certain kinds of contents would receive government funding.[102]

The Court upheld the restriction because it did not perceive a "realistic danger that [Section] 954(d)(1) will compromise First Amendment values."[103] In contrast, Justice Scalia argued that the requirement "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated,"[104] although he believed the restriction was constitutional.[105] In his view, the government had absolute discretion with respect to what it chose to fund.[106]

Summum suggests how *Finley* could have been decided using a different approach. Because the NEA would have "'effectively controlled' the messages [over the competing entries] . . . by exercising 'final approval authority' over their selection,"[107] the chosen entries might have been viewed as government speech. The claim here is not that the *Finley* Court adopted the final approval authority approach—on the contrary, the *Finley* Court rejected that the government regulation would "give rise to the suppression of protected expression,"[108] and instead argued that "[a]ny content-based considerations that may be taken into account in the grant-

100. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (citing 20 U.S.C. § 954(d)(1) (2014)).

101. *Id.* at 578.

102. *Cf. id.* at 594 (Scalia, J., concurring in the judgment). ("It is evident in the legislative history that § 954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as Serrano's 'Piss Christ,' the portrayal of a crucifix immersed in urine, and Mapplethorpe's show of lurid homoerotic photographs.")

103. *Id.* at 583.

104. *Id.* at 590 (Scalia, J., concurring in the judgment).

105. *Id.* (Scalia, J., concurring in the judgment) ("[T]hat is perfectly constitutional.").

106. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 599 (1998) (Scalia, J., concurring in the judgment) ("The Government, *I* think, may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned."); *see* Mark P. McKenna, *Intellectual Property, Privatization and Democracy: A Response to Professor Rose*, 50 ST. LOUIS U. L.J. 829, 837 (2006) ("As Justice Scalia noted in a recent speech about government funding of the arts, it has long been the case that 'he who pays the piper calls the tune.'").

107. Pleasant Grove City v. Summum, 555 U.S. 460, 473 (2009) (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005)).

108. *Finley*, 524 U.S. at 585.

making process are a consequence of the nature of arts funding."[109] By analyzing why the regulation did not offend First Amendment guarantees rather than whether First Amendment guarantees had been triggered, the Court was eschewing a government speech approach. Nonetheless, one might wonder whether the Court will someday retroactively declare *Finley* a government speech case just as the *Rosenberger* Court retroactively declared *Rust* a government speech case.[110]

Johanns suggests that government control of the message suffices to make expression government speech,[111] and *Summum* suggests that expression might constitute government speech, if government ultimately decides which expression will be represented.[112] These are two very different approaches to deciding when expression should be characterized as government speech, and the most recent government speech case did little to clarify the underlying jurisprudence.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court examined a refusal by the Texas Department of Voter Vehicles Board to authorize a license plate design proposed by the Sons of Confederate Veterans ("SCV").[113] Texas makes a variety of kinds of license plates available. For example, there are "the State's general-issue license plates,"[114] which contain "the word 'Texas,' a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan 'The Lone Star State.'"[115] Or, a driver might create a specialty plate, which "contains the word 'Texas,' a license plate number, and one of a selection of designs prepared by the State."[116] Included among the specialty plate options was a process whereby a nonprofit organization would submit "a draft design of the specialty license plate,"[117] which the Board could reject "for a number of reasons, for example 'if the design might be offensive to any member of the public . . . or for any other reason established by rule.'"[118]

109. *Id.*

110. *See supra* notes 44-46 and accompanying text.

111. *See Johanns*, 544 U.S. at 562.

112. *See Summum*, 555 U.S. at 473.

113. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243–44 (2015) ("[T]he Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal.").

114. *Id.* at 2244.

115. *Id.*

116. *Id.*

117. *Id.* (citing 43 TEX. ADMIN. CODE § 217.45(i)(2)(C)).

118. *Id.* at 2245 (citing TEX. TRANSP. CODE ANN. § 504.801(c)).

The Board rejected the proposed design of the SCV, which would have included the Confederate flag on the plate.[119] SCV sued, claiming a violation of First Amendment guarantees.[120]

The *Walker* Court held that "specialty license plates issued pursuant to Texas's statutory scheme convey government speech,"[121] offering "reasoning rest[ing] primarily on . . . [the] analysis in *Summum*."[122] The Court discussed three factors mentioned in *Summum*: (1) a history of using the contested object as a means of communicating with the public;[123] (2) a common understanding that messages conveyed by objects on property can be associated with the owners of that property;[124] and (3) the fact that governmental unit had control over which objects were selected for inclusion.[125] The Court did not discuss whether the presence of any of these factors was necessary for a finding that particular expression was government speech, although the Court implied that satisfying all of those factors would suffice to establish a claim of government speech.

The *Walker* Court then applied these criteria to license plates, noting: (1) "the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States;"[126] (2) Texas license plate designs "are often closely identified in the public mind with the

119. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) At the bottom of the proposed plate were the words "SONS OF CONFEDERATE VETERANS." At the side was the organization's logo, a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette.

120. *Id.* ("In 2012, [Sons of Confederate Veterans] and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). SCV argued that the Board's decision violated the Free Speech Clause of the First Amendment.").

121. *Id.* at 2246.

122. *Id.*

123. *Id.* at 2247 ("[H]istory shows that '[g]overnments have long used monuments to speak to the public.'") (citing Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).

124. *Id.* ("[I]t '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.' As a result, 'persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf.'") (citing *Summum*, 555 U.S. at 471).

125. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2247 (2015) ("[W]e found relevant the fact that the city maintained control over the selection of monuments . . . . And we observed that the city government in *Summum* 'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection.") (citing *Summum*, 555 U.S. at 473).

126. *Id.* at 2248.

[State];"[127] and (3) "Texas maintains direct control over the messages conveyed on its specialty plates."[128] Indeed, the Court hypothesized that everyone understood that the license plate suggested state involvement. "[A] person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message."[129] Otherwise, "the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate."[130] Further, Texas had "direct control over the messages conveyed on its specialty plates,"[131] if only because the "Board must approve every specialty plate design proposal before the design can appear on a Texas plate."[132]

Justice Alito suggested in his dissent that an individual who saw license plates supporting football rivals of the University of Texas would be unlikely to believe that "the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents."[133] He thus cast doubt on whether it was reasonable to believe that the state endorsed the license plate messages, which undercut that the second factor had been met.

While Justice Alito is correct that individual onlookers would likely attribute a message supporting the University of Southern California to a private party rather than the state, that point is not dispositive. *Johanns* suggests that the viewers' beliefs about who is sponsoring a message need not undermine that particular expression is government speech. Indeed, the government can identify particular expressions as its own even if those expressions communicate contradictory messages, e.g., people should both increase and decrease their beef consumption. The government can send a multitude of messages as its own.[134] While the Court in both *Walker* and *Summum* argued that the three factors supported the conclusion that the expression at issue was government speech, the Court never suggested that the previous government speech cases (where all three factors were not met) were wrongly decided. But that means that those wishing to understand and formulate the government speech jurisprudence cannot simply look at *Summum* and *Walker*. They must also look at *Rust* and

127. *Id.* (citing *Summum*, 555 U.S. at 472).

128. *Id.* at 2249.

129. *Id.*

130. *Id.*

131. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015).

132. *Id.* (citing 43 TEX. ADMIN. CODE §§ 217.45(i)(7)–(8), 217.52(b) (2016)).

133. *Id.* at 2255 (Alito, J., dissenting).

134. *See* Wright, *supra* note 14, at 353–54 ("That the state wishes to convey many, perhaps hundreds, of governmental messages through its specialty license plate program also does not establish that the various messages are not government speech.").

Johanns, when discussing the criteria that must be met before particular expression can be classified as government speech.

II. Government Speech in the Circuits

The Court's refusal to offer clear criteria by which to determine whether the government is acting as speaker, rather than regulator, has put the circuit courts in a difficult position. Some apply the *Summum* factors, even though the Court has found government speech in cases where those factors have not been met. Others have followed the Court's lead, thereby making clearer some of the undesirable implications of the Court's current jurisprudence.

A. *Tam*

In *In re Tam*, the Federal Circuit examined a challenge to a refusal by the Patent and Trademark Office ("PTO") to register the name "The Slants."[135] The Lanham Act prohibits the PTO from "registering scandalous, immoral, or disparaging marks."[136] Mr. Tam had chosen that name for the band not because he wished to disparage but because he wanted to affirm his pride in being Asian.[137] Nonetheless, the Board had found that "the mark is disparaging to a substantial composite of people of Asian descent."[138]

Much of the *Tam* opinion discussed why the "disparagement provision"[139] involved viewpoint discrimination and did not pass muster under strict scrutiny.[140] Yet, a more basic question was whether First Amendment speech protections were even triggered, to which the government had argued that "trademark registration is government speech, and as such outside the coverage of the First Amendment."[141] The court then set out to show why "there [was] no government speech at issue in the

135. *In re* Tam, 808 F.3d 1321, 1331-32 (Fed. Cir. 2015) ("The Board affirmed the examiner's refusal to register the mark."), *cert. granted*, Lee v. Tam, 2016 WL 1587871 (U.S. Sept. 29, 2016) (No. 15-1293).

136. *Id.* at 1327 (citing 15 U.S.C. § 1052(a) (2006)).

137. *Id.* at 1332 (noting that the band's Wikipedia entry quoted Tam as saying: "We want to take on these stereotypes that people have about us, like the slanted eyes, and own them. We're very proud of being Asian—we're not going to hide that fact. The reaction from the Asian community has been positive.")

138. *Id.*

139. *Id.* at 1336.

140. *See Tam*, 808 F.3d at 1334.

141. *In re* Tam, 808 F.3d 1321, 1345 (Fed. Cir. 2015).

rejection of disparaging trademark registrations that would insulate [Section] 2(a) from First Amendment review."[142]

The Federal Circuit made a number of points, for example, that there "is simply no meaningful basis for finding that consumers associate registered private trademarks with the government,"[143] and that "the PTO routinely registers marks that no one can say the government endorses."[144] Those points are well-taken, although Justice Alito had basically suggested in his *Walker* dissent that no one would associate with the state of Texas various messages contained on the license plates.[145] However, Justice Alito's argument did not win the day in *Walker*, and there was no suggestion that the *Walker* majority believed that "the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents."[146] Further, those seeing the advertisement "Beef. It's What's for Dinner[]" would likely have associated that message with private beef producers rather than the government,[147] but that did not preclude the advertisement from being government speech.

The *Tam* court suggested that "the PTO's processing of trademark registrations no more transforms private speech into government speech than when the government issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses."[148] Yet, the PTO does not merely process trademark applications; it also makes a judgment about which marks are scandalous and which are not,[149] which means that the registering of the trademark might be taken to imply tacit endorsement.[150] In addition, the PTO makes a

142. *Id.*

143. *Id.* at 1346.

144. *Id.*

145. *See supra* note 133 and accompanying text.

146. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2255 (2015) (Alito, J., dissenting).

147. *See supra* note 63 and accompanying text.

148. *In re* Tam, 808 F.3d 1321, 1348 (Fed. Cir. 2015).

149. M. Christopher Bolen, et al., *When Scandal Becomes Vogue: The Registrability of Sexual References in Trademarks and Protection of Trademarks from Tarnishment in Sexual Contexts*, 39 IDEA 435, 436 (1999) (Section 2(a) of the Lanham Trademark Act permits the United States Patent and Trademark Office ("PTO") to refuse registration of any mark that 'consists of or comprises immoral, deceptive, or scandalous matter.'").

150. Todd Anten, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 397 (2006) ("[F]ederal registration may also provide intangible psychological benefits to a trademark holder through the government's implicit approval of the mark."); Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476, 1484 (2011) (discussing the view that permitting registration of a trademark suggests that the government is giving its stamp of approval); Stephen R. Baird, *Moral*

decision about whether a mark is sufficiently distinctive.[151] In any event, the PTO controls who receives trademark protection and who does not, and the *Summum* Court suggested that the government's control over who is selected was itself an important if not dispositive element in establishing government speech.[152]

There is something appealing in the *Tam* court's assertion that expression is not transformed into government speech merely because the government issues a permit, but part of that appeal may be based on the assumption that issuing the permit is merely ministerial[153] and does not involve the government's making judgments about the worthiness of the expression. It is fair to suggest that the government's issuing a permit should not be thought equivalent to embracing the content of a message, but *Summum* makes clear that the government may be speaking even when the content of its speech does not match the content of a private speaker's expression.[154]

The *Tam* court worried that its agreeing with the government that permitting registration of a trademark amounted to government speech had the potential to "transform every act of government registration into one of government speech and thus allow rampant viewpoint discrimination."[155] That would depend upon whether other types of registration might also be thought to carry some sort of government imprimatur. For example, where permits to engage in expressive activities are handed out on a first-come,

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Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks, 83 TRADEMARK REP. 661, 663 n.6 (1993) (discussing "the Board's previously stated contention in McGinley that a federal trademark registration suggests the government's implied approval of the owner's use of the mark"). *See also* Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U. L. REV. 573, 577 (2006) ("[T]he signal from a patent is necessarily intermingled with expressions of the government's approval.").

151. Terry Ann Smith, *Telephone Numbers That Spell Generic Terms: A Protectable Trademark or an Invitation to Monopolize A Market?*, 28 U.S.F. L. Rev. 1079, 1087 (1994) ("Once the [Patent and Trademark Office] or a court determines that a mark is distinctive enough to be capable of protection, the Lanham Act dictates that likelihood of consumer confusion, due to the similarity of the marks, shall then be the main focus when evaluating whether the mark should be granted trademark protection.").

152. *See supra* note 99 and accompanying text.

153. Statter v. United States, 66 F.2d 819, 821 (9th Cir. 1933) ("According to the weight of authority, the legal definition of a ministerial act is an act that is mandatory upon an officer under given circumstances, and calls for the exercise of no judgment or discretion on the part of such officer.").

154. *See supra* notes 87–92 and accompanying text.

155. *In re* Tam, 808 F.3d 1321, 1348 (Fed. Cir. 2015).

first-served basis,[156] there will be no presumed endorsement of the message.

The *Tam* court considered the three factors discussed in *Walker*: (1) license plates have historically been viewed as communicating a government message;[157] (2) license plates are closely identified in the public mind with the government;[158] and (3) the state exercised control over the plates,[159] thus concluding that *Walker* had no application to the case before the court.[160] Yet, permitting a trademark to be registered communicates, at the very least, that the government does not believe that the trademark falls into a prohibited category. Further, the public might well associate trademark registration and enforcement with the government,[161] and the government decides (controls) whether the trademark can be registered.[162]

Suppose, however, that all three factors are not met. The Court has never indicated that the failure to meet one of the factors would prevent expression from being treated as government speech. Nor could the Court hold such a position unless it were willing to overrule some of the previous government speech cases. Medical advice given at private clinics would hardly be associated with the government; nor would commercials extolling the benefits of having beef for dinner.

The *Tam* court quite sensibly worried that were it to accept the government's claim that trademark registration amounted to government speech, then there would be no apparent stopping point at which the government could be barred from making such a claim. Yet, the criteria for determining whether expression is government speech implicitly or

156. *See* Jews for Jesus, Inc. v. Port of Portland, 172 F. App'x 760, 764 (9th Cir. 2006) ("Permits will be assigned on a first-come, first-served basis, and the permitting official is not given any discretion in the decision.").

157. *Tam*, 808 F.3d at 1346 (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015)).

158. *Id.* (citing *Walker*, 135 S. Ct. at 2248).

159. *Id.* (citing *Walker*, 135 S. Ct. at 2249).

160. *Id.* ("The government's argument in this case that trademark registration amounts to government speech is at odds with the Supreme Court's analysis in *Walker* and unmoored from the very concept of government speech.").

161. *See* Gwendolyn Gill, *Through the Back Door: Attempts to Use Trade Dress to Protect Expired Patents*, 67 U. CIN. L. REV. 1269 (1999) ("In providing trademark protection, the federal government grants an essentially indefinite monopoly to a person or business for the use of a trademark—a word, phrase, design, or symbol—that identifies the origin of the product with which the trademark is associated.").

162. *Cf.* Daniel Lifschitz, *The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew*, 34 LOY. L.A. INT'L & COMP. L. REV. 197, 216 (2011) (discussing "what motivates the government to grant exclusive controls over them [patents, copyrights and trademarks]").

explicitly endorsed by the *Tam* court do not account for those cases in which government speech has been recognized, making the requirement that these criteria be met seem ad hoc.

B. Tennyson

Does the government speech jurisprudence open the door to viewpoint discrimination? Consider *American Civil Liberties Union of North Carolina v. Tennyson.*[163] North Carolina permits drivers to choose a pro-life license plate but does not permit them to choose a pro-choice license plate.[164] The Fourth Circuit had previously held that such a policy violates First Amendment guarantees.[165] However, that decision had been vacated and remanded by the United States Supreme Court for consideration in light of *Walker.*[166] Unsurprisingly, upon reconsideration, the Fourth Circuit concluded that "specialty license plates issued under North Carolina's program amount to government speech and that North Carolina is therefore free to reject license plate designs that convey messages with which it disagrees.[167]

There may be a whole host of issues about which the government will want to take sides, which will mean that license plates may become the forum in which government will permit certain, but not other, messages to be articulated. To make matters even more complicated, license plates proclaiming the "correct" message under one administration may be deemed to be proclaiming a disfavored message if a different party gains control of the government. It remains to be seen whether, for example, individuals will be required to get new plates if a previously approved message should become disfavored.

Government speech is by no means limited to license plates or monuments in parks, and contentious issues include, but are not limited to, discussions of abortion or matters involving race or the Civil War. As *Tennyson* illustrates, the government speech doctrine may well be invoked

163. ACLU of N.C. v. Tennyson, 815 F.3d 183 (4th Cir. 2016).

164. *Id.* at 184 ("North Carolina operates a specialty license plate program that offers . . . a 'Choose Life' plate, but the State has repeatedly rejected efforts to include a pro-choice license plate.").

165. *Id.* ("In our previous opinion in this case, we affirmed the decision of the district court and held that North Carolina's specialty license plate program violated the First Amendment.") (citing ACLU v. Tata, 742 F.3d 563 (4th Cir. 2014)).

166. *Id.* ("The State sought review by the Supreme Court, which vacated our decision and remanded the case to us for reconsideration in light of the Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*").

167. *Id.* at 185 (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015)).

to justify the government's offering a favored position (or, perhaps, precluding the expression of a disfavored position) on a variety of topics in a variety of settings. Thus far, the Court has not offered helpful constraints on when the government can claim speech as its own, so it remains to be seen how the doctrine will be cabined.

Conclusion

Tam and *Tennyson* illustrate the positions the circuit courts will likely take when confronted with government speech claims. Some of the circuits will accept the claims, if only because the Court has not imposed meaningful restrictions on when the government can claim expression as its own, while other courts will attempt to impose meaningful restrictions on when the government can avoid First Amendment speech restrictions by claiming expression as its own. Precisely because the circuits will be adopting different approaches to claims that certain expression constitutes government speech and thus is not subject to First Amendment limitations, relevantly similar cases will be decided differently in different circuits, at least until the United States Supreme Court offers much more guidance with respect to which expression is properly classified as government speech.

The Court in *Summum* and *Walker* discussed and applied three factors, but neither decision says, or even implies, that those factors must be met before the government can claim speech as its own. Indeed, the government speech cases prior to *Summum* would presumably have been decided differently in light of those factors, and the Court has nowhere suggested that *Rust* and *Johanns* were incorrectly analyzed as government speech cases.

The Court has never required that the government identify its own speech or that the public know which speech is the government's, perhaps out of the belief that forcing the government to label its own speech might undercut the effectiveness of that speech or other speech that the government also wishes to make. But the two different ways to establish that expression is government speech—either the government controls the content of the message or controls which expressions are chosen for some special purpose—give the government an easy way to avoid First Amendment speech limitations.

Until the Court offers clear factors limiting the conditions under which the government can claim that expression is government speech, the government will likely be tempted to classify more and more expression as government speech. Doing so might yield great benefits to the government, because constitutional constraints will have been nullified,

and the political costs might be negligible, if only because the public might not even know that the government was speaking. But this will mean that there may be more and more contexts in which there will be no marketplace of ideas and the public will be denied the benefits that might accrue when contrasting positions are included in discussions of matters of public import. In short, the Court has used an undefined category to dispose of cases without offering any helpful ways to prevent that category from eviscerating First Amendment guarantees. The Court must act quickly to fill the void that it has created; or else, the very speech guarantees that the Court must apply may be undermined beyond repair.