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### Public Perceptions of Government Speech

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# Public Perceptions of Government Speech

Daniel J. Hemel & Lisa Larrimore Ouellette<sup>1</sup>

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The Supreme Court has stated repeatedly in recent years that the First Amendment’s Free Speech Clause “does not regulate government speech.”<sup>2</sup> While in most circumstances the government must adhere to a requirement of “viewpoint neutrality” in its regulation of private speech,<sup>3</sup> the government is subject to no such requirement when it engages in speech of its own. Thus, a public school cannot prohibit students from expressing anti-war views,<sup>4</sup> but the government is free to propagate its own messages in support of a war effort.<sup>5</sup> Likewise, a city generally cannot ban neo-Nazis from marching through its streets,<sup>6</sup> but it can issue its own condemnation of fascism. The rule that the government “shall make no law . . . abridging the freedom of speech”<sup>7</sup> does not require the government to remain on the sidelines in public debates.

Although the proposition that the government need not remain viewpoint-neutral in its own speech is clear, the line between “government speech” and private expression is often fuzzy. Consider just a few of the recent cases in which federal courts have wrestled with this question. Does a temporary exhibit on the ground floor of the state capitol constitute government speech or private speech? (A federal district court recently ruled that such exhibits are private speech, and thus Texas could not prohibit a secularist group from displaying a banner inside that state’s capitol that declared “[t]here are no gods . . . .”<sup>8</sup>) What about visitors’ guides displayed and distributed by a private publisher at highway rest areas operated by a state agency? (The Fourth Circuit recently held that these guides are government speech, and thus the Virginia Department of Transportation could insist on exercising editorial control over the guides.<sup>9</sup>) And does a public university

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<sup>2</sup> *Matal v Tam*, 137 S Ct 1744, 1757 (2017); *Pleasant Grove City v Summum*, 555 US 460, 467 (2009); see *Walker v Texas Division, Sons of Confederate Veterans, Inc.*, 135 S Ct 2239, 2255 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”).

<sup>3</sup> See, for example, *Rosenberger v Rector & Visitors of the University of Virginia*, 515 US 819, 834 (1995); *Police Department of Chicago v Mosley*, 408 US 92, 95–96 (1972).

<sup>4</sup> See *Tinker v Des Moines Independent Community School District*, 393 US 503 (1968).

<sup>5</sup> See *Matal*, 137 S Ct at 1758.

<sup>6</sup> See *Collin v Smith*, 578 F2d 1197 (7th Cir 1978), *cert denied*, 439 US 916.

<sup>7</sup> US Const Amend I.

<sup>8</sup> See *Freedom from Religion Foundation, Inc. v Abbott*, 2016 WL 7388401, \*2, 4–5 (WD Tex).

<sup>9</sup> See *Vista-Graphics, Inc. v Virginia Department of Transportation*, 682 Fed Appx 231, 236–37 (4th Cir 2017).

engage in government speech when it permits student organizations to use its trademarked name and logo on T-shirts? (The Eighth Circuit recently answered that question in the negative, holding that Iowa State University could not prevent a student group supporting marijuana legalization from using the school's name and logo on merchandise when it granted such permission to other student organizations.<sup>10</sup>)

The stakes of the debate are enormous. In the context of any particular case, the question of whether expression constitutes government speech or private speech often will determine the outcome. And over the landscape of First Amendment law, the government-versus-private-speech question looms large. If all government speech were subject to the viewpoint-neutrality requirement, public administration would be paralyzed: a city could not so much as erect a sign saying "STOP" without adding one that says "GO." Yet without some meaningful limit on the government's ability to claim expression as its own, the government speech doctrine could eviscerate the bar on viewpoint discrimination among private speakers.

To draw the line between government speech and private expression, the Supreme Court's early government speech cases looked to whether the speaker is a "traditional" government agency or official<sup>11</sup> and to whether the government exercises "control over the message."<sup>12</sup> In the past decade, however, the Court has placed increasing emphasis on whether members of the public reasonably perceive the relevant expression to be government speech. One justice has gone so far as to suggest that this factor should be the sole criterion for distinguishing government speech from private expression.<sup>13</sup>

This new emphasis on public perception has manifested itself in the Court's three most recent government speech cases. In 2009, the Court unanimously held in *Pleasant Grove City v Summum* that privately donated monuments in a city park constitute government speech in part because "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf."<sup>14</sup> Six years later, in *Walker v Texas Division, Sons of Confederate Veterans*, the Court split 5–4 as to whether specialty license plate designs submitted by private organizations qualify as "government speech," with the majority and dissent disagreeing as to whether members of the public would perceive the license plates to convey a message on the State of Texas's behalf.<sup>15</sup> And this past

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<sup>10</sup> See *Gerlich v Leath*, 861 F3d 697, 712–14 (8th Cir 2017).

<sup>11</sup> See *Keller v State Bar of California*, 496 US 1, 13 (1990).

<sup>12</sup> See *Johanns v Livestock Marketing Association*, 544 US 550, 561 (2005).

<sup>13</sup> See *Summum*, 555 US at 487 (Souter, J, concurring in the judgment).

<sup>14</sup> 555 US at 471.

<sup>15</sup> Compare *Sons of Confederate Veterans*, 135 S Ct at 2249 ("Texas license plates are, essentially, government IDs. . . . [P]ersons who observe designs on IDs routinely—and reasonably—interpret them as conveying some message on the issuer's behalf." (alterations and quotation marks omitted)), with *id* at 2255 (Alito, J, dissenting) ("[W]ould you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars?").

Term, in *Matal v Tam*, the Court held that federal registration of trademarks is not government speech because (among other factors) “there is no evidence that the public associates the contents of trademarks with the Federal Government.”<sup>16</sup>

The Supreme Court’s turn toward public perception as an often-determinative factor in government speech cases is, we think, a welcome development. Government intervention in the marketplace of ideas is especially dangerous when it is nontransparent. In such instances, government officials potentially can launder messages through the mouths of private speakers and escape electoral accountability for that expression. If government officials want to escape the viewpoint-neutrality requirement that is generally applicable to speech regulation, they should—we think—have to claim those messages as their own.

But while there are strong theoretical reasons to draw the line between government speech and private speech on the basis of public perception, the Court has so far failed to develop a reliable method for determining whether the public perceives expression to be government speech. The Court’s statement in *Sumnum* that members of the public “routinely” interpret monuments on government land as government speech rested on nothing more than *ipse dixit*. The majority’s conclusion in *Sons of Confederate Veterans* that observers understand specialty license plate designs to be government speech similarly relied on judicial assertion. Most recently, the Court in *Tam* seized on the absence of any evidence that the public associates the content of trademarks with the government but ignored the fact that there was no evidence in the other direction either.

It does not have to be this way. Courts can do better than relying on armchair speculation to determine whether members of the public attribute expression to the government. And in other contexts, courts do. Most notably, courts in trademark infringement cases often consult consumer surveys to determine whether the defendant’s use is likely to cause confusion related to the plaintiff’s mark<sup>17</sup>—in other words, whether the defendant’s use causes consumers to misattribute a product or message to the plaintiff. The acceptance of survey evidence in trademark law reflects a recognition that empirical claims regarding consumer psychology are better supported through quantitative social science than through judicial guesswork.

The argument for resorting to survey evidence applies with similar force in the government speech context. As noted, government speech cases, like trademark infringement cases, often come down to how judges or justices expect the public to react to certain stimuli. And as in the trademark context, judicial speculation is likely to be biased and inaccurate. If the worry is that members of the public will perceive private speech to be government speech or government speech to be private speech, then it would seem that the best way

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<sup>16</sup> 137 S Ct at 1760.

<sup>17</sup> J. Thomas McCarthy, 4 *McCarthy on Trademarks and Unfair Competition* §§ 23:1, 32:158 (Thomson Reuters 5th ed 2017).

to resolve the worry is to ask a representative sample of the population. This is not to say that survey results should be dispositive in government speech cases, just as survey results are not dispositive in the trademark infringement context.<sup>18</sup> But as in the trademark infringement context, survey evidence can play an important role in validating and falsifying claims regarding public perceptions as to the source of arguably-government speech.

This article lays out the argument for using survey evidence in government speech cases.<sup>19</sup> We supplement our normative argument with a proof of concept: a survey of a nationally representative sample of more than 1200 respondents whose views on government speech we gauged. Some of the speculative claims made by the justices in recent government speech cases are borne out by our survey: for example, we find that members of the public do routinely interpret monuments on government land as conveying a message on the government's behalf. In other respects, however, the justices' speculation proves less accurate: for instance, while the Court in *Tam* says that it is "far-fetched" to suggest that "the federal registration of a trademark makes the mark government speech,"<sup>20</sup> we find that nearly half of respondents hold this "far-fetched" view.

We further find that respondents are somewhat more likely to attribute messages to the government if they agree with those messages themselves. For example, individuals are more likely to attribute pro-choice messages to the government if they hold pro-choice views, and individuals are more likely to attribute atheistic messages to the government if they have positive attitudes toward atheism. One possible interpretation of this finding might be that courts should *not* rely on public perception in government speech cases because doing so will favor already-popular beliefs while disadvantaging minority views. Our interpretation is different. In determining whether expression constitutes government speech, members of the Court as well as members of the public inevitably are affected by both the medium of expression and the content of the message. Survey experiments such as the one we conducted here can be useful in disentangling the effects of medium from the effects of message because the controlled setting allows researchers to vary the message while holding medium constant. Thus, survey experiments can reduce the risk that government speech doctrine will systematically favor some views over others.

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<sup>18</sup> See *id.* § 32:158 (cited in note 17).

<sup>19</sup> The idea of using trademark-like consumer surveys in the government speech context is mentioned by Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 *BU L Rev* 587, 611–13 (2008). Norton does not, however, explain how the idea might be implemented in practice. She notes the "vexing question of what number or percentage of onlookers need to identify a message's source as governmental," and adds that "[f]ixing the number with any principled specificity poses substantial challenges." *Id.* at 613. Some of these practical issues were addressed by Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 *Md L Rev* 713 (2001), although their work focused on survey evidence in Establishment Clause cases and predated the general acceptance of online surveys. Building on the insights of these earlier authors, we provide the first empirical demonstration of how a government speech survey might work in practice and address counterarguments beyond the difficulty in implementation.

<sup>20</sup> 137 S Ct at 1748.

To be sure, the use of survey evidence in government speech cases raises a number of implementation issues that require careful thought. For example, parties might manipulate surveys to support their views, forcing the court to resolve disputes about social science methodologies. But the current approach of armchair speculation is even more manipulable, and courts already evaluate social science methodologies in the trademark survey context as well as many others. Another challenge relates to line-drawing: what percentage of the public must perceive expression to be government speech for it to qualify as such? Rather than proposing a specific numerical threshold, we suggest that the best approach is to compare with controls—i.e., to test against expression that any court would (or would not) consider to be government speech. The use of such comparisons can allow courts to assess whether members of the public perceive particular instances of gray-area expression—messages that are arguably but not certainly government speech—more like paradigmatic examples of government speech (e.g., the engravings on the Lincoln Memorial) or more like paradigmatic examples of private expression (e.g., billboards on privately owned property).

We address these and other concerns at further length below. Our reflection on implementation challenges underscores the broader point that government speech doctrine ought not be outsourced to a mechanical test. Using survey evidence to inform government speech doctrine does not obviate the need for judges to apply their own experience and expertise—as well as legal and prudential reasoning—in the context of individual cases. Our more limited claim is that the ability of courts to resolve government speech cases will be aided by more rigorous evidence of how the public actually perceives the kinds of expression at issue.

Our analysis proceeds in three parts. Part I explores the rise of public perception as a factor in government speech cases and considers whether this doctrinal development is a desirable one. We argue that it is, but that the Court's government speech jurisprudence would be enriched by consulting survey evidence as a measure of public perception. Part II explains the structure of our survey—which draws from the facts of *Sumnum*, *Sons of Confederate Veterans*, and *Tam*—and presents our results. Part III considers the doctrinal and normative implications of our findings. We conclude that the use of survey evidence can reduce the arbitrariness inherent in the Court's current approach to the public perception factor in government speech cases while also mitigating the pervasive concern that the extension of government speech doctrine to messages produced by private parties will eviscerate First Amendment protections.

## **I. Relevance of Public Perceptions of Government Speech**

We begin with a brief history of the Supreme Court's government speech doctrine and the role of the public perception factor in the Court's cases. We then consider and respond to criticism of the Court's turn toward public perception as a factor distinguishing government speech from private expression. We ultimately conclude that public perception *should* matter—

perhaps more than any other factor—in deciding whether expression qualifies as government speech, and that survey evidence can aid the Court in determining whether members of the public perceive speech as coming from the government.

## A. Doctrinal Roots

### 1. *Origins and Purposes of the Government Speech Doctrine*

The phrase “government speech” is nowhere to be found in the first 200 years of Supreme Court opinions. In part this may be attributable to the fact that viewpoint neutrality is itself a relatively young doctrine—only in the mid-1930s did the Court start to take seriously the notion that the First Amendment prevents the government from restricting private expression on the basis of viewpoint.<sup>21</sup> Yet several more decades passed before the Court first made reference to the “so-called ‘government speech’ doctrine” in the 1990 case of *Keller v State Bar of California*.<sup>22</sup> In that case, a group of California attorneys argued that the State Bar violated their free speech rights by using compulsory dues to finance political and ideological activities with which they disagreed. The Bar responded that—as a government entity speaking on its own behalf—it was exempt from normal Free Speech Clause scrutiny.<sup>23</sup> The Court implicitly accepted the State Bar’s argument that government entities are subject to a different Free Speech Clause standard. According to the Court:

Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If 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.<sup>24</sup>

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<sup>21</sup> On the evolution of the Court’s viewpoint-neutrality doctrine, see Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va L Rev 203, 215–18 (1982).

<sup>22</sup> 496 US 1 (1990). Justices made passing reference to “government speech” in two Establishment Clause cases decided shortly before *Keller*. See *County of Allegheny v ACLU*, 492 US 573, 661, 664 (1989) (Kennedy, J, concurring in the judgment in part and dissenting in part); *Board of Education v Mergens*, 496 US 226, 250 (1990). Justice Stewart arguably anticipated the modern-day government speech doctrine in a footnote to a concurring opinion in *Columbia Broadcasting System, Inc. v Democratic National Committee*, 412 US 94, 132 (1973), but he spoke there only for himself and not for the Court. See *id.* at 139 n 7 (Stewart, J, concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”).

<sup>23</sup> *Keller*, 496 US at 10–11.

<sup>24</sup> *Id.* at 12–13.

The Court in *Keller* ultimately concluded that the government speech doctrine did not apply in that case because “the very specialized characteristics of the State Bar . . . distinguish it from the role of the typical government official or agency.”<sup>25</sup> But in the process of shooting down the State Bar’s government speech argument, the Court gave rise to a doctrine that, according to one eminent analyst, would soon threaten “to swallow much of the First Amendment’s protections.”<sup>26</sup>

As the government speech doctrine has evolved from dicta in *Keller* to *ratio decidendi* in later cases, the Court’s rationale for the doctrine has evolved as well. The justification offered in *Keller*—that the doctrine is needed so that government officials can “speak for themselves”—has given way to two other arguments in favor of a Free Speech Clause exemption for government speech.

First, the justices have said that “it is not easy to imagine how government could function” if government speech were subject to Free Speech Clause scrutiny—and, in particular, the requirement that the government maintain viewpoint neutrality in its regulation of speech.<sup>27</sup> As Justice Scalia observed in *Rust v Sullivan*, a viewpoint-neutrality requirement for government speech would mean that when Congress established the National Endowment for Democracy, it also would have been “constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”<sup>28</sup> Or as Justice Breyer put the point in *Sons of Confederate Veterans*: “How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?”<sup>29</sup> And as Justice Alito piled on in *Tam*, a viewpoint-neutrality requirement would suggest that “[d]uring the Second World War,” when “the Federal Government produced and distributed millions of posters . . . urging enlistment, the purchase of war bonds, and the conservation of scarce resources,” it also needed to “balance the message . . . by producing and distributing posters encouraging Americans to refrain from engaging in these activities.”<sup>30</sup> This line of *reductio ad absurdum* argument is meant to establish that the Free Speech Clause could not possibly apply to the government’s own speech.

Second, the justices have suggested that the government has an interest in disassociating itself from speech that it does not endorse. This interest in disassociation and the avoidance of misattribution appears somewhat obliquely in *Summum*, where Justice Alito notes that it is “not common for property owners to open up their property for the installation of permanent monuments

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<sup>25</sup> *Id.* at 12.

<sup>26</sup> Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 Fed Communications L.J. 579, 586 (2010); see also Erwin Chemerinsky, *The Troubling Government Speech Doctrine*, ACS Blog (June 19, 2015), <https://www.acslaw.org/acsblog/the-troubling-government-speech-doctrine>.

<sup>27</sup> *Summum*, 555 US at 468; *Tam*, 137 S Ct at 1757.

<sup>28</sup> 500 US 173, 194 (1991).

<sup>29</sup> 135 S Ct at 2246.

<sup>30</sup> 137 S Ct at 1758.

that convey a message with which they do not wish to be associated.”<sup>31</sup> (Justice Breyer makes essentially the same observation with respect to state-issued license plates in *Sons of Confederate Veterans*.<sup>32</sup>) The point comes through more clearly in several of the Court’s earlier cases involving forum doctrine<sup>33</sup> and the regulation of speech in public schools.<sup>34</sup>

The two arguments are related: The government’s interest in supporting the spread of democracy and not communism or fascism is based both on a programmatic rationale (equal financing for communism and fascism would undermine the government’s pro-democracy objective) and a disassociation rationale (the government does not want communist or fascist views to be attributed to it). And most would agree that both arguments have some merit. Of course the government should be able to say “Get Your Flu Shot” without adding “Beware of Vaccines.” Of course it should be able to tell motorists to “Slow for Pedestrians” without adding “Speed Up.” The challenge is to delineate the boundaries of the government speech doctrine so as to leave space for non-neutral government speech without at the same time “swallow[ing] much of the First Amendment’s protections.”<sup>35</sup>

## 2. *Drawing the Line Between Government and Private Speech*

In *Keller*, the justices appear to have assumed that the “so-called ‘government speech’ doctrine” that they had minted would apply only to the

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<sup>31</sup> 555 US at 471.

<sup>32</sup> 135 S Ct at 2249, quoting *id.*

<sup>33</sup> See *Lehman v City of Shaker Heights*, 418 US 298, 304 (1974) (interest in “minimiz[ing] . . . the appearance of favoritism” supports city’s decision to ban political advertisements on public buses); *Greer v Spock*, 424 US 828, 839 (1976) (ban on speeches and demonstrations of a partisan nature on military base supported by military’s interest in being “insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates”); *Cornelius v NAACP Legal Defense & Education Fund*, 473 US 788, 809 (1985) (interest in avoiding “appearance of favoritism” supports exclusion of legal defense and political advocacy organizations from federal employees’ charity drive).

<sup>34</sup> See, for example, *Bethel School District v Fraser*, 478 US 675, 685–86 (1986) (“perfectly appropriate” for high school “to disassociate itself” from student’s lewd speech at school assembly—and to suspend student for three days—“to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the fundamental values of public school education” (quotation marks omitted)); *Hazelwood School District v Kuhlmeier*, 484 US 260, 271 (1988) (“[A] school may in its capacity as publisher of a school newspaper or producer of a school play disassociate itself not only from speech that would substantially interfere with its work or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences” (alterations, citations, and quotation marks omitted)). For an overview, see Abner S. Greene, *(Mis)attribution*, 87 Den U L Rev 833, 848–53 (2010).

<sup>35</sup> Chemerinsky, 63 Fed Communications L J at 586 (cited in note 26); see also Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 BC L Rev 695 (2011) (“Has government speech doctrine undermined the First Amendment’s seemingly inviolable viewpoint neutrality requirement?”); Mary-Rose Papandrea, *The Government Brand*, 110 Nw U L Rev 1195, 1216 (2016) (“Walker’s expensive view of government speech doctrine grants state actors broad authority to restrict private speech.”).

messages of “traditional government agencies and officials.”<sup>36</sup> Thus, even though California’s highest court had accorded “governmental” status to the State Bar, the Bar’s speech was not “government speech” for First Amendment purposes. The Court noted three factors that distinguish the Bar from “most other entities that would be regarded in common parlance as ‘government agencies’”: its principal funding comes from dues levied on members; all lawyers admitted to practice in California must be members; and the state supreme court rather than the Bar has final authority over admission, suspension, disbarment, and the establishment of ethical codes of conduct.<sup>37</sup>

The *Keller* Court’s line between “traditional government agencies and officials,” to whom the government speech doctrine would apply, and quasi-governmental entities such as the State Bar, to whom it would not, did not hold for long. The very next Term, in *Rust v Sullivan*, the Court upheld a regulation that prohibited certain federally funded organizations from using federal dollars to provide abortion-related counseling or otherwise to promote abortion as a method of family planning.<sup>38</sup> The Court did not dwell on the fact that the doctors and nonprofit organizations whose speech was being regulated in *Rust* were not in any sense traditional government agencies or officials. Indeed, the Court did not cite *Keller* at all. Instead, it said “when the Government appropriates public funds to establish a program,” it is “entitled”—within broad limits—“to define the limits of that program,” including limits on what recipients of program funds can and cannot say.<sup>39</sup>

But the Court would soon come to rethink *Rust*’s sweeping language. In *Legal Services Corporation v Velasquez*,<sup>40</sup> the Court considered the validity of an appropriations provision that barred legal aid attorneys who received federal funding from challenging state welfare laws on federal statutory or constitutional grounds. One might be excused for thinking that this would be an easy case under *Rust*: when the government appropriates public funds to establish a program, it is generally entitled to define the limits of that program. Not so. The Court in *Velasquez* said that a legal aid attorney “is not the government’s speaker,” and that “[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.”<sup>41</sup> The Court failed to explain why a doctor’s advice to a patient and an attorney’s advice to a client would be classified differently for First Amendment purposes, with the former falling within the government speech doctrine’s scope and the latter landing beyond.

The Court’s implicit rejection of *Rust* did not, however, signify a return to *Keller*’s “traditional government agencies and officials” standard. Nor would

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<sup>36</sup> *Keller*, 496 US at 13.

<sup>37</sup> See *id* at 11–12.

<sup>38</sup> 500 US 173 (1991).

<sup>39</sup> *Id* at 194.

<sup>40</sup> 531 US 533 (2001).

<sup>41</sup> *Id* at 542–43.

it lead immediately to the Court adopting public perception as a factor in government speech analysis. Indeed, in *Johanns v Livestock Marketing Association*,<sup>42</sup> a 2005 case, a majority of the Court explicitly rejected the notion that public perception had any relevance to whether expression constitutes government speech.

*Johanns* involved a First Amendment challenge to a federal law requiring beef producers and importers to pay a \$1 per head assessment on cattle sales to fund beef promotional campaigns conceived by a 20-person committee. Half the committee's members were appointed by the Secretary of Agriculture; half were chosen by a beef industry group. Beef producers who objected to the mandatory assessment argued that the per-head assessment compelled them to subsidize private speech with which they disagreed.

The Court—in an opinion by Justice Scalia—rejected the dissident beef producers' argument, holding that the beef promotional campaigns constitute government speech. The Court reached this conclusion notwithstanding the substantial similarities between the 20-member committee running the beef ad campaigns and the State Bar in *Keller*. In both cases, the organization's principal funding came from assessments on industry participants, who comprised its members.<sup>43</sup> In both cases, the organization's actions were subject to the approval of another government actor (in *Keller*, the state Supreme Court; in *Johanns*, the Agriculture Secretary<sup>44</sup>). And yet in *Keller*, these “very specialized characteristics of the State Bar of California . . . served to distinguish it from the role of the typical government official or agency” for First Amendment purposes,<sup>45</sup> whereas the Court in *Johanns* concluded that the ads produced by the 20-member committee constituted government speech.

What “distinguishes [*Johanns*] from *Keller*,” according to the Court, is the “degree of governmental control over the message funded by the [beef] checkoff.”<sup>46</sup> Congress described in broad brushstrokes the objective of the promotional efforts, and the Agriculture Secretary “exercises final approval authority over every word used in every promotional campaign.”<sup>47</sup> This, in the majority's view, was enough to make the beef ads government speech. “The message set out in the beef promotions is from beginning to end the message established by the Federal Government,” Justice Scalia said.<sup>48</sup> This holds true, in the Court's view, notwithstanding the fact that the government “solicits assistance from nongovernmental sources in developing specific messages.”<sup>49</sup>

That a message is “from beginning to end” established by the federal government does not, however, appear to be a necessary criterion for

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<sup>42</sup> 544 US 550 (2005).

<sup>43</sup> Compare *Keller*, 496 US at 11, with *Johanns*, 544 US at 554.

<sup>44</sup> Compare *Keller*, 496 US at 11–12, with *Johanns*, 544 US at 563.

<sup>45</sup> *Keller*, 496 US at 12.

<sup>46</sup> 544 US at 561.

<sup>47</sup> See *id.* at 561.

<sup>48</sup> *Id.* at 560.

<sup>49</sup> *Id.* at 562.

classifying expression as government speech. After all, the government does not exercise such control with respect to the doctor-patient communications that came within the scope of the government speech doctrine in *Rust*. It is also doubtful that this degree of government control is a sufficient condition for expression to be classified as government speech: if, for example, the government demanded to see and approve every litigation document produced by a federally funded legal aid lawyer before it was filed, the First Amendment violation in *Legal Services Corporation v Velasquez* would seem more egregious, not less so.

Notably, in none of these early government speech cases did the majority ask whether members of the public perceived the messages in question to emanate from the government. Only Justice Souter, dissenting in *Johanns*, suggested that public perception should be relevant to government speech analysis. In his view, the government should not be able to rely on a government speech defense “[u]nless the putative speech appears to be coming from the government.”<sup>50</sup> Otherwise, government officials would be able to escape judicial scrutiny for their decisions to support certain expression while at the same time “conceal[ing] their role from the voters with the power to hold them accountable.”<sup>51</sup>

Yet a majority of the Court was not yet ready to endorse the idea that public perception should matter to whether expression is classified as government speech. Justice Scalia, writing for the majority in *Johanns*, said that the beef ads at issue in that case constituted government speech “whether or not the reasonable viewer would identify the speech as the government’s.”<sup>52</sup> The test for the validity of the beef program, according to Justice Scalia, “is not on whether the ads’ audience realizes the Government is speaking, but on the compelled assessment’s purported interference with [beef producers’] First Amendment rights.”<sup>53</sup>

One-and-a-half decades into the Court’s experiment with a special First Amendment exemption for government speech, then, the doctrine was in a state of disarray. The distinction between “traditional” and nontraditional government speeches and agencies had broken down. So too had *Rust*’s bright-line rule allowing the legislature to define the limits of government-funded programs. If there were any standard that could be discerned from *Johanns*, it would be that expression constitutes government speech when “[t]he message . . . is from beginning to end . . . established by the . . .

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<sup>50</sup> Id at 578–79 (Souter, J, dissenting).

<sup>51</sup> Id at 578.

<sup>52</sup> Id at 564 n 7 (majority opinion). “If a viewer would identify the speech as [the beef producers’],” according to Justice Scalia, “the analysis would be different.” Id. That is, the Free Speech Clause does—under Justice Scalia’s view—protect private individuals against the risk that government speech will be misattributed to them. This latter concern fits within the Court’s compelled speech framework but is separate from the government speech analysis. See id at 565 n 8.

<sup>53</sup> Id at 564 n 7.

[g]overnment.”<sup>54</sup> But as will soon be seen, the Court would quickly pedal back from that “beginning to end” standard as well.

### 3. *The Public Perception Trilogy*

In the past decade, the Supreme Court has taken a new tack in its government speech cases. The message-control criterion of *Johanns* has given way to a new emphasis on public perception. This jurisprudential trend has manifested itself in three cases so far.

#### a. *Pleasant Grove City v Summum*

The Court’s 2009 decision in *Pleasant Grove City v Summum* involved a 2.5-acre Pioneer Park in Pleasant Grove City, Utah, that featured fifteen permanent displays, eleven of which were donated by private individuals or organizations. One of those was a Ten Commandments monument donated by the Fraternal Order of Eagles.<sup>55</sup> Summum, a religious organization headquartered in nearby Salt Lake City, sought permission to erect a similarly sized stone monument presenting the “Seven Aphorisms” upon which the Summum religion is based. The city rejected the request. Summum sued, claiming that the city violated its free speech rights by allowing the Ten Commandments monument but rejecting the Seven Aphorisms.<sup>56</sup>

The central question in *Summum* was whether privately donated monuments on display in a public park qualify as government speech. If so, then the city would be free to discriminate between the Ten Commandments and the Seven Aphorisms. All the justices agreed that monuments in a public park are government speech, and that the city could therefore accept the Ten Commandments while rejecting Summum’s contribution.<sup>57</sup>

In explaining how the Court reached this conclusion, Justice Alito, writing for the majority, emphasized the (apparent) fact that “persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.”<sup>58</sup> Thus, Justice Alito saw “little chance that observers will fail to appreciate the identity of the speaker.”<sup>59</sup> As for why public perception should be a relevant factor in government speech analysis, the only reason offered by Justice Alito was that

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<sup>54</sup> Id at 560.

<sup>55</sup> 555 US at 465.

<sup>56</sup> See id at 464–66.

<sup>57</sup> The Court noted that there are still restraints on government speech, such as that it “must comport with the Establishment Clause.” Id at 468. Establishment Clause issues were not raised in *Summum*, but the concurring opinions disagreed on whether they were settled. Compare id at 482–83 (Scalia, J, concurring) (arguing that there is no Establishment Clause violation), with id at 487 (Breyer, J, concurring) (“It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate.”).

<sup>58</sup> Id at 471 (majority opinion).

<sup>59</sup> Id.

municipal governments have an interest in controlling the messages they convey internally and externally. “Public parks are often closely identified in the public mind with the government unit that owns the land,” he wrote, and selectivity allows a city to “defin[e] the identity that [it] projects to its own residents and the outside world.”<sup>60</sup>

Public perception was not the only factor mentioned in the majority opinion: Justice Alito also noted the long history of privately donated monuments on public land<sup>61</sup> as well as the space constraints that might prevent public parks from accommodating all donations.<sup>62</sup> Significantly, though, Justice Alito did not say—as Justice Scalia had in *Johanns*—that the message in question was controlled by the government “from beginning to end.” The government’s role with respect to privately designed and donated monuments, according to Justice Alito, is one of “selective receptivity”<sup>63</sup> rather than beginning-to-end editorial direction. Indeed, Justice Alito rejected the idea that monuments might convey a discrete message within anyone’s control. As he put it, “it frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure,” and “the ‘message’ conveyed by a monument may change over time.”<sup>64</sup>

While the majority in *Summum* placed greater emphasis on public perception than the Court had in the past, Justice Souter went a step further and argued in a concurring opinion that the *sole* test in cases such as *Summum* should be “whether a reasonable and fully informed observer would understand the expression to be government speech.”<sup>65</sup> Justice Souter’s only explanation for his proposed single-factor test was that it would “serve coherence” by bringing the test for government speech in line with the test employed in Establishment Clause cases “for spotting forbidden governmental endorsement of religion.”<sup>66</sup> Justice Souter also did not explain how a court should determine whether “a reasonable and fully informed observer” would understand privately donated monuments on public land to be government speech—or even how he had reached that conclusion. He simply stated: “Application of this observer test provides the reason I find the monument here to be government expression.”<sup>67</sup>

#### b. Walker v Texas Division, Sons of Confederate Veterans

The public perception factor played an even more prominent role in *Walker v Texas Division, Sons of Confederate Veterans*, which involved a Texas program that allowed private individuals and organizations to propose their

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<sup>60</sup> Id at 472.

<sup>61</sup> See id at 471.

<sup>62</sup> See id at 480.

<sup>63</sup> Id at 471.

<sup>64</sup> Id at 476–77.

<sup>65</sup> Id at 487 (Souter, J, concurring in the judgment).

<sup>66</sup> Id.

<sup>67</sup> Id.

own designs for state license plates. The state's Department of Motor Vehicles Board approved hundreds of such designs but rejected a proposal from the Sons of Confederate Veterans for a plate that would feature the group's name and a Confederate battle flag image. The Sons of Confederate Veterans claimed that the rejection of their proposed plate violated their free speech rights.<sup>68</sup>

In a 5–4 decision, the Court held that specialty license plates are government speech, and that Texas was therefore free to choose which plates it would and would not accept. Writing for the majority, Justice Breyer articulated a three-factor test for distinguishing government speech from private expression. The first factor, “history,” looks to whether the relevant medium has been used to communicate government messages in the past.<sup>69</sup> The third factor, selectivity, looks to whether the government “maintains direct control over the messages.”<sup>70</sup> The middle factor is public perception: whether “persons who observe” the expressions in question “routinely—and reasonably—interpret them as conveying some message on the [government’s] behalf.”<sup>71</sup>

But how can a court know whether members of the public perceive speech to be the government’s? Justice Breyer listed a number of considerations with variable relevance to the inquiry at hand. For example, he highlighted the fact that Texas law requires vehicle owners to display license plates, which—in Justice Breyer’s view—strengthens the connection that observers will draw between license plates and the state.<sup>72</sup> But Texas also generally requires individuals to wear pants or otherwise to cover their bottoms in public,<sup>73</sup> and this does not mean that pants are perceived to be government speech. Justice Breyer also emphasized that “Texas dictates the manner in which drivers may dispose of unused plates.”<sup>74</sup> But Texas also dictates the manner in which tires and untreated infectious waste may be disposed,<sup>75</sup> and those items very obviously do not constitute government speech.

In a stinging dissent, Justice Alito took issue with the majority’s application of the public perception factor. “Here is a test,” Justice Alito wrote.

Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You

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<sup>68</sup> 135 S Ct at 2243–45.

<sup>69</sup> See *id.* at 2248.

<sup>70</sup> See *id.* at 2249.

<sup>71</sup> *Id.* at 2248, quoting *Sumnum*, 555 US at 471.

<sup>72</sup> *Id.*

<sup>73</sup> See Tex Penal Code § 21.08.

<sup>74</sup> 135 S Ct at 2248.

<sup>75</sup> See Northeast Recycling Council, *Disposal Bans & Mandatory Recycling in the United States* 134 (May 1, 2017), at [https://nerc.org/documents/disposal\\_bans\\_mandatory\\_recycling\\_united\\_states.pdf](https://nerc.org/documents/disposal_bans_mandatory_recycling_united_states.pdf).

would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver. As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars?<sup>76</sup>

Justice Alito evidently would answer that question in the negative. But it is not entirely clear why. After all, Justice Alito had said in *Sumnum* that “it frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure,”<sup>77</sup> and yet the public may perceive that object or structure to be government speech nonetheless. The fact that Texas specialty license plates convey many different messages would not, under the logic of *Sumnum*, seem to disqualify them from government speech status.

Justice Alito’s dissent appears to rest on the strong intuition that the observer on the side of a Texas highway would perceive specialty license plates to be government speech. But one wonders why Justice Alito is so confident in his conclusion. Sitting by the side of a Texas highway and studying the license plates on the vehicles passing by is not—we might surmise—a frequent pastime of any of the justices (or, for that matter, their clerks). And yet the Court’s increasing emphasis on the public perception factor seems to require the justices to engage in these sorts of imaginative inquiries to determine the Free Speech Clause’s scope.

### c. *Matal v Tam*

The Court’s most recent government speech case, *Matal v Tam*, again emphasized public perception as a factor distinguishing government speech from private expression. *Tam* involved a rock band, “The Slants,” whose name is a derogatory term for persons of Asian origin. The band’s members, who are Asian-American, explained that they sought to “reclaim” the derogatory term. When The Slants’ lead singer, Simon Tam, sought to register his band’s name as a trademark, the Patent and Trademark Office (PTO) rejected his application on the basis of section 2(a) of the Lanham Act, which prohibits registration of any mark that “may disparage . . . persons, living or dead.”<sup>78</sup> Tam sought judicial review of the PTO’s decision and argued that the denial of his application violated his free speech rights. The PTO argued in response that federal registration of trademarks is a form of “government speech” exempt from Free Speech Clause scrutiny.<sup>79</sup>

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<sup>76</sup> 135 S Ct at 2255 (Alito, J, dissenting) (paragraph break omitted).

<sup>77</sup> *Sumnum*, 555 US at 478.

<sup>78</sup> 15 USC § 1052(a).

<sup>79</sup> 137 S Ct 1744, 1751–55 (2017).

The Court roundly rejected the PTO's government speech argument. Justice Alito, writing for a unanimous Court on this point, said that it was "far-fetched to suggest that the content of a registered mark is government speech."<sup>80</sup> According to Justice Alito:

If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public. For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to "make.believe" (Sony), "Think different" (Apple), "Just do it" (Nike), or "Have it your way" (Burger King)? Was the Government warning about a coming disaster when it registered the mark "EndTime Ministries"?<sup>81</sup>

As in *Sons of Confederate Veterans*, Justice Alito seems to believe that the incoherence of the messages conveyed by registered trademarks places these expressions outside the bounds of government speech. And, also as in *Sons of Confederate Veterans*, Justice Alito makes no effort to reconcile this position with *Sumnum's* conclusion that incoherence does not disqualify a monument as government speech.

Moreover, while Justice Alito pays lip service to the "history" and "selectivity" factors from *Sons of Confederate Veterans*,<sup>82</sup> it is hard to put much stock in his treatment of either factor. Justice Alito said that "[w]ith the exception of the enforcement of [section 2(a) of the Lanham Act], the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register."<sup>83</sup> But that same fact could just as easily support the opposite conclusion: Ever since the Lanham Act was passed, the Patent and Trademark Office has refused to register marks that it deems to be disparaging toward "persons, living or dead."<sup>84</sup> And while one can criticize the Patent and Trademark Office for being insufficiently selective in choosing which marks to register, the PTO does reject somewhere around a quarter of marks at the substantive review stage<sup>85</sup>—a figure that would seem to suggest "selective receptivity."

Ultimately, then, Justice Alito's determination that federal registration of trademarks is not government speech seems to come down to his strong

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<sup>80</sup> Id at 1758.

<sup>81</sup> Id at 1758–59 (footnotes omitted). The Federal Circuit subsequently relied on this conclusion when holding section 2(a)'s ban on "immoral" or "scandalous" marks to be unconstitutional. *In re Brunetti*, 2017 WL 6391161, \*13 (Fed Cir).

<sup>82</sup> See id at 1760.

<sup>83</sup> 137 S Ct at 1760.

<sup>84</sup> Act of July 5, 1946, ch 540, § 2(a), 60 Stat 427, 428.

<sup>85</sup> Barton Beebe, *Is the Trademark Office a Rubber Stamp?*, 48 Hous L Rev 751, 770–72 (2011).

intuition—evidently shared by his colleagues—that the public perceives trademarks to be private expression. But his test for what constitutes government speech is no more determinate than Justice Stewart’s test for what constitutes obscenity.<sup>86</sup> Lower courts, government officials, and private parties are left to guess how the Court will come out when the question arises in a new context.

## B. Evaluating the Role of Public Perception in Government Speech Analysis

The Court’s government speech jurisprudence is easy to criticize—and the *Sumnum/Sons of Confederate Veterans/Tam* trilogy is especially vulnerable. One line of attack against the turn toward public perception argues that these perceptions are disconnected from the normative justification for government speech doctrine.<sup>87</sup> A second line of attack focuses on the unpredictability and malleability of the Court’s public perception analysis.<sup>88</sup> We address these concerns in turn.

### 1. Why Should Public Perception Matter?

Recall the reasons given by the Court for exempting government speech from Free Speech Clause scrutiny. The Court in *Keller* argued that the exemption enables government officials to participate in public debates, while subsequent cases emphasize the programmatic importance of government speech as well as the government’s interest in avoiding misattribution of private expression to itself. As significant as these interests may be, they do little to justify the use of the government speech doctrine to defeat free speech claims in cases like *Sumnum* and *Sons of Confederate Veterans*, in which the relevant speech was privately produced.

Consider first the *Keller* Court’s argument that allowing government officials to express their positions without violating the Free Speech Clause facilitates the participation of public officials in democratic debate. This seems true enough, and leading academic commentators on government speech doctrine generally agree with the claim.<sup>89</sup> But the argument does not explain why government speech principles ought to extend to cases such as *Johanns*,

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<sup>86</sup> See *Jacobellis v Ohio*, 378 US 184, 197 (1964) (“I know it when I see it . . .”).

<sup>87</sup> See, for example, Case Note, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 129 Harv L Rev 221, 225 (2015) (noting that neither the approach of the majority nor the dissent in *Sons of Confederate Veterans* “aligns with the purported justification for the exemption that regulation of government speech enjoys from the strictures of the First Amendment”).

<sup>88</sup> See, for example, Papandrea, 110 Nw U L Rev at 1216 (cited in note 35) (“Because it is not clear who the reasonable observer is and precisely what background knowledge she might have, this test leads to uncertainty and unpredictability.”).

<sup>89</sup> See, for example, Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex L Rev 863, 865 (1979) (“Government expression is critical to the operation of a democratic polity . . .”); Steven Shiffrin, *Government Speech*, 27 UCLA L Rev 565, 603 (1980) (“Indeed it is arguably the function, and perhaps the duty, of public officials to speak out on all issues of the day . . .”).

*Summum*, and *Sons of Confederate Veterans*, in which the relevant expression is produced in the first instance by nongovernment officials. The *Keller* rationale would instead seem to support something like the following test: expression qualifies as government speech when it is generated by elected or appointed government officials. This, not coincidentally, is quite close to the “traditional government agency or official” standard that the *Keller* Court appeared to embrace.

Consider next the *reductio ad absurdum* argument made by the Court in *Rust*, *Sons of Confederate Veterans*, and *Tam*: how could the government function if it were required to advocate both sides of every issue or else to stay silent?<sup>90</sup> Again, the argument explains why a viewpoint-neutrality requirement should not apply to every type of government speech: at the very least, the government must be allowed to urge schoolchildren to “Just Say No” to illegal drugs and alcohol without also encouraging them to experiment with depressants, hallucinogens, opiates, and stimulants.<sup>91</sup> But the government could function just fine if Free Speech Clause scrutiny applied to privately designed ad campaigns, monuments, and license plates—it would just have to design those ads, monuments, and license plates itself. While it may be efficient for the government to solicit donations or proposals from private parties under certain circumstances, the need to do so is certainly not existential.<sup>92</sup>

Finally, consider the risk that members of the public will misattribute messages to the government unless the government has the ability to disassociate itself from views with which it disagrees. This interest in avoiding misattribution may be a real one, but it arises only because the government already has begun accepting privately designed monuments, privately designed license plates, and other forms of privately generated expression. If Pleasant Grove City accepted no private donations of monuments, it would not need to disassociate itself from the messages of *Summum*. If Texas allowed only a “Lone Star State” license plate, it would not need to disassociate itself from the *Sons of Confederate Veterans*. The misattribution problem, in other words, is a problem of the government’s own making.

This is not to deny that the government may be justified in rejecting a monument, license plate design, or other form of expression to avoid the risk of misattribution under some circumstances. But before that argument can become a persuasive one, we must first identify a compelling reason or set of reasons why the government should be allowed to solicit private assistance in

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<sup>90</sup> See text at notes 28–30.

<sup>91</sup> On the history and (questionable) efficacy of the Drug Abuse Resistance Education (D.A.R.E.) program, the source of the well-known “Just Say No” slogan, see Wei Pan & Haiyan Bai, *A Multivariate Approach to Meta-Analytic Review of the Effectiveness of the D.A.R.E. Program*, 6 *Intl J Envir Rsrch & Pub Health* 267 (2009); and Scott O. Lilienfeld & Hal Arkowitz, *Why “Just Say No” Doesn’t Work*, *Scientific Am* (Jan 1, 2014), <https://www.scientificamerican.com/article/why-just-say-no-doesnt-work>.

<sup>92</sup> Cf. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 *Iowa L Rev* 1259, 1264 (2010) (“[T]here is no real reason why the government needs to stifle the speech of private persons to get an official government message across.”).

designing monuments, license plates, and other expression that might then be attributed to it.

Some reasons for allowing the government to reach out for private assistance are relatively obvious but also relatively weak. No doubt there are fiscal benefits to outsourcing certain speech production functions. For example, by accepting privately donated monuments in Pioneer Park, Pleasant Grove City can beautify a public space without bearing the financial cost of designing and producing those structures itself. Private parties also might be more skilled than government officials at designing advertisements, monuments, license plates, and the like. Yet we doubt that these fiscal and aesthetic benefits are so significant as to allow the government to engage in viewpoint discrimination over an ill-defined domain. One might rightly want a more powerful justification before opening this constitutional Pandora's box.

A stronger argument is that private participation in the design of monuments and other items that might be attributed to the government is important to the process of "collective self-definition" that occurs in successful democratic polities.<sup>93</sup> As Justice Alito notes in *Summum*, the Statue of Liberty, the Iwo Jima monument at Arlington National Cemetery, and the Vietnam Veterans Memorial were all designed by privately designed and funded.<sup>94</sup> In each of these cases, the monument or memorial played an important role in articulating shared values or reifying collective memories. Something similar can be said of many other objects with nongovernmental origins. The Ohio state motto was apparently "the brainchild of a Cincinnati schoolboy."<sup>95</sup> The drawing of the Roman goddess Diana on the US Postal Service's Breast Cancer Research Stamp was the work of a Baltimore artist.<sup>96</sup> Examples abound.

Applying a viewpoint-neutrality argument to these acts of collective self-definition would, of course, be self-defeating. (Must the Statue of Liberty be paired with a Statue of Tyranny?) And excluding everyone except for "traditional government agencies and officials" from the design of these collective self-expressions would undermine the entire exercise. Citizen involvement in the creation of public monuments, mottos, stamps, and so on allows individuals from various walks of life—artists, architects, and students, among others—to participate in the process of defining and articulating the values of the polity. Could that task be left entirely to politicians? Perhaps so, but only at a considerable (and not purely financial) cost.

But once we depart from the "traditional government agency or official" standard, several real dangers arise. In addition to the misattribution

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<sup>93</sup> See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm & Mary L Rev 267, 283 (1991).

<sup>94</sup> *Summum*, 555 US at 471.

<sup>95</sup> See *ACLU v Capitol Square Review & Advisory Board*, 243 F3d 289, 318 (6th Cir 2001). The Sixth Circuit rejected an Establishment Clause challenge to the motto—"With God, All Things Are Possible." Id.

<sup>96</sup> Rachel Warren, *Stamping Out Breast Cancer, One Envelope at a Time*, Washington Post, July 6, 1998, at C1.

risk mentioned above (i.e., the risk that individuals will misattribute messages to the government that the government does not endorse), there is the risk of misattribution in the opposite direction: a risk that observers will misattribute the government's message to private parties. Government speech may be more persuasive when it is laundered through the mouths of nongovernmental speakers.<sup>97</sup> For example, the government may seek to free-ride off the credibility of another trusted speaker (e.g., a patient's physician)<sup>98</sup> or may wish to intervene in the marketplace of ideas without its intervention being discounted as propaganda.<sup>99</sup> In this way, a doctrine meant to facilitate democratic discourse might instead have a distortionary effect.

A related risk is that if individuals do not identify speech as emanating from the government, then government officials might not be held accountable for that expression. This was the concern voiced by Justice Souter in *Johanns*. "Democracy," he wrote, "ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message."<sup>100</sup> But this democratic check works only if "the putative speech appears to be coming from the government."<sup>101</sup> Voters are unlikely to punish public officials for speech that they misattribute to a nongovernmental source.

Electoral accountability is, of course, an imperfect check on the abuse of the government speech doctrine. If, for example, a majority of voters in a state are pro-life, then elected officials might be rewarded at the ballot box for allowing a "Choose Life" license plate while rejecting a "Respect Choice" design.<sup>102</sup> More generally, public officials can use the freedom afforded by the

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<sup>97</sup> See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *Hastings L.J.* 983, 1009 (2005).

<sup>98</sup> Lawrence Lessig uses the example of *Rust v. Sullivan* to illustrate the point:

There the government required (partially) governmentally funded doctors to say certain things about what methods of family planning were best, and to refrain from giving women any information about abortion as a method of family planning. The clear purpose of these regulations was to steer women away from abortion. But the power of this message was amplified dramatically by its being delivered, without disclaimer, by a doctor. Out of the mouth of a doctor, the antiabortion message had a much more powerful effect than an antiabortion message out of the mouth of Congressman Henry Hyde. . . . In part because it was hidden that it was the government that was speaking, the government's message had a much more powerful effect, if only by deceiving poor women about the source of the message.

Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U Chi L Rev* 943, 1017 (1995).

<sup>99</sup> Lessig calls this "the Orwell effect": "when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation." This, in turn, leads to "a strong incentive for the government to deliver its message of change while hiding the messenger." *Id.*

<sup>100</sup> *Johanns*, 544 US at 575 (Souter, J., dissenting).

<sup>101</sup> *Id.* at 578.

<sup>102</sup> This example closely tracks the facts of *ACLU v. Tennyson*, 815 F3d 183 (4th Cir 2016). In that case, the ACLU sued North Carolina for discriminating between pro-life and pro-choice

government speech doctrine to privilege certain views over others. But while the threat posed by government speech is present even when members of the public perceive the relevant speech to be the government's, the threat is arguably even more acute when members of the public are confused about a message's source.

In any event, whatever apprehensions we might have with regard to public perception as a factor distinguishing government speech from private expression, it is not obvious that there is a better alternative out there.<sup>103</sup> The focus on history in *Summum*, *Sons of Confederate Veterans*, and *Tam* leaves government speech doctrine ill-equipped for technological change. Does, say, a posting on an agency's Facebook page or a retweet from an agency's account qualify as government speech?<sup>104</sup> The fact that no agency posted on Facebook or tweeted before the twenty-first century cannot be dispositive. As noted, the emphasis on selectivity in several of the Court's cases leads to the counterintuitive result that Free Speech Clause scrutiny is relaxed when government exerts *greater* control over the flow of ideas.<sup>105</sup> And the Court's concern regarding space constraints in *Summum* does not translate well to other areas: most of us share the intuition that the Postal Service should be allowed to choose to print Harriet Tubman's face on postage stamps and to choose not to print Adolf Hitler's, even though there is no binding practical constraint that prevents the Postal Service from printing both.

In sum, the public perception factor seems to be consonant with the concerns that underlie the government speech doctrine and applicable—at least in theory—across a wide range of areas.<sup>106</sup> Whether the practical challenges of applying the public perception factor outweigh its abstract appeal is a separate question to which we now turn.

## 2. *Can Public Perception Be Measured?*

Even if one agrees that public perception is normatively relevant to the government speech doctrine's scope, one still might doubt whether the public

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license plate designs. The Fourth Circuit initially sided with the ACLU but reversed course after the Supreme Court held in *Sons of Confederate Veterans* that specialty license plate designs are government speech. See *id.* at 184.

<sup>103</sup> This is not to say that there is no other possibility for drawing this line. For other proposals, see Blocher, 52 BC L Rev at 751–66 (cited in note 35) (suggesting that government speech could be limited to when there are adequate alternatives for private expression, or when the government would lack adequate alternatives, or when the government affirmatively offers equal alternatives for discriminated-against viewpoints); Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 Ala L Rev 337, 377–392 (2016) (arguing that the government should be able to create and regulate content on “speech platforms”).

<sup>104</sup> Cf. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 Denv U L Rev 899 (2010) (discussing government speech doctrine for new expressive technologies).

<sup>105</sup> See text following note 49.

<sup>106</sup> Of course, speech that passes this test must still satisfy other limitations such as the Establishment Clause. See note 57; see also Nelson Tebbe, *Government Nonendorsement*, 98 Minn L Rev 648, 651 (2013) (arguing that the Constitution also prohibits certain forms of government endorsement, such as “Vote Democrat” or “America is a white nation”).

perception factor can be operationalized in a nonarbitrary way. The Court's record on this score is not inspiring. As one commentator appropriately complains, the Court has offered "no meaningful guidance for determining when observers reasonably attribute private expression to the government."<sup>107</sup>

Indeterminacy is not, however, an inherent feature of every legal test that relies on public perception. Social science has over the past several decades developed a reasonably reliable—though concededly imperfect—tool for measuring public opinion: the statistical survey.

Courts consult survey evidence in a variety of cases in which public opinion is relevant to the resolution of a legal dispute.<sup>108</sup> In trademark law, litigants routinely introduce survey evidence to show that a defendant's use of a plaintiff's mark is—or is not—"likely to cause confusion" in the minds of consumers.<sup>109</sup> Thus, if the question in *Tam* had not been whether the USPTO could constitutionally reject The Slants' mark for disparaging persons of Asian origin but instead whether the mark was likely to cause confusion with the Boston-based Irish folk band Sláinte,<sup>110</sup> the parties might well have introduced survey evidence to substantiate their claims. Survey evidence also plays an important role in the resolution of false advertising claims. As one court has noted, when "we are asked to determine whether a statement acknowledged to be literally true and grammatically correct nevertheless has a tendency to mislead," the court's own reaction "is at best not determinative and at worst irrelevant."<sup>111</sup> The relevant question in those cases is: "what does the person to whom the advertisement is addressed find to be the message?"<sup>112</sup> Survey evidence is the "customary way of proving significant actual deception" in those cases.<sup>113</sup>

The use of surveys in court is not, however, limited to trademark and false advertising cases. Indeed, courts consult survey evidence in the First Amendment context already. The Supreme Court's three-part test for determining whether speech is obscene—and therefore unprotected by the Free Speech Clause—requires the adjudicator to determine "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."<sup>114</sup> One court has observed that "[e]xpert testimony based on a public opinion poll is uniquely

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<sup>107</sup> See Papandrea, 110 Nw U L Rev at 1219 (cited in note 35).

<sup>108</sup> For a comprehensive overview, see Shari Seidman Diamond, *Reference Guide on Survey Research*, in *Reference Manual on Scientific Evidence* 359, 363–67 (National Academies, 3d ed 2011).

<sup>109</sup> 15 USC §§ 1114(1), 1125(a); see *Exxon Corp. v Texas Motor Exchange*, 628 F2d 500, 506 (5th Cir 1980) ("Parties often introduce survey evidence in an effort to demonstrate that there is a likelihood of confusion.").

<sup>110</sup> Sláinte, <http://www.slaintetheband.com> (last visited Nov. 5, 2017).

<sup>111</sup> *American Brands, Inc. v R. J. Reynolds Tobacco Co.*, 413 F Supp 1352, 1357 (SDNY 1976).

<sup>112</sup> *Id.*

<sup>113</sup> *First Health Group Corp. v United Payors & United Providers, Inc.*, 95 F Supp 2d 845, 848 (ND Ill 2000).

<sup>114</sup> *Miller v California*, 413 US 15, 24 (1973).

suitied to a determination of community standards,” and “[p]erhaps no other form of evidence is more helpful or concise.”<sup>115</sup>

Survey evidence will not be relevant to every First Amendment question; it is only useful if the legal inquiry focuses on the actual views of members of the public.<sup>116</sup> For example, in deciding whether a regulation of protected speech serves a compelling government interest, survey evidence might be of limited utility because the doctrinal inquiry does not depend on whether members of the public *perceive* the government interest at stake to be compelling. The claim that survey evidence should be consulted in government speech cases is thus contingent on the premise that the distinction between government speech and private expression should depend on the *actual* views of members of the public.

Some have suggested a different yardstick in government speech cases. For example, Justice Souter said in *Sumnum* that “the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech.”<sup>117</sup> If that is the measure of government speech, then surveys of less-than-fully-informed observers would seem to shed little light on doctrinal questions. Yet in our view, Justice Souter’s “reasonable and fully informed observer” standard has little to recommend it. The fully informed observer would never misattribute private speech to the government or vice versa because the observer is, by hypothesis, fully informed about the message’s source. Our concern—and, we think, the concern that is normatively relevant to the government speech doctrine—is how a less-than-fully-informed observer might react to a message of muddled origin.

### 3. *Concerns About the Use of Survey Evidence*

There are, to be sure, several reasons to pause before embracing survey evidence in government speech cases. We canvas those concerns here and explain how some—though not all—can be resolved through real-world demonstrations.

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<sup>115</sup> *Saliba v State*, 475 NE2d 1181, 1185 (Ind Ct App 1985); see also *Commonwealth v Trainor*, 374 NE2d 1216, 1220 (Mass 1978) (“A properly conducted public opinion survey, offered through an expert in conducting such surveys, is admissible in an obscenity case if it tends to show relevant standards in the Commonwealth.”). Such surveys can be conducted without themselves falling afoul of obscenity laws by phrasing questions in the abstract, such as whether respondents think it is acceptable for “movie theaters, restricting attendance to adults only, to show films that depict nudity and actual or pretended sexual activities,” *Saliba*, 475 NE2d at 1191; see *Trainor*, 374 NE2d at 1222.

<sup>116</sup> This may be true in a number of First Amendment contexts beyond government speech and obscenity cases. See, for example, Diamond & Koppelman, 60 Md L Rev at 716 (cited in note 19) (proposing surveys in Establishment Clause cases); Robert Post, *Compelled Commercial Speech*, 117 W Va L Rev 867 (2015) (arguing that compelled commercial speech raises no more constitutional concern than government speech based on the empirical claim about public perception that “most members of the public recognize government mandated labels and reports when they see them”).

<sup>117</sup> 555 US at 487.

One concern is cost. Our own experience from several such surveys is that nationally representative panels assembled by survey research firms generally cost a few dollars per respondent; a thousand-person sample might thus cost several thousands of dollars (though well below \$10,000). This is not a negligible amount for many litigants; moreover, parties to trademark cases sometimes spend even larger sums on surveys (including the cost of survey experts), suggesting that the costs could rise well above the four-digit range.<sup>118</sup> Yet even without the use of surveys, government speech litigation is an expensive enterprise. For example, the religious group Sumnum requested attorneys' fees of more than \$69,000 arising from the district court stage of monument-related litigation parallel to the Pleasant Grove City case in the mid-2000s.<sup>119</sup> More recently, a municipality in California was awarded nearly \$230,000 in attorneys' fees and court costs resulting from its (successful) defense against a First Amendment challenge in state court involving government speech issues.<sup>120</sup> That tab only increases at higher levels of appellate review: hourly rates for prominent members of the Supreme Court bar reportedly fall in the \$1,100 to \$1,800 range.<sup>121</sup> While none of this meant to trivialize the real costs that parties—especially less affluent parties—would bear in conducting rigorous surveys, it does suggest that insofar as the use of survey evidence can reduce uncertainty in government speech cases, the resulting reduction in other litigation costs may make a turn toward survey evidence economical in the long run.

A second concern, and one that is harder to address in the abstract, is whether members of the public can answer questions about government speech in a meaningful way.<sup>122</sup> Asking an ordinary American whether federal registration of a trademark “convey[s] a government message”<sup>123</sup> may be like asking him or her whether the Higgs field has a non-zero constant value in vacuum: the terms of the question are gobbledygook.<sup>124</sup> We defer in-depth discussion of this concern to Part III, where we take stock of the evidence we gather from a survey of a nationally representative sample. As a preview: We think our results suggest that individuals *do* understand these sorts of questions, and that their intuitions about what does and does not constitute government speech are not that far off from the intuitions of the justices.

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<sup>118</sup> See Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 Cal L Rev 351, 361 & n 53 (2014) (quoting trademark survey expert stating that costs typically fall in \$75,000-\$150,000 range).

<sup>119</sup> *Sumnum v Duchesne City*, 482 F3d 1263, 1276 (10th Cir 2007).

<sup>120</sup> *Vargas v City of Salinas*, 200 Cal App 4th 1331, 1338 (Cal Ct App 2011).

<sup>121</sup> See David Lat, *Top Supreme Court Advocates Charge How Much Per Hour?*, Above The Law (Aug. 10, 2015, 4:51 PM), <https://abovethelaw.com/2015/08/top-supreme-court-advocates-charge-how-much-per-hour>.

<sup>122</sup> See Papandrea, 110 Nw U L Rev at 1228 (cited in note 35) (expressing concern that the public perception factor will expand government speech due to mistaken attribution of speech to the government).

<sup>123</sup> *Tam*, 137 S Ct at 1760.

<sup>124</sup> Cf. *id* at 1759 (“[I]t is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means.”).

A third concern is that even if individuals understand the terms of the question, their answers will be influenced by doctrinally irrelevant factors. For example, individuals may be more likely to ascribe expression to the government if they agree with the message or if they anticipate that politicians will agree with the message. In that case, reliance on public perception in government speech cases may serve to shield popular views from Free Speech Clause scrutiny. To some extent, the government speech doctrine already produces this result because the views expressed by the government are likely to be those that a majority holds. We recognize this as a real concern both with regard to the government speech doctrine in general and with regard to the use of survey evidence specifically, though we will suggest several ways that surveys can mitigate this worry.

A fourth concern is in some respects the flipside of the third: not that individuals will be influenced by doctrinally irrelevant factors, but that individuals will be influenced by the Court's own decisions. If the Supreme Court holds that a particular form of expression constitutes government speech, then individuals who are aware of the Court's decision may update their priors and subsequently say that any similar form of expression also constitutes government speech. This concern is analogous to the "circularity problem" in Fourth Amendment law, where the Court relies on "reasonable expectations of privacy" to determine whether a search has occurred.<sup>125</sup> If an individual's reasonable expectations of privacy are influenced by Fourth Amendment doctrine, then the Court's later decisions may be partly determined by its earlier ones.<sup>126</sup>

We do not think that the circularity concern is fatal to our proposal. As a preliminary matter, it is not clear that circularity—if established—would be a problem for government speech doctrine. As long as individuals identify government speech as such, then the government cannot launder its message through private speakers and government officials cannot escape accountability for government speech. Thus, the checks on government speech that arise when public perceptions are accurate do not depend on whether public perceptions are endogenous to judicial decisions.<sup>127</sup> Moreover, we find little evidence that survey respondents pay close attention to Supreme Court decisions. A majority of respondents reported that they had not heard of *Sumnum*, *Sons of Confederate Veterans*, and *Tam*, and those that said they had heard

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<sup>125</sup> See *Katz v United States*, 389 US 347, 361 (1967) (Harlan, J, concurring).

<sup>126</sup> See Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U Chi L Rev 1747 (2017).

<sup>127</sup> To elaborate: Imagine that the Court held that specialty license plate designs were government speech, and that members of the public therefore attributed those designs to the state. Government officials would not be able to disguise their own messages as private expression (because members of the public would understand license plates to be government speech), and they would have to answer to the electorate for those designs. Now imagine instead that the Court held that specialty license plate designs were private speech, and that members of the public therefore did not attribute such designs to the state. Specialty license plate designs would thus be subject to the viewpoint-neutrality rule that is generally applicable to private expression.

about the cases did no better than a coin flip when asked about the results.<sup>128</sup> We also take solace in Matthew Kugler and Lior Strahilevitz's findings regarding circularity in the Fourth Amendment context: they report only a slight and temporary change in public perceptions regarding the privacy of cell phone searches following the Supreme Court's landmark 2014 decision in *Riley v California*.<sup>129</sup>

A fifth concern relates not to the worry that individuals will be influenced by past Supreme Court decisions but that they may be influenced by the upcoming case. If, for example, the citizens of Pleasant Grove City (population 33,509)<sup>130</sup> favor the city's position in *Summum*, and if they understand that identifying statues in Pioneer Park as government speech will advance the city's cause, then reliance on survey evidence drawn from Pleasant Grove City runs the risk of transforming government speech cases into adjudication by Gallup poll. Yet survey designers can take several steps to allay this strategic-response concern. One is to ask potential respondents whether they have heard of the pending case and to exclude those who have. Another is to draw respondents from a larger (perhaps national) pool, where it is less likely that individuals will have heard of a case that is especially salient in a particular jurisdiction. Still another is to vary the facts presented in the survey just enough that the fact pattern is not immediately recognizable: e.g., instead of asking whether a privately donated Ten Commandments statue in Pioneer Park is government speech, the survey might ask whether a privately donated statue featuring lyrics of the John Lennon song "Imagine" in New York's Central Park is government speech.<sup>131</sup> Answers to the latter query would still shed light on the public perception question in *Summum*: whether members of the public who observe donated monuments on public land "routinely" interpret them as conveying a message on the government's behalf.<sup>132</sup>

A sixth concern relates to line-drawing: What percentage of respondents must believe that a particular expression is government speech for

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<sup>128</sup> Overall, 63% of respondents said they did not know how *Summum* was resolved; 56% said the same about *Sons of Confederate Veterans*; and 59% said that they did not know the result in *Tam*. We asked respondents who claimed that they *did* know how the Court resolved those cases to tell us whether the expression in question was held to be government speech or private speech. Of that group, 48% correctly answered "government speech" in *Summum*; 46% correctly answered "government speech" in *Sons of Confederate Veterans*; and 58% correctly answered "private speech" in *Tam*.

<sup>129</sup> See *Riley v California*, 134 S Ct 2473 (2014) (holding that police cannot search digital information on an arrestee's cell phone without a warrant); Kugler & Strahilevitz, 84 U Chi L Rev at 1781 (cited in note 126) (reporting results from multi-wave survey indicating that expectations of privacy with respect to cell phones returned to pre-*Riley* levels within one year after decision).

<sup>130</sup> See US Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016* Population Estimates, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last updated May 2017).

<sup>131</sup> Cf. *Summum*, 555 US at 474–75 (discussing the "Imagine" statue as another example of government speech).

<sup>132</sup> See *id* at 471.

the speech to qualify as such? A similar question arises in the trademark confusion context: What percentage of consumers must confuse the defendant's products with the plaintiff's before the defendant will be held liable for trademark infringement? Figures over 25% will generally support a likelihood-of-confusion finding, though plaintiffs have prevailed on the basis of much weaker evidence as well.<sup>133</sup> One approach is to use a set of controls: examples of expression that no court would consider to be government speech, as well as examples that virtually any jurist could consider to be government speech. For instance, if members of the public are no more likely to say that federal registration of a trademark constitutes government speech than that a billboard on private property constitutes government speech, then that fact would be powerful evidence in support of the Court's view in *Tam*.<sup>134</sup> By contrast, if members of the public are no less likely to say that trademark registration constitutes government speech than that the text engraved on the Lincoln Memorial does, then that would be equally powerful evidence against the Court's position.<sup>135</sup> The specific threshold courts demand may depend on how they balance the dangers of viewpoint discrimination against the harm of constraining the government's ability to say what it wants. But in any case, we think courts will be aided by rigorous evidence of how public perception of the kind of speech at issue compares with perception of other expression. Resorting to survey evidence does not remove the need for normative judgment in interpreting those results.

Last but certainly not least, the usefulness of survey evidence in any case will depend upon the quality of the survey and its conformance to social-scientific best practices. In federal court, methodological issues generally will be addressed through adjudication of a *Daubert* motion on admissibility.<sup>136</sup> Federal judges routinely (if imperfectly) evaluate the reliability of survey methodologies in the trademark context.<sup>137</sup> We see no reason why the challenge of assessing

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<sup>133</sup> See McCarthy § 32:188 (cited in note 17).

<sup>134</sup> Diamond and Koppelman offer this suggestion as part of their proposal for using survey evidence in Establishment Clause cases. See Diamond & Koppelman, 60 Md L Rev at 752 (cited in note 19) ("If respondents were also asked precisely the same questions about a display that is widely accepted by the courts as indicating no religious endorsement (e.g., a sign saying 'Welcome to Los Angeles') and twenty percent reported a perception of state endorsement of particular religious views, that twenty percent would properly be attributed to the effects of guessing or the particular wording of the question, and not to the allegedly infringing display.").

<sup>135</sup> This approach would help address the concern of Papandrea, 110 Nw U L Rev at 1226-34 (cited in note 35), that mistaken perceptions will cause an expansion of the government speech defense.

<sup>136</sup> See *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 593-95 (1993) (court should consider whether evidence relies on falsifiable methodology, whether theory or technique has been subject to peer review, what the likely error rate is, and whether methodology is generally accepted in relevant scientific community).

<sup>137</sup> See McCarthy § 32:158 (cited in note 17). But see Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 Va L Rev 2099, 2131 (2004) ("Consumer surveys are the best evidence of secondary meaning, but surveys are difficult to design properly and expensive to conduct. . . . Judges also find it difficult to evaluate survey methodology, especially when confronted with competing expert testimony, and this increases the likelihood of error.").

the reliability of survey methods will be categorically more difficult in the government speech context. Of course, the stakes may be higher when survey evidence will be used to inform a constitutional holding than when used only to resolve a fact-specific dispute in an individual case, and so the risk of manipulation may be more acute. But even this much is not clear—the stakes in cases such as *Summum* and *Sons of Confederate Veterans* are in some respects far greater and in other respects rather paltry compared to a multimillion-dollar trademark battle. Moreover, manipulation is a risk even under the status quo: lawyers and jurists who assert that members of the public do or do not perceive expression to be government speech are no doubt influenced in their claims by their own preferences regarding the case outcome. The use of survey evidence has the virtue of subjecting such claims to falsification. When compared with the current method of assessing public perception—which often entails armchair speculation colored by ideological motivation—we think survey evidence is a substantial improvement.

## II. Surveying the Public About Government Speech

Some of the concerns limned above cannot be resolved in the abstract. Most significantly, the concern that individuals will be unable to answer questions about government speech in a coherent fashion can be refuted only by demonstration.<sup>138</sup> To that end, and to provide a first look at how public perception interacts with government speech doctrine, we conducted a proof-of-concept survey based on the scenarios at issue in *Summum*, *Sons of Confederate Veterans*, and *Tam*. Here we describe our survey methodology, followed by the results.

### A. Methodology

The survey was administered online in October 2017 to a nationally representative sample of 1223 respondents recruited by Survey Sampling International (SSI), as well as in September 2017 to a pilot group of 503 respondents recruited through Amazon's Mechanical Turk (MTurk) platform. Appendix Table A1 shows the demographic breakdown of each sample compared with the US population.<sup>139</sup> In this section, we present and discuss only the SSI results; Appendix Table A3 and Figures A1–A6 show that the results were similar for the MTurk sample, except that respondents were

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<sup>138</sup> See text at notes 123–124.

<sup>139</sup> Table A1 shows that the SSI sample closely matches the US population in terms of gender, age, race, and ethnicity but is somewhat more highly educated. The MTurk sample was more male, young, and white (non-Hispanic) than the national population, and even more highly educated than the SSI sample. For example, the percentage of the population age 18 and over with a bachelor's degree is 19%, compared with 23% for the SSI sample and 38% for the MTurk sample.

consistently less likely to view all scenarios as government speech. The survey instrument and datasets are available online.<sup>140</sup>

Each respondent saw four scenarios involving potential instances of government speech: (1) a statue in a city park (as in *Summum*),<sup>141</sup> (2) a specialty state license plate (as in *Sons of Confederate Veterans*),<sup>142</sup> (3) registration of a federal trademark (as in *Tam*),<sup>143</sup> and (4) a private billboard that is visible from a public road (as a control that is clearly not government speech). Each scenario was randomly assigned to a message with a different substantive content: (1) the Ten Commandments (as in *Summum*),<sup>144</sup> (2) either an atheist or Muslim message (as a contrasting religious message), (3) either a pro-life or pro-choice message (as in *ACLU v Tennyson*, a Fourth Circuit decision applying *Sons of Confederate Veterans*),<sup>145</sup> and (4) either a corporate (Mickey Mouse) or patriotic (Abraham Lincoln) message. Thus, for example, one respondent might see the following four scenarios:

1. A city park contains 15 permanent statues. One of the statues is a Ten Commandments monument. Do you think the placement of the monument in the park indicates that the city government endorses the monument's message?
2. Drivers may choose between standard state license plates with the state motto or a variety of specialty license plates. One of the specialty options is a license plate with a Muslim symbol. Do you think the availability of this specialty license plate indicates that the state government endorses the license plate design's message?
3. A trademark is a word, phrase, or symbol that identifies brands or products (like Coca-Cola®, Target®, or Nike®). The federal government registers trademarks (as indicated by the ® symbol). One of the trademarks that the government has registered is a trademark for a pro-choice slogan submitted for use on T-shirts. Do you think the registration of this trademark indicates that the government endorses the trademark's message?
4. Disney purchases billboard space from a private company to display a billboard with a picture of Mickey Mouse. Do you think the visibility of this billboard from public roads indicates that the government endorses the billboard's message?

A second respondent might then see a statue with statements supporting atheism, a pro-life specialty license plate, an Abraham Lincoln trademark registration, and a Ten Commandments billboard.

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<sup>140</sup> [Before publication, we will upload the final versions of the data and codebook to <https://dataverse.harvard.edu>.]

<sup>141</sup> 555 US at 464.

<sup>142</sup> 135 S Ct at 2243–44.

<sup>143</sup> 137 S Ct at 1751.

<sup>144</sup> 555 US at 464.

<sup>145</sup> 815 F3d at 184–85; see note 102 above.

The scenarios also randomly varied in the specific details provided: for the statue, license plate, and trademark conditions, respondents were given (1) the basic fact patterns listed above, (2) additional information about private involvement (i.e., that private organizations donated the statues, designed the license plates, and submitted the trademarks), (3) additional information about government selectivity (i.e., that the government must approve and has rejected park statues, license plate designs, or trademark registrations in the past), or (4) both information about private involvement and government selectivity.

The specific question also randomly varied, with respondents being asked (1) whether the respondent “associate[s]” the message with the government,<sup>146</sup> (2) whether the government’s action indicates that it “endorses” the message it issue,<sup>147</sup> or (3) whether the government’s action “conveys a message on [its] behalf.”<sup>148</sup> These question forms track the various ways that the Supreme Court has framed the government speech inquiry. For each question form, respondents were given the same four choices: “Definitely not,” “Probably not,” “Definitely yes,” “Probably yes.”<sup>149</sup> For example, variations on the fact pattern involving a Ten Commandments statue in a city park included the following:

1. A city park contains 15 permanent statues. One of the statues is a Ten Commandments monument. Do you think the placement of the monument in the park indicates that the city government endorses the monument’s message?
2. A city park contains 15 permanent statues, which were donated by private groups or individuals. One of the statues is a Ten Commandments monument donated by a private organization. Do you think the placement of the monument in the park conveys a message on the city government’s behalf?
3. A city park contains 15 permanent statues. The city government must approve new statues, and it has rejected proposed statues in the past. One of the approved statues is a Ten Commandments monument. Do you associate the monument’s message with the city government?

Table 1 summarizes this variation in scenarios, showing that each scenario will involve one of four mediums, one of seven messages, one of three

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<sup>146</sup> Cf. *id.*, quoting *Sumnum*, 555 US at 471 (“[L]icense plates are, essentially, government IDs. And issuers of ID ‘typically do not permit’ the placement on their IDs of ‘message[s] with which they do not wish to be associated.’”).

<sup>147</sup> Cf. *Sons of Confederate Veterans*, 135 S Ct at 2249 (“[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.”).

<sup>148</sup> Cf. *id.*, quoting *Sumnum*, 555 US at 471 (“‘[P]ersons who observe’ designs on IDs ‘routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.’”).

<sup>149</sup> These four responses were then numerically coded as  $-1.5$ ,  $-0.5$ ,  $0.5$ ,  $1.5$ , so that each jump is 1.0 apart on our “government speech” scale.

informational conditions, and one of three question forms.<sup>150</sup> To reiterate, each respondent saw all four mediums (in a random order), each with a different message. The added information was randomly chosen for each statue, license plate, and trademark registration scenario independently (so one respondent might see information about private involvement for all three of these scenarios, and another might see three different variations). Each respondent always saw the same question form for all four of their scenarios.

**Table 1. Variation in Survey Scenarios**

Medium	Content	Added Information	Question Form
1. statue in park ( <i>Summum</i> )	1. 10 Commandments	1. none	1. associate with gov't?
2. specialty license plate ( <i>Sons of Confederate Veterans</i> )	2. atheism	2. private involvement	2. gov't endorses?
3. trademark registration ( <i>Tam</i> )	3. Muslim	3. government selectivity	3. conveys a message on gov't's behalf?
4. private billboard	4. pro-life	4. both	
	5. pro-choice		
	6. Mickey Mouse		
	7. Lincoln		

Finally, participants were asked for their views on the four messages they saw—the Ten Commandments, atheism or the Muslim religion, abortion, and Disney or Lincoln, and for demographic details.

## B. Results

Based on Supreme Court government speech jurisprudence, one would expect the medium of speech to matter significantly to public perceptions, with the expected ordering from most to least likely to be viewed as government speech being: (1) statue in the park, (2) specialty license plate, (3) trademark registration, and (4) private billboard. As discussed in Part I, the Supreme Court unanimously held in *Summum* that the placement of a monument in a city part is government speech.<sup>151</sup> The Court split 5–4 in *Sons of Confederate*

<sup>150</sup> The survey contained one additional variation, although the results are not presented below: We wanted to test whether views on trademark registration varied if the trademark at issue was one that might be denied registration under the prohibition on “immoral” or “scandalous” marks in 15 USC § 1052(a), which was at issue in a Federal Circuit case that was decided after our survey was completed. See *In re Brunetti*, 2017 WL 6391161 (Fed Cir Dec 15, 2017) (holding the bar on immoral or scandalous marks to be unconstitutional). Thus, for the half of respondents whose trademark scenario involved a religious message (Ten Commandments, atheist, or Muslim), these respondents were further randomized into either the normal condition (as above) or a mark that would likely be viewed as “immoral” or “scandalous”: “Fuck [the message at issue].” This variation did have large effects on views, but we were averaging over a small number of respondents (fewer than 80 for the atheism and Muslim conditions), and the results were not statistically significant. Because there was no parallel to this “scandalous” condition for the billboard, license plate, and statue conditions, or for the pro-life, pro-choice, Mickey Mouse, and Lincoln messages, the results from the scandalous trademark scenarios are omitted from the figures and regressions presented below.

<sup>151</sup> 555 US at 464. Justice Souter only concurred in the judgment but agreed that the monument is government speech. *Id.* at 485 (Souter, J, concurring in the judgment).

*Veterans*, with Justice Breyer's opinion for the Court holding that specialty license are government speech,<sup>152</sup> and Justice Alito's dissent arguing that the public does not in fact associate license plate designs with the state government.<sup>153</sup> In *Tam*, a unanimous Court held that federal registration does not make a trademark government speech.<sup>154</sup> And presumably a private billboard visible from a public highway is an even easier case of purely private speech; Justice Alito's *Sons of Confederate Veterans* dissent gave the example of a *state* selling advertising space on billboards along public highways as an example of the kind of absurd scenario that he thought might be government speech under the majority's logic.<sup>155</sup>

As shown in Figure 1, the survey results suggest that the public's actual views roughly accord with the Court's speculations about those views.<sup>156</sup> Respondents were mostly likely to view the statue in the park as government speech—that is, as conveying a message on the government's behalf or indicating endorsement or association—and were least likely to view the private billboard as government speech. In the middle, license plates were more likely to be viewed as government speech than federally registered trademarks, but the difference is small; neither mean is statistically significantly different from zero, although the difference between the means is significant (one-tailed  $p = 0.049$ ). While the *Sons of Confederate Veterans* and *Tam* majority opinions asserted that the public views the government to be associated with specialty license plates but not registered trademarks,<sup>157</sup> these results suggest that that empirical question is closer than the Court acknowledged.

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<sup>152</sup> 135 S Ct at 2253.

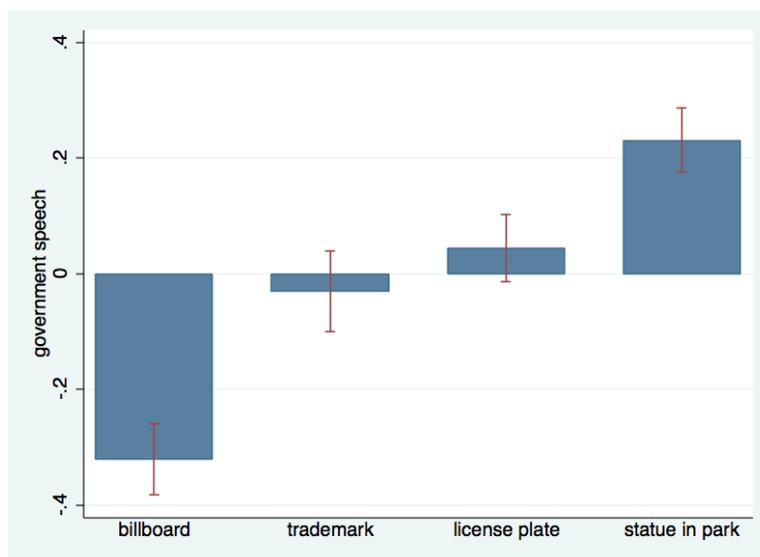
<sup>153</sup> *Id* at 2255 (Alito, J, dissenting).

<sup>154</sup> 137 S Ct at 1760. Other portions of Justice Alito's opinion attracted only a plurality of justices, but the discussion of government speech in Part III–A was unanimous.

<sup>155</sup> 135 S Ct at 2256 (Alito, J, dissenting).

<sup>156</sup> Figure 1 shows the mean of the “government speech” variable, as described above in note 149 (averaging over the three question forms, with the four responses to each question coded as  $-1.5$ ,  $-0.5$ ,  $0.5$ , and  $1.5$ ), with error bars representing 95% confidence intervals. The regression results in Table A2, in which the billboard is the omitted medium, show that this effect of variation in medium on public perceptions persists when controlling for other factors.

<sup>157</sup> See text at notes 71–74, 80–81.



**Figure 1. Effect of varying medium of speech on public perception as government speech**

As explained in Part I, the Supreme Court has also emphasized the relevance of government *selectivity* in evaluating whether something constitutes government speech. In *Sumnum*, it was important that cities “have exercised selectivity” and have “select[ed] the monuments that portray what they view as appropriate for the place in question.”<sup>158</sup> This became the third factor of the *Sons of Confederate Veterans* test: whether the state “maintains direct control over the messages conveyed.”<sup>159</sup>

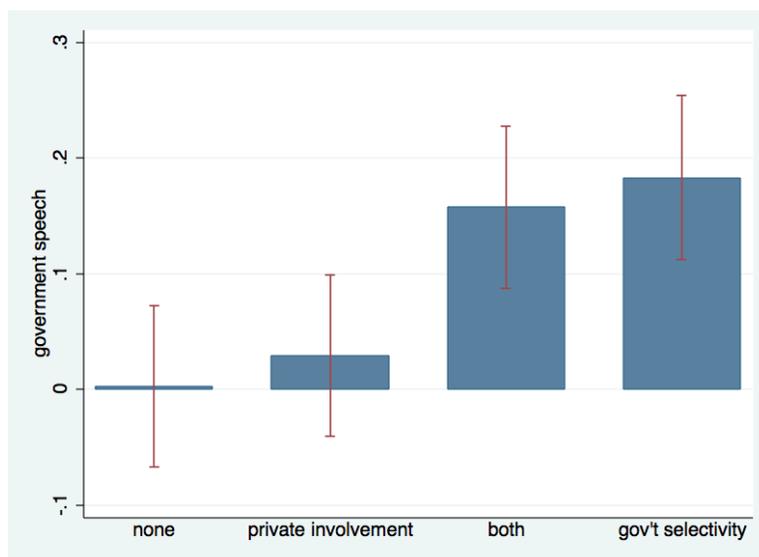
Figure 2 shows that the public, like the Court, is more likely to view a message as government speech when it is clear that the government is selective in allowing messages of that variety to be conveyed. Evidence that the government is selective in which statues, specialty license plates, or registered trademarks it allows made it more likely that respondents would view the scenario they encountered as conveying a message on the government’s behalf or indicating government endorsement of or association with the message. Evidence that these messages were submitted by private parties seemed somewhat less important: it caused a small and statistically insignificant increase in whether respondents viewed the message as government speech, though a larger decrease for the MTurk pilot sample.<sup>160</sup> But information about selectivity, whether combined with information about private involvement or not, caused a large and statistically significant increase in whether the message was viewed in government speech.<sup>161</sup>

<sup>158</sup> 555 US at 471–71.

<sup>159</sup> 135 S Ct at 2249.

<sup>160</sup> Appendix Figure A2 shows that for the MTurk sample, information about private involvement decreased the likelihood that the message would be viewed as government speech by just over 0.1, one-tailed  $p = 0.07$ .

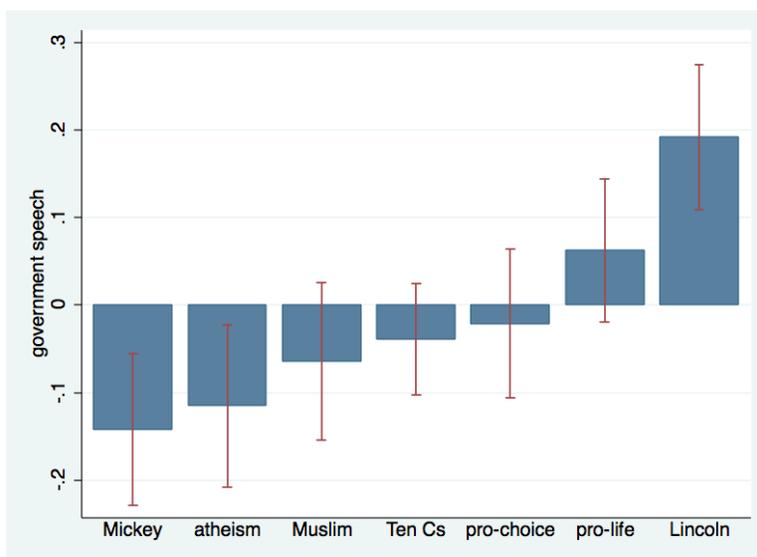
<sup>161</sup> The difference in the mean government speech outcome variable for respondents who saw information about selectivity vs. not was 0.15 ( $p < 0.01$ ). For the MTurk sample, it was 0.25 ( $p < 0.01$ ).



**Figure 2. Effect of providing additional information about private involvement or government selectivity for the statue, license plate, and trademark scenarios**

While medium and government selectivity are clearly relevant to the government speech question under existing doctrine, the *viewpoint* expressed by the message is not. Indeed, it would be ironic for a Court that generally prohibits viewpoint discrimination to have a doctrine that is viewpoint discriminatory.

But our results show, perhaps unsurprisingly, that the message (as distinct from the medium) does affect perceptions of whether the message is government speech. Figure 3 shows the response across the seven messages we tested, averaging across the other sources of variation. Respondents were most likely to view scenarios as government speech when the message involved Abraham Lincoln, and were least likely to ascribe Mickey Mouse messages to the government. Interestingly, respondents were more likely to credit the government with abortion-related messages—particularly pro-life messages—than religious ones. Among the religious messages, the Ten Commandments was the most likely to be considered government speech, but the difference between it and the atheist messages was significant only at the 10% level.



**Figure 3. Effect of varying content on public perception as government speech**

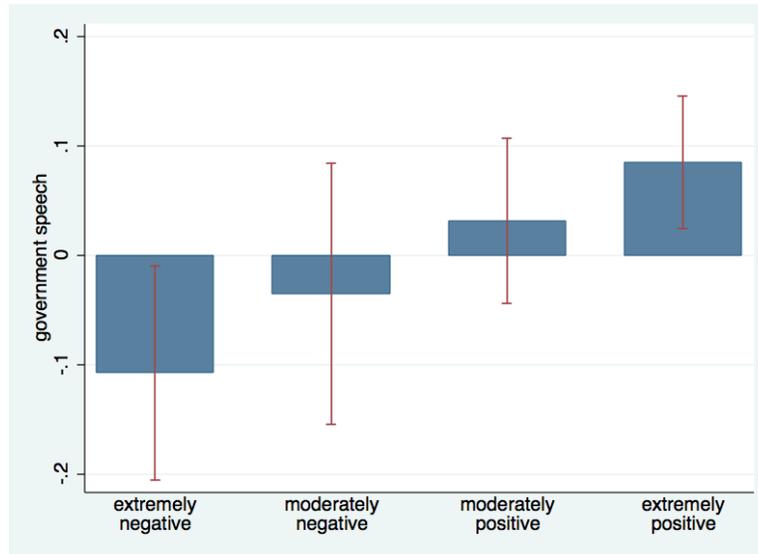
We think there are at least two reasons that the message itself might affect public perceptions. First, it might simply seem more plausible that the government would be endorsing one message over the other. For example, Abraham Lincoln is already the subject of well-known examples of government speech such as the Lincoln Memorial, Mount Rushmore, the five-dollar bill, and—most ubiquitously—the penny. In contrast, it might seem less likely that the government would endorse a corporate message like Disney’s Mickey Mouse. And respondents who recall something about separation of church and state from their high school civics classes might be skeptical that religious messages could constitute government speech.

Second, respondents might be more willing to associate messages with the government when they agree with those messages themselves. Lincoln is one of the universally liked US presidents;<sup>162</sup> atheists and Muslims are the religious groups toward which the US public holds the most negative views.<sup>163</sup> To test this second hypothesis, we also asked respondents at the end of the survey for their views on the messages at issue in the four scenarios they saw. Table A2 shows that for the nationally representative SSI respondents, this measure of “Agreement” with the message was positively correlated with the

<sup>162</sup> See *Washington, Lincoln Most Popular Presidents: Nixon, Bush Least Popular*, Rasmussen Reports (July 4, 2007), at [http://www.rasmussenreports.com/public\\_content/politics/people2/2007/washington\\_lincoln\\_most\\_popular\\_presidents\\_nixon\\_bush\\_least\\_popular](http://www.rasmussenreports.com/public_content/politics/people2/2007/washington_lincoln_most_popular_presidents_nixon_bush_least_popular) (reporting that Lincoln is viewed favorably by 92% of the general public, second only to George Washington at 94%); Robert W. Merry, *America’s Greatest President: Abraham Lincoln*, *Natl Interest* (Feb. 16, 2015), <http://nationalinterest.org/feature/americas-greatest-president-abraham-lincoln-12957> (“Whenever academics and scholars tickle their fancy by putting forth yet another poll of historians on presidential rankings, there is little doubt about which president will top the list—Abraham Lincoln.”).

<sup>163</sup> See *Americans Express Increasingly Warm Feelings Toward Religious Groups*, Pew Research Center (Feb. 15, 2017), at <http://www.pewforum.org/2017/02/15/americans-express-increasingly-warm-feelings-toward-religious-groups>.

assessment of whether it is government speech, and that this correlation is statistically significant at the 1% level. This result is driven by respondents who felt the most strongly about the message—those who stated that they had “extremely” or “moderately” negative or positive views—and the results for these respondents are shown in Figure 4.<sup>164</sup>



**Figure 4. Effect of respondents' views on the message**

Finally, note that for all of the above results, the responses from our three question forms were combined into one average “government speech” outcome variable. Figure 5 separates the results from the three questions and illustrates that the precise question wording can have a large effect on responses. As explained above, respondents were asked (1) whether they *associate* the message with the government (e.g., “Do you associate the specialty license plate design’s message with the state government?”); (2) whether they think the government *endorses* the message (e.g., “Do you think the availability of this specialty license plate indicates that the state government endorses the license plate design’s message?”); or (3) whether they think the scenario *conveys a message* on the government’s behalf (e.g., “Do you think the availability of this specialty license plate conveys a message on the state government’s behalf?”).

Figure 5 shows that all else equal, respondents are less likely to say that they associate a given message with the government than that the government endorses the message or that the scenario conveys a message on the government’s behalf, an effect that was even stronger for the MTurk sample (as shown in Appendix Figure A5). We also observed a significant difference between the “conveys a message” and “endorses” responses, but only for the SSI sample. Although the Supreme Court has emphasized the importance of public perception in government speech cases, it has not clarified which (if any) of these phrasings is the relevant question. Our results illustrate, at the very

<sup>164</sup> This effect was not observed for the MTurk respondents.

least, that government speech survey designers must pay attention to these differences in wording.

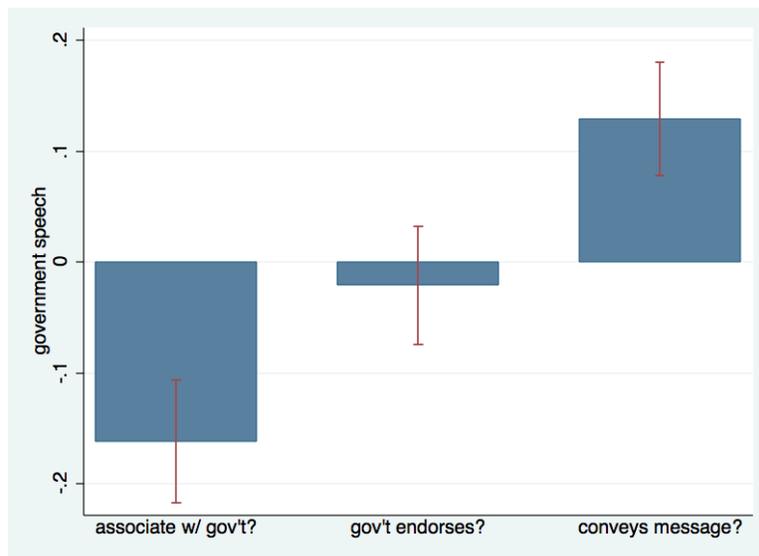


Figure 5. Effect of varying question form

In sum, our survey results support some of the Supreme Court's speculations about public perceptions of government speech, but they also show that the public can be swayed by details that should not matter to the doctrinal outcome, such as the content of the message at issue. As we will discuss further in Part III, we view this as a feature of survey evidence, not a bug: by relying on surveys that isolate the effect of a variable at interest from other distracting details, justices can prevent government speech doctrine from systematically favoring more sympathetic views.

### III. The Promise and Pitfalls of Survey Evidence

What, if anything, can we conclude from these results about the use of survey evidence in government speech cases—or, more generally, about the current state of the Court's government speech jurisprudence? While recognizing that reasonable minds may draw different inferences from the same data, we emerge from this exercise with five key takeaways.

The first, and perhaps most important, is that public perceptions of government speech roughly track the justices' speculations, except that *Tam* is a closer case from the audience's perspective than it is from the justices'. The ordinal ranking for medium of expression—with statues in public parks as the most likely to be considered government speech, followed by license plates, followed by federal registration of trademarks—matches the results in *Summum* (9-0), *Sons of Confederate Veterans* (5-4), and *Tam* (0-8). While we see this as an encouraging sign that members of the public can answer questions about government speech in a reasonably coherent way, others might think this is a strike against our proposal: after all, if the justices are already doing a

reasonably good job of estimating public perceptions of government speech based on intuition alone, why do we need surveys?

Our response is twofold. First, while the justices' conclusions are broadly consistent with our survey results, their explanations for those conclusions are—as emphasized in Part I—rather flimsy. Insofar as respect for the judiciary depends on well-reasoned opinions, the use of survey evidence can improve upon judicial *ipse dixit* even if it does not alter results. Second, while the justices were unanimous in *Sumnum* and *Tam*, lower court judges were not: the grant of certiorari in *Sumnum* was the outgrowth of a circuit split,<sup>165</sup> and the Federal Circuit's en banc decision below in *Tam* was divided.<sup>166</sup> Likewise, while a slight majority of the Court in *Sons of Confederate Veterans* and a slight majority of our respondents concluded that specialty license plate designs are government speech, six circuits came out the other way,<sup>167</sup> and the issue continues to spark disagreement among lower court judges.<sup>168</sup> The lower courts have also struggled to apply the public perception factor in other cases since *Sons of Confederate Veterans* in contexts ranging from exhibits<sup>169</sup> or rallies<sup>170</sup> on government property to actions by public schools.<sup>171</sup>

<sup>165</sup> See *Sumnum v Pleasant Grove City*, 483 F3d 1044 (10th Cir 2007).

<sup>166</sup> See *In re Tam*, 808 F3d 1321, 1375 (Fed Cir 2015) (Dyk, J, concurring in part and dissenting in part) (“[I]t has been questioned whether federal registration imparts the ‘imprimatur’ of the federal government on a mark, such that registration could be permissibly restricted as government speech. I believe that such action is justified.”).

<sup>167</sup> See Papandrea, 110 Nw U L Rev at 1216 n 129 (cited in note 35) (collecting citations).

<sup>168</sup> In *ACLU v Tennyson*, discussed at note 102, the dissenting judge argued that the “specifics” of North Carolina’s specialty license plate program “must impact the way the North Carolina public views its specialty plates” and distinguish the resulting perceptions from those in Texas. 815 F3d 183, 188 (4th Cir 2016) (Wynn, J, dissenting). And state supreme courts have disagreed on whether personalized vanity license plates are government speech. Compare *Commissioner of Indiana Bureau of Motor Vehicles v Vawter*, 45 NE3d 1200, 1202, 1205 (Ind 2015) (yes), with *Mitchell v Maryland Motor Vehicle Administration*, 148 A3d 319, 328 (Md 2016) (no).

<sup>169</sup> Compare *Vista-Graphics, Inc. v Virginia Department of Transportation*, 682 Fed Appx 231, 236 (4th Cir 2017) (“[W]e are confident that the public will associate the [informational tourism guides at state rest areas] with the Commonwealth of Virginia, regardless whether the government itself produces the guides.”); and *United Veterans Memorial & Patriotic Association of the City of New Rochelle v City of New Rochelle*, 72 F Supp 3d 468, 474–75 (SDNY 2014) (“[I]t is obvious that [a flag flying at a city-owned armory] would be regarded as government speech” because “flags, like monuments, are reasonably interpreted ‘as conveying [a] message on the property owner’s behalf.’”), affd 615 F Appx 693 (2d Cir 2015), with *Freedom from Religion Foundation v Abbott*, 2016 WL 7388401, \*5 (WD Tex) (“[A] reasonable person would not find the [Texas State] Capitol exhibits are the voice of the government.”).

<sup>170</sup> Compare *A.N.S.W.E.R. Coalition v Jewell*, 153 F Supp 3d 395, 412 (DDC 2016) (holding that government speech doctrine should shield the Trump Presidential Inaugural Committee’s exclusive access to areas traditionally used for inaugural protests because “the Inauguration Ceremony and Parade are ‘closely identified in the public mind with’ the United States government”), affd in part on other grounds, *A.N.S.W.E.R. Coalition v Basham*, 845 F3d 1199 (DC Cir 2017), with *Higher Society of Indiana v Tippecanoe County*, 858 F3d 1113, 1118 (7th Cir 2017) (“[R]easonable people would not attribute to the government the views expressed at protests and rallies on government property.”).

<sup>171</sup> Compare *Mech v School Board of Palm Beach County*, 806 F3d 1070 (11th Cir 2015) (concluding that observers would believe that a public school had endorsed banners for private businesses hung on its fences on the *Sumnum* theory that “government property is ‘often closely

The question of whether members of the public perceive expression to be government speech is not one that can be answered reliably on the basis of judicial intuition. The fact that the Court is 3-for-3, by our accounting, should not be grounds for great confidence in its ability to take the public's pulse.

A second takeaway is that, somewhat to our surprise, the fact that expression is generated by private parties does not seem to reduce the likelihood that members of the public will perceive that expression to be government speech. This finding provides some validation for the Court's decision to jettison the "traditional government agencies and officials" standard from *Keller*. Meanwhile, government selectivity does seem to influence whether members of the public perceive speech to be the government's. This finding suggests a way to harmonize the second and third factors in the three-factor *Sons of Confederate Veterans* test: factor three (whether the government can and does reject messages on the basis of content) is normatively relevant because it feeds into factor two (public perception). Indeed, the three-factor *Sons of Confederate Veterans* test arguably can be boiled down to a single inquiry: whether members of the public have understood and continue to understand the expression in question to be government speech.

A third takeaway is that message matters: members of the public are much more likely to perceive a Lincoln monument, license plate, or mark to be government speech than, say, an otherwise equivalent expression bearing the visage of Mickey Mouse. Somewhat more disconcertingly, members of the public are more likely to perceive speech to be the government's when they approve of that speech personally. The finding that members of the public appear to be influenced by this doctrinally irrelevant factor might be considered a problem for our proposal.

We see the matter differently. Judges, too, are influenced by the message as well as the medium in government speech cases. Consider the license plate controversy. When holding that license plates were government speech meant that the state could exclude a pro-life message, Republican-appointed judges on the Seventh,<sup>172</sup> Eighth,<sup>173</sup> and Ninth Circuits<sup>174</sup> said that license plates were private speech. When holding that license plates were government speech meant that the state could exclude a pro-choice message, Republican-appointed judges on the Sixth Circuit said that license plates were

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identified in the public mind with the government unit that owns the land"); and *Cambridge Christian School v Florida High School Athletic Association*, 2017 WL 2458314, \*8 (MD Fla) (asserting that use of public stadium loudspeaker for a pre-game prayer led by a Christian school in the state football playoffs would "be perceived as state endorsement of [the school's] religious message"), with *Gerlich v Leath*, 152 F Supp 3d 1152 (SD Iowa 2016) (dismissing anecdotal evidence that the public associated a student group's marijuana-related T-shirt design with the university "because the record shows almost no reaction to the Article [featuring the T-shirt] from the general public"), *affd*, 861 F3d 697 (8th Cir 2017).

<sup>172</sup> See *Choose Life Illinois, Inc. v White*, 547 F3d 853 (7th Cir 2008). Judge Terrence Evans, a Clinton appointee, joined his co-panelists in *Choose Life Illinois*, marking a departure from the partisan voting pattern observed elsewhere.

<sup>173</sup> See *Roach v Stouffer*, 560 F3d 860 (8th Cir 2009).

<sup>174</sup> See *Arizona Life Coalition Inc. v Stanton*, 515 F3d 956 (9th Cir 2008).

government speech (over the dissent of their Democrat-appointed colleague).<sup>175</sup> When the question came up in the Confederate flag context, every court of appeals judge who was initially appointed to the federal bench by a Democratic President and who weighed in on the question voted in favor of the view that license plates are government speech (in which case the Confederate flag plate could be excluded); all but one of the 10 court of appeals judges initially appointed to the bench by a Republican President who weighed in on the question voted in favor of the view that license plates are private speech.<sup>176</sup> The Supreme Court is not immune from ideologically inflected voting patterns on questions of government speech either. With the exception of Justice Thomas, who voted with the majority in *Sons of Confederate Veterans*, the rest of the Court followed the same partisan pattern as the circuits: Democratic-appointed justices voted for the view that license plates are government speech (and thus that Texas can exclude the Confederate plate), while Republican-appointed justices took the opposite position.

The fact that ideology influences judicial decisionmaking is nothing new. Yet for those who think that the ideological content of the message should not influence the result in government speech cases, survey evidence provides a promising path. For example, surveys can ask different subsets of respondents about pro-life and pro-choice plates—or about plates featuring the Confederate flags and plates featuring the face of Lincoln—in order to disentangle the effect of medium from the effect of message. And while we are not so naïve as to think that this strategy will mean that government speech cases can be resolved in an ideological vacuum, we think that well-constructed surveys can do some work in counteracting the effect of ideology on government speech decisions.

A fourth takeaway is that the question matters. The Supreme Court toggles among three different versions of the government speech inquiry: whether the public *associates* expression with the government;<sup>177</sup> whether the public understands the government to be *endorsing* expression;<sup>178</sup> and whether expression *conveys* a message on the government's behalf.<sup>179</sup> We find that respondents are more likely to say that the government “conveys” a message than that it “endorses” a message or that they “associate” a message with the government. This might strike some readers as surprising: “endorse” and “convey” are arguably stronger verbs than “associate.” On the other hand, we can imagine circumstances in which a speaker might convey a message and yet the listener would not associate the speaker with that message. (Mundanely: If

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<sup>175</sup> See *ACLU of Tennessee v Bredesen*, 441 F3d 370, 379–80 (6th Cir 2006).

<sup>176</sup> See *Sons of Confederate Veterans, Inc. v Commissioner of the Virginia DMV*, 305 F3d 241 (4th Cir 2002) (denying rehearing *en banc*); *Texas Division, Sons of Confederate Veterans, Inc. v Vandergriff*, 759 F3d 388 (5th Cir 2014), *rev'd sub nom, Sons of Confederate Veterans*, 135 S Ct 2239.

<sup>177</sup> See *Sumnum*, 555 US at 471 (“associated”); *Sons of Confederate Veterans*, 135 S Ct at 2251 (“associates”); *Tam*, 137 S Ct at 1760 (“associates”).

<sup>178</sup> See *Sons of Confederate Veterans*, 135 S Ct at 2249 (“endorsed”); *Tam*, 137 S Ct at 1758 (“endorsing”).

<sup>179</sup> See *Sumnum*, 555 US at 471–72 (“convey”); *Sons of Confederate Veterans*, 135 S Ct at 2246 (“convey”); *Tam*, 137 S Ct at 1760 (“convey”).

Daniel asks Lisa what time it is, Lisa might “convey” the answer “noon” but Daniel would not therefore “associate” Lisa with the lunch hour.)

Which of these verbs best captures the government speech inquiry depends in part on what interests the government speech doctrine is intended to protect. Insofar as the doctrine serves to shield the government from the risk that it will be associated with messages that it disavows, then asking whether respondents “associate” a message with the government would seem appropriate. Insofar as the doctrine serves to ensure that the government cannot launder its message through the mouths of private speakers, then asking whether the government “conveys” a message via the expression in question might be the better way to frame the inquiry. All of this serves to underscore the point that precision about the normative basis for government speech doctrine will inform the design of surveys.

Fifth and finally, we think our results should allay concerns that reliance on public perception in government speech cases will lead to a shrinking of First Amendment protections.<sup>180</sup> Members of the public are not systematically more likely than judges to perceive speech as emanating from the government. Moreover, the Court’s decisions do not appear to have a profound effect on public perception. Just over two years after the Court held in *Sons of Confederate Veterans* that license plate designs are government speech, our respondents were close to evenly divided on the question. And only three months after the Court held in *Tam* that trademark registration is not government speech, a substantial minority of respondents maintained the opposite view. The fear of a self-reinforcing cycle in which Court decisions drive the public to perceive more and more expression as government speech is not borne out here. While subsequent surveys will be useful in determining whether public perception is consistent across time, our results suggest that members of the public understand the category of government speech to be bounded.

Our results do not, of course, resolve all questions about public perception of government speech, nor do they allay all concerns about the use of survey evidence in government speech cases. We hope this is a first step toward a richer understanding of how the public perceives expression in the gray area between government and private speech, but ours is most certainly not the final word. Among other avenues of inquiry, future research might examine the role of government selectivity in more detail. Does it matter if over 99% of messages are approved by the relevant government entity (as for trademark registrations) versus 50% or less than 1%? Does it matter if the respondents are given a sense of the range of approved messages—such as knowing that the government has approved both pro-life and pro-choice messages—rather than only being asked to evaluate a single message? Future research also might examine whether public perceptions are consistent across jurisdictions and regions. Further data on this question could help parties and

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<sup>180</sup> See Papandrea, 110 Nw U L Rev at 1234 (cited at note 35) (“Under well-established First Amendment principles, the government is required to support the speech of private speakers. A focus on reasonable observers who erroneously believe this tolerance operates as endorsement threaten the future of free speech rights in this country.”).

courts assess whether the appropriate population for surveys used in litigation is local, regional, or national.

#### IV. Conclusion

It has been nearly a decade since a majority of the Court embraced public perception as a factor distinguishing government speech from private expression, and the justices have yet to offer a justification for that doctrinal turn or a reliable method for determining what public perceptions actually are. This article has sought to plug both holes. We have argued that a narrower conception of government speech—along the lines of the “traditional government agencies and officials” standard suggested in *Keller*—would fail to capture certain acts of collective self-definition that are important to the development of a democratic community. At the same time, a public perception test serves to police against message laundering while also ensuring that elected officials remain politically accountable for government speech. And although the Court’s application of the public perception has so far been ad hoc, we have suggested that reliance on survey evidence can channel and constrain the government speech inquiry so that case outcomes are determined by more than judicial guesswork.

As a proof of concept, we have conducted what is to our knowledge the first survey of a nationally representative sample on the subject of government speech. Our results provide a factual basis for certain elements of the Court’s government speech jurisprudence. Members of the public are indeed more likely to attribute statues in a public park to the government than to do the same with respect to trademark registration. Moreover, the fact that private parties generated a message does not significantly affect perceptions of government speech, though the fact that the government exercises selectivity with respect to messages does. We also find that members of the public—perhaps no differently than judges—are influenced by the content of messages as well as the medium, and that they are more likely to attribute to the government messages with which they agree.

Our results do not support calls for a revolution in government speech doctrine. More modestly, we suggest that survey evidence can supplant judicial *ipse dixit* in the application of the public perception factor, and that surveys can serve as checks on the government speech doctrine’s expansion. To be sure, distinguishing government speech from private expression will remain a difficult line-drawing exercise even with the help of survey data. But at the very least, the use of survey evidence can transform that line-drawing exercise from one that depends on judicial imagination into an empirically grounded inquiry.

## Appendix

**Table A1. Demographic Characteristics**

	# in MTurk Sample N=503	% of MTurk Sample	# in SSI Sample N=1223	% of SSI Sample	% of US Population <sup>181</sup>
<b>Gender</b>					
Male	278	55%	580	47%	49%
Female	225	45%	643	53%	51%
<b>Age</b>					
18–24	41	8%	196	16%	13%
25–34	203	40%	226	18%	18%
35–44	107	21%	219	18%	17%
45–54	85	17%	226	18%	18%
55–64	49	10%	177	14%	16%
65+	18	4%	179	15%	18%
<b>Race/Ethnicity</b>					
Non-Hispanic White	394	78%	786	64%	62%
Latino or Hispanic	23	5%	173	14%	17%
Black or African-American	32	6%	150	12%	12%
Asian or Pacific Islander	37	7%	55	4%	5%
Native American	0	0%	8	<1%	<1%
2 or More Races or Other	17	3%	51	4%	2%
<b>Educational Attainment</b>					
Less than high school	2	<1%	20	2%	12%
High school graduate	52	10%	277	23%	29%
Some college; no degree	122	24%	325	27%	19%
Associate's degree	59	12%	129	11%	10%
Bachelor's degree	191	38%	286	23%	19%
Master's degree	55	11%	137	11%	8%
Doctorate or professional	22	4%	49	4%	3%

<sup>181</sup> See *2011-2015 American Community Survey 5-Year Estimates*, US Census Bureau (2015), at [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_5YR\\_DP05&src=pt](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP05&src=pt) (gender, age, and race/ethnicity); *Educational Attainment in the United States: 2016*, US Census Bureau (2016), at <https://www.census.gov/data/tables/2016/demo/education-attainment/cps-detailed-tables.html> (education).

Table A2. Regression Results for SSI Sample

	1	2	3	4	5
<b>Medium</b>					
Statue	0.551*** (0.0422)	0.550*** (0.0418)	0.549*** (0.0418)	0.550*** (0.0403)	0.549*** (0.0403)
License Plate	0.365*** (0.0429)	0.364*** (0.0426)	0.364*** (0.0426)	0.364*** (0.0411)	0.364*** (0.0411)
Trademark	0.290*** (0.0473)	0.272*** (0.0470)	0.271*** (0.0469)	0.267*** (0.0448)	0.266*** (0.0447)
<b>Content</b>					
Lincoln		0.337*** (0.0599)	0.326*** (0.0598)	0.349*** (0.0577)	0.340*** (0.0576)
Pro-Life		0.191*** (0.0590)	0.257*** (0.0609)	0.195*** (0.0565)	0.251*** (0.0585)
Pro-Choice		0.139** (0.0600)	0.177*** (0.0607)	0.148** (0.0575)	0.181*** (0.0583)
Ten Cs		0.103* (0.0535)	0.0970* (0.0534)	0.108** (0.0510)	0.103** (0.0509)
Muslim		0.0725 (0.0617)	0.125** (0.0627)	0.0768 (0.0591)	0.122** (0.0603)
Atheism		0.0254 (0.0632)	0.0969 (0.0656)	0.0269 (0.0605)	0.0883 (0.0629)
<b>Question Form</b>					
Convey Message		0.291*** (0.0376)	0.286*** (0.0375)	0.276*** (0.0362)	0.272*** (0.0361)
Endorse		0.138*** (0.0382)	0.135*** (0.0381)	0.122*** (0.0368)	0.119*** (0.0367)
<b>Other</b>					
Agreement			0.0343*** (0.00899)		0.0294*** (0.00862)
Age				-0.0134*** (0.000953)	-0.0134*** (0.000950)
Female				-0.0839*** (0.0309)	-0.0825*** (0.0309)
Nonwhite				0.0887*** (0.0331)	0.0896*** (0.0330)
Liberal				0.0692*** (0.00957)	0.0673*** (0.00955)
Education				0.00981 (0.0102)	0.00935 (0.0102)
Constant	-0.320*** (0.0312)	-0.584*** (0.0550)	-0.633*** (0.0558)	-0.0140 (0.0786)	-0.0563 (0.0792)
<b>N</b>	4585	4585	4585	4585	4585
<b>R<sup>2</sup></b>	0.037	0.058	0.062	0.127	0.130

*Notes:* The billboard is the omitted medium, Mickey Mouse is the omitted message, and the association question is the omitted question form. N = 4585 because all 1223 respondents saw four scenarios, and then the 307 respondents who saw a “scandalous” trademark were dropped. Robust standard errors in parenthesis; \*\*\* $p < 0.01$ , \*\* $p < 0.05$ , \* $p < 0.1$ .

**Table A3. Regression Results for Mechanical Turk Sample**

	1	2	3	4	5
<b>Medium</b>					
Statue	1.107*** (0.0565)	1.102*** (0.0555)	1.102*** (0.0556)	1.102*** (0.0551)	1.102*** (0.0551)
License Plate	0.738*** (0.0598)	0.735*** (0.0585)	0.733*** (0.0586)	0.735*** (0.0582)	0.733*** (0.0583)
Trademark	0.400*** (0.0640)	0.402*** (0.0641)	0.400*** (0.0641)	0.406*** (0.0632)	0.404*** (0.0632)
<b>Content</b>					
Lincoln		0.520*** (0.0817)	0.532*** (0.0820)	0.539*** (0.0809)	0.550*** (0.0813)
Pro-Life		0.410*** (0.0825)	0.359*** (0.0880)	0.419*** (0.0823)	0.373*** (0.0879)
Pro-Choice		0.307*** (0.0817)	0.304*** (0.0818)	0.316*** (0.0817)	0.313*** (0.0818)
Ten Cs		0.352*** (0.0726)	0.340*** (0.0732)	0.362*** (0.0725)	0.351*** (0.0731)
Muslim		0.299*** (0.0856)	0.264*** (0.0878)	0.314*** (0.0864)	0.283*** (0.0885)
Atheism		0.0699 (0.0827)	0.0498 (0.0829)	0.0776 (0.0829)	0.0597 (0.0830)
<b>Question Form</b>					
Convey Message		0.226*** (0.0546)	0.225*** (0.0545)	0.204*** (0.0547)	0.203*** (0.0546)
Endorse		0.232*** (0.0527)	0.231*** (0.0528)	0.217*** (0.0527)	0.216*** (0.0527)
<b>Other</b>					
Agreement			-0.0219* (0.0129)		-0.0197 (0.0128)
Age				-0.00562*** (0.00186)	-0.00545*** (0.00186)
Female				0.0517 (0.0447)	0.0529 (0.0447)
Nonwhite				0.0563 (0.0549)	0.0565 (0.0551)
Liberal				0.0294** (0.0132)	0.0295** (0.0131)
Education				-0.0449*** (0.0167)	-0.0448*** (0.0167)
Constant	-0.906*** (0.0377)	-1.346*** (0.0673)	-1.316*** (0.0693)	-1.033*** (0.112)	-1.014*** (0.112)
<b>N</b>	1889	1889	1889	1889	1889
<b>R<sup>2</sup></b>	0.161	0.197	0.199	0.210	0.211

*Notes:* The billboard is the omitted medium, Mickey Mouse is the omitted message, and the association question is the omitted question form. N = 1889 because all 503 respondents saw four scenarios, and then the 123 respondents who saw a “scandalous” trademark were dropped. Robust standard errors in parenthesis; \*\*\* $p < 0.01$ , \*\* $p < 0.05$ , \* $p < 0.1$ .

Figures A1–A5. Replication of Figures 1–5 for Mechanical Turk Sample

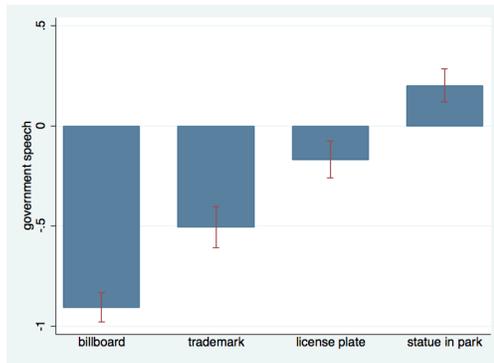


Figure A1. Medium

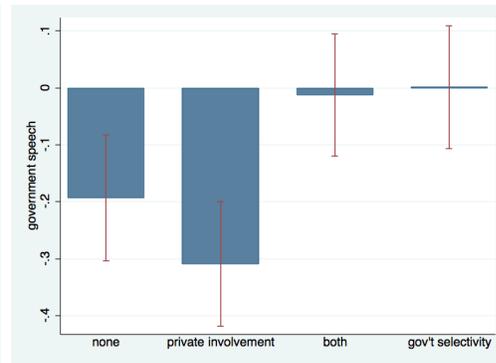


Figure A2. Additional information

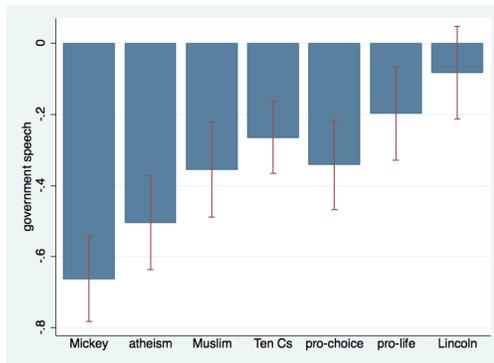


Figure A3. Content

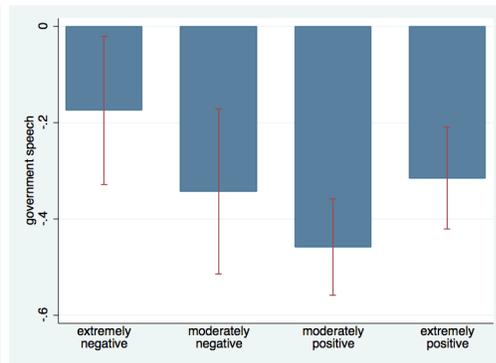


Figure A4. View on the content

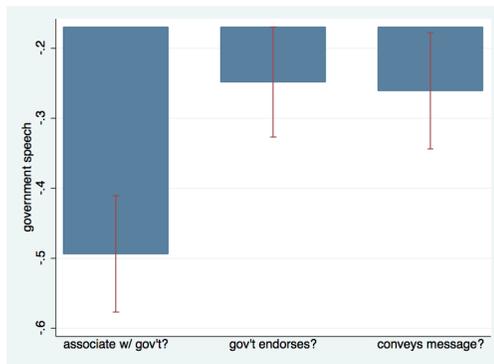


Figure A5. Question form