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Persuasion, Transparency, and Government Speech

GIA B. LEE*

INTRODUCTION

Under a little-known agreement with the major television networks, the White House Office of National Drug Control Policy reviewed the scripts of more than 100 episodes of television shows such as “E.R.,” “Beverly Hills 90210,” and “Cosby.” This review took place often before the shows aired. In exchange for broadcasting programming that the White House found to convey “proper” anti-drug messages, the networks received more than $20 million worth of credit for required public service broadcasting.

Hundreds of local television news stations reaching tens of millions of households around the country ran prepackaged video news segments produced and distributed by the federal government. The segments lauded a broad range of government policies and initiatives, from high profile issues like regime change in Iraq and Medicare reform to less prominent matters such as efforts to offer free after-school tutoring or to fight holiday drunk driving. Absent any attribution to the government, many segments concluded with individuals signing off, stating, for example, “In Washington, I’m Karen Ryan reporting,” or

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[983]
"In Washington, I'm Alberto Garcia reporting."

In *Rust v. Sullivan*, doctors received federal funding to provide family planning counseling to patients but were prohibited from discussing abortion as a method of family planning. The program did not require the doctors to disclose that the content of their advice was constrained by government directives. The Supreme Court issued *McCulloch v. Maryland*, a controversial federalism decision that prompted an outpouring of criticism from defenders of states' rights. Concerned about the risk that the criticism posed to the Court and the Union, the Chief Justice published a series of newspaper essays defending the Court's decision. He signed the essays, "A Friend to the Union," or "A Friend of the Constitution." These examples are far from exhaustive. Though the full extent of this practice is necessarily difficult to measure, recent reports suggest that federal, state, and local government entities and officials may engage in pseudonymous or anonymous communications more often than we might imagine. These types of communications—


those that do not reveal the government as their source—are the subject of this Article.

The Chief Justice's identity remained largely concealed for generations following the publication of his essays.\(^6\) By contrast, the government role in the other three contexts received significant, if not immediate, public attention and criticism. Commentators called the television programs a form of "mind control,"\(^7\) an "improper cooptation of supposedly independent media,"\(^8\) and "an outrageous abandonment of the First Amendment."\(^9\) Nearly forty thousand citizens signed a petition calling on the Federal Communications Commission, Congress, and local broadcasters to stop the broadcasting of video news segments absent government attribution,\(^10\) while the General Accounting Office ("GAO") issued a memorandum to executive branch departments and agencies advising that the segments violated federal laws banning the use of appropriations for propaganda purposes.\(^11\) A group of grantees and collaboration with State Department employees in writing the op-ed. See Matter of: To the Hon. Jack Brooks, supra, at 1–2. Two foreign opposition leaders signed similar op-eds without disclosing the State Department's role in preparing the pieces. See id. at 1–3. The editorials supported the White House's proposed transfer of the Small Business Administration (SBA) to the Department of Commerce. See Matter of: Dep't of Health and Human Servs., supra note 2, at 11 (discussing GAO File B-229257). The SBA "prepared the[] editorials and provided them to newspapers around the country to run as the position of the recipient newspapers without disclosing to the readers of those editorials that SBA was the source of the information." Id. Recent reports suggest that state governments, too, engage in these types of veiled communications. See Barstow & Stein, supra note 2, at A1 (noting that "the Texas Parks and Wildlife Department alone has produced some 500 video news releases since 1993"); Dion Nissenbaum, Schwarzenegger Videos The Latest Flap Over Prepackaged News Stories, SAN JOSE MERCURY NEWS, Mar. 13, 2005, at IA (noting that California Governor Arnold Schwarzenegger and former California Governor Gray Davis both issued video news releases). See Matter of: Dep't of Health and Human Servs., supra note 2, at 11; see also Gerald Gunther, John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland, 21 STAN. L. REV. 449, 449–50 (1969). John Podhoretz, TV Antidrug Messages Are No Scandal, WALL ST. J., Jan. 19, 2000, at A22 (quoting "Harvard media eminence Bill Kovach"). Editorial, TV and Propaganda (Cont'd), WASH. POST, Jan. 21, 2000, at A28. Lacey & Carter, supra note 1, at A1 (quoting Andrew Jay Schwartzman, Media Access Project). William Fisher, Media: Bush to Continue Producing "Packaged News Stories," IPS-INTER PRESS SERVICE, Mar. 29, 2005. Also, two Senators and two media advocacy groups asked the Federal Communications Commission to investigate the propriety of the broadcasters' use of the video news segments. See id.; William Triplett, Orgs Seek FCC Review of Bush Vids, DAILY VARIETY, Mar. 22, 2005, at 6. See Circular on Prepackaged News Stories, File B-304272 (General Accounting Office, Feb. 17, 2005) [hereinafter Matter of: Prepackaged News Stories]. The GAO found that the segments violated the standard prohibition in many appropriations laws providing that "[n]o part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." See id. at 2 (quoting the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 624, 118 Stat. 2809, 3278 (Dec. 8, 2004)); see also Matter of: Dep't of Health and Human Servs., supra note 2, at 10 (discussing the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 626, 117 Stat. 11, 479 (2003));
doctors who supervised the use of the family planning funds brought suit against the federal government challenging the legality and constitutionality of the counseling restrictions. 12

In response, government officials offered a variety of rationales for their actions. For the anti-drug television programs, White House officials stressed the importance of the message and effectiveness of the means chosen. They claimed that “it’s important to get the anti-drug message out in as many ways as we can,” 13 and described the media arrangement as simply an “innovative” way of “getting anti-drug messages out.” 14 Federal officials emphasized the widespread use of video news releases. Spokespersons from the United States Department of Health and Human Services, for instance, pointed out that they “are everywhere”; their use “is a common, routine practice in government and the private sector.” 15 As long as the video releases were “purely

see also Matter of: To the Hon. Jack Brooks, supra note 5 (discussing the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1985, Pub. L. No. 98-411, § 501, 98 Stat. 1545 (1984)). The laws do not define the term “propaganda,” and it does not appear that any federal court has attempted to interpret it. The GAO, however, has repeatedly interpreted it to include, among other things, materials that are misleading as to source. See Matter of: Dep’t of Health and Human Servs., supra note 2, at 10–11 (discussing various GAO opinions); Matter of: Prepackaged News Stories, supra, at 2. The GAO also concluded that the expenditure of funds to produce the video segments violated the Antideficiency Act, 31 U.S.C. § 1341(a) (2000), which prohibits federal employees from making expenditures that exceed available budget authority. See Matter of: Prepackaged News Stories, supra, at 2 n.3.

As the Administration pointed out in response to the GAO memorandum, see Memorandum from Joshua B. Bolten, Director, Office of Management and Budget, to Heads of Departments and Agencies, Re: Use of Government Funds for Video News Releases, File M-o5-10 (Mar. 11, 2005), the GAO’s legal opinions are not binding on the executive branch or the judiciary. Delta Chem. Corp. v. West, 33 F.3d 380, 382 (4th Cir. 1994); see United States v. Alaska Pub. Util. Comm’n, 23 F.3d 257, 262 (9th Cir. 1994); see also Diebold v. United States, 947 F.2d 787, 804 (6th Cir. 1991).

In response to the recent reports about paid commentators promoting White House education and marriage policies, see supra note 5, several members of Congress have proposed bills to make the prohibition on “covert propaganda” a permanent part of the U.S. Code. See Rhonda Chriss Lokeman, Fakers and Frauds Fool American Taxpayers, KAN. CITY STAR, Feb. 16, 2005, at B9.


14. Burkins & Flint, supra note 1, at B1. The director of the White House’s drug policy office explained, “what we are running is a public-health communications campaign.” All Things Considered, supra note 1.

The networks, too, defended the anti-drug programs, but focused instead on their ultimate decision-making authority. See, e.g., Burkins & Flint, supra note 1, at B1; Networks Trade Integrity for a Few Commercials, USA TODAY, Jan. 17 2000, at 14A. A CBS spokesperson, for example, reported, “[a]t no time has the independence or creative integrity of our programming been compromised.” Burkins & Flint, supra note 1, at B1. Likewise, an NBC executive stated, “We never ceded content control to the ONDCP [Office of National Drug Control Policy] or any other government department.” Id.

15. Goldstein, supra note 2, at A1; Robert Pear, U.S. Videos, for TV News, Come Under Scrutiny, N.Y. TIMES, Mar. 15, 2004, at A1. The officials also stated that the government was “required to inform beneficiaries about changes in Medicare,” and the television news segments were “a legal,
informational” and did not involve “advocacy,” the Department of Justice’s Office of Legal Counsel stated, they did not constitute “propaganda” in violation of the appropriations laws.16 Defending the restrictions on health care professionals, the Solicitor General’s office pointed to, and the Supreme Court accepted, the government’s prerogative to shape the family planning counseling that it was funding.17 The Supreme Court echoed this view, stating that “when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program.”18 Although Chief Justice Marshall did not publicly defend his writing, he did worry about its appropriateness. He apparently questioned whether he, as a government official, should write at all. As Gerald Gunther recounts, “[t]he Chief Justice was sufficiently concerned about proprieties to conceal his identity, but not enough to abstain from writing.”19

In each of the four cases, the government officials either failed to acknowledge or expressly rejected the idea of disclosing the governmental role in promoting the message. Administration officials did not concede that the doctors receiving family planning funds should at least have informed their patients of the government-imposed restrictions.20 Nor does it appear that the Chief Justice considered indicating that the “friend” worked as a government official.21 In the news video and anti-drug contexts, public commentators explicitly called for the government to require the news segments22 and entertainment

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16. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to the General Counsels of the Executive Branch, Office of Legal Counsel, Re: Whether Appropriations May be Used for Informational Video News Releases (Mar. 1, 2005). The Office of Legal Counsel concluded that the video news segments concerning Medicare reform were purely informational and thus did not constitute illegal propaganda. See also Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to Alex M. Azar II, General Counsel, Department of Health and Human Services, Re: Expenditure of Appropriated Funds for Informational Video News Releases, at www.usdoj.gov/olc/opfinal.htm (July 30, 2004).


18. Rust, 500 U.S. at 194.


20. As discussed further below, see infra text accompanying note 339, the Supreme Court noted that the federal program did not prohibit the doctors from disclosing the counseling restrictions. Rust, 500 U.S. at 203.

21. JOHN MARSHALL’S DEFENSE OF MCCULLOCH v. MARYLAND, supra note 4, at 1–21; see also Gunther, supra note 6, at 449–55.

22. See, e.g., Eric Boehlert, Lies, Bribes and Hidden Costs, at http://www.salon.com/news/feature/2004/04/05/medicare/print.html (Apr. 5, 2004) (quoting a Duke University professor, stating “Why not do a straightforward public service announcement and identify the source of information? Why have people pretend to be journalists? … It’s outrageous that viewers were being duped.”); Bush Defiant Over Prepackaged “News,” TELEVISION WK., Mar. 21, 2005, at 8 (“The government has the right to send out promotional video news releases as long as they’re labeled as such.”); Murray Light, “News” Items Hurt Bush’s Credibility, BUFF. NEWS, Mar. 27, 2005, at 13 (calling for a “government [disclosure]
programs\textsuperscript{33} to indicate the fact of government support. The decision to inform the viewers, government officials responded, lay in the hands of the television stations and networks. Pressed on why the government does not require disclosure, the President stated, "the local stations ought to, if there's a deep concern about that, ought to tell their viewers what they're watching."\textsuperscript{24} Similarly, concerning the anti-drug programs, the White House took the position that "it was not the government's place to notify viewers of the drug office's arrangement with the networks."\textsuperscript{25}

This Article takes the opposite position. It argues that, when the government participates in public debate, it should make the fact of its participation transparent. Relying in part on social science research to examine the role of government communications in public debate,\textsuperscript{26} the

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\textsuperscript{33} To indicate the fact of government support.

\textsuperscript{24} News Conference, President George W. Bush, Public Papers of the Presidents (Mar. i6, 2005). Similarly, in justifying the distribution of Medicare reform news video segments, a Health and Human Services ("HHS") spokesperson stated, "We left the decisions [on the news segments] directly in the hands of the TV producer in terms of what to use and how to use it, including attribution." Emily Pierce, \textit{HHS Erred on Videos, GAO Finds}, \textit{Roll Call}, May 20, 2004. An HHS spokesperson also stated, "TV stations knew the [Medicare] videos came from us and could have identified the government as the source if they had wanted to." Pear, supra note 2, at A24. Asked if members of the public could justifiably be angry about not being informed of the source of the mock news story, the spokesperson responded, "If I'm a viewer, I'd be angry at my television station." Kemper, supra note 2, at A16.

\textsuperscript{25} By "government communications," I refer broadly to the myriad ways in which the
Article argues that the legitimacy of those communications depends on the public’s ability to identify what the government says and how it does so. It maintains that the constitutional commitment to political accountability counsels governmental actors to ensure the transparency of government communications and that those actors may avoid the principle of transparency only in exceptional cases. The Article also argues that courts have a role to play in enforcing the transparency principle. Although the principle does not give rise to a judicially enforceable right, courts should take transparency into account in cases involving what this Article refers to as the “government speech” defense—cases in which litigants assert First Amendment claims, and the government seeks to justify its alleged speech-infringing actions on the ground that it is merely exercising the government’s broad latitude to speak. Though five Justices of the Supreme Court earlier this month declined to incorporate transparency into the Court’s assessment of a government speech defense in Johanns v. Livestock Marketing Association, the majority approach in that case was misguided, for it failed adequately to account for the essentially private nature of the speech at issue and the important structural considerations implicated by the challenged program.

In making this argument, this Article proceeds in five parts. Part I starts with some background. It introduces the concept of government communications and explains that such communications, even if primarily informational in nature, ultimately seek to persuade. It then reviews the underlying conceptions of government persuasion in the existing doctrine and literature on government communications. Responding to those conceptions, Part II presents contemporary social science research on how people receive and evaluate messages and how knowledge of the speaker’s identity may affect that process. It explains how people process messages in general and governmental messages in particular. Consistent with common sense assumptions, but contrary to common premises in First Amendment and public deliberation theories, people do not simply focus on the arguments presented. Rather, they employ two modes of processing, one that corresponds to attention to arguments, and another that relies on simple decision rules or cues. Part II then turns to the “government” cue, and discusses how and why the significance of that cue varies from context to context.

The next three Parts focus on the issue of transparency. Part III points to the prevalence of non-transparent government communications government communicates, whether the speaker be a politician, civil servant, agency, or other, and whether the form is written, spoken, on-line, or visual. See infra Part I.A. By “government,” I refer to all levels of the American government, federal, state, and local.

and argues that two factors—advances in technology and the blurring of the public/private distinction—will only increase the frequency of such communications. Part III also explains how non-transparent communications affect public debate. It draws again on social science literature to show that the lack of transparency creates substantial problems for political accountability: not only can a government (or in fact any speaker) conceal its role in promoting particular messages, but it can enhance its messages' persuasiveness by using a variety of source cues, such as credibility, popularity, or agreement by independent sources. The government, in other words, may make its views appear to be held by more esteemed or authoritative sources than they necessarily are, and more widely accepted than they really are.

Part IV then explains the constitutional dimension of the transparency principle. It argues that governments should not have the same freedom to speak as private parties, and that that difference results from the constitutional commitment to political accountability. It also maintains that, notwithstanding the various reasons why we might prefer governments sometimes to speak non-transparently, the rationale for recognizing the right of private parties to speak anonymously or pseudonymously does not apply with equal force to government speakers. Put another way, Part IV acknowledges the costs of following the transparency principle, but concludes that the Constitution calls for, and the benefits to political accountability justify, tolerating those costs.

Part V discusses the practical implications of the transparency principle. Part V first makes clear that, except in rare circumstances, governments should ensure that recipients of government messages understand the government's responsibility for the speech. In elaborating that standard, Part V clarifies that, because of the difficulties identifying when government officials or employees speak in their private or official capacities as well as the need to protect individual First Amendment rights, the transparency principle ought not to apply when it is reasonable to conclude that the officials or employees speak, at least in part, on their own accord. Yet when a private party receives government subsidies for expressive purposes, the government should require the private party to disclose that fact. Part V acknowledges that there may be certain circumstances in which the transparency principle ought not to apply.

Part V then takes up the issue of judicial enforceability. This Part argues that, given judicial management and competence concerns, as well as the need to avoid chilling private speech, the transparency principle does not give rise to a judicially enforceable right, but instead primarily serves as a hortatory constitutional ideal to which all governmental actors should adhere. Yet the transparency principle is still relevant to the work of the courts. It is a factor that courts should take into account
when individuals raise First Amendment challenges to government action and the government defends by claiming that the contested program involves government speech. Addressing the Supreme Court’s reasoning in *Johanns*, Part V argues that the government should not be able to assert that defense unless it can show, at a minimum, that the reasonable recipient of the speech understands that speech to originate from the government. A brief conclusion follows.

For three reasons, this Article devotes considerable attention to the social science research on message processing. First, despite the research’s centrality to questions about the function and impact of speech, the legal literature concerning speech has largely overlooked this research. This omission is particularly striking, as legal scholars have paid increasing attention to social science research in addressing other areas of the law. Second, although the social science research in many ways comports with common sense understandings of how people process messages, much of the legal doctrine and literature on speech reflect inaccurate assumptions about the ways in which people actually process messages. For example, one of the foundational principles informing First Amendment doctrine, the Holmesian view that “the best test of truth is the power of the thought to get itself accepted in the competition of the market,” is overstated and does not take basic social science conclusions into account. Although the legal literature does not necessarily adopt the Holmesian view, some scholarship, including much concerning government speech, reveals other overly simplified assumptions.

Third, and finally, the social science research helps to provide a fuller picture of the impact of the lack of transparency on political accountability. One could argue for the transparency principle without any discussion of the research on message processing. If we knew only that citizens could not identify non-transparent government speech and thereby could not hold the government accountable for it, that would be a sufficient basis for the argument that non-transparent communications conflict with the constitutional commitment to political accountability. By enabling a richer examination of the ways in which non-transparent communications interfere with political accountability, the social science literature helps to make the case for transparency even stronger.

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30. *See infra* Part II.A.

31. *See infra* Part I.B.

32. *See infra* Part III.B.
I. BACKGROUND

A. THE NATURE OF GOVERNMENT SPEECH

Our federal, state, and local governments regularly communicate their views to the public. A mayor delivers a speech on the importance of voting. The Surgeon General issues a report on the health risks of smoking. A public high school invites a motivational speaker to encourage self-esteem and resistance to peer pressure. A television commercial portrays a Native American, on finding litter and pollution, shedding a tear. In live speeches, broadcasted debates, or published reports, or through website postings, catchy slogans, or glossy images, government communications pervade the social and political life of our nation.33

Like any entity that itself cannot literally speak, a government must speak through the voices or efforts of others.34 Politicians, official spokespersons, or other employees may speak in their official capacities, or offices, agencies, or departments may author pamphlets, reports, or announcements. A government depends not only on individuals or organizations that are formally part of the government to convey its messages, but also on private individuals or organizations. Often pursuant to contract or grant, and sometimes pursuant to regulation, such private parties assist governments in disseminating arguments and ideas favored by the government.35 In some cases, private parties, such as advertising agencies, simply help produce messages that government bodies then convey. In other cases, private parties, such as paid endorsers, themselves deliver the messages to audiences.

A government communicates for a variety of reasons. It may, for example, seek to inform the public of matters the government deems relevant, to rally support for governmental policies and practices, to encourage or deter certain behavior, or to communicate shared values and perspectives. In doing so, a government seeks to shape public awareness, influence public opinion, or secure popular support. In other words, notwithstanding the myriad of apparent intentions, government communications generally entail an element of persuasion. As Mark Yudof has aptly remarked, "[i]nevitably, government, or those who are a

33. Of course the government also communicates, or expresses, its views through the law itself. See, e.g., Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943 (1995). I focus here on the government's efforts to participate in public debate in the more traditional sense. Whereas people generally know of the government's responsibility for laws and regulations, they do not, as I discuss below, necessarily know of its responsibility for speech.


35. The government's use of private parties to convey its messages parallels the government's use of private parties to perform traditional governmental functions, and thus contributes to the blurring of the traditional public/private distinction. See infra notes 122–26 and accompanying text.
part of it, seeks to persuade citizens to act, or to allow it to act differently than they would have without the information supplied by the government."

B. CONCEPTIONS OF GOVERNMENT PERSUASION

The propriety and legitimacy of a government's powers of communication and persuasion in a democracy have been the subject of considerable disagreement. Courts and commentators have espoused a broad range of views on the proper role of, and limits on, government speech in public debate. At one end of the spectrum is the view that governments should have broad latitude to engage freely and fully in persuasive communications. On this view, governments play an important role in contributing to public debate about all sorts of matters, and government communications generally ought to be welcomed and encouraged. At the other end of the spectrum lies the view that it is generally improper for governments to engage in normative discussions about matters of public import. On that view, government communications, particularly those taking a position on contested social or political issues, do not enhance, but instead endanger the flourishing of public discussion. Many commentators take middle-ground positions, generally acknowledging the desirability of some government communications but also stressing the serious risks they pose to open public debate.

Wherever it sits on the spectrum, each view flows from a conception

37. See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."); Abner Greene, Government of the Good, 53 VAND. L. REV. 1 (2000).
38. See generally Greene, supra note 37. See also Southworth, 529 U.S. at 235.
40. See infra notes 57-58.
41. See generally David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. REV. 675 (1992) (arguing for neutrality of certain public-funded institutions); Steven J. Heyman, State-Supported Speech, 1999 Wis. L. REV. 1119 (arguing that distributive justice principles ought to govern subsidized speech issues); Robert C. Post, Subsidized Speech, 106 YALE L.J. 151 (1996) (asserting that government-subsidized speech may sometimes compromise citizen independence and thus arguing for a functional approach); Martin H. Redish & Daryl I. Kessler, Government Subsidies and Free Expression, 80 MINN. L. REV. 543 (1996) (analyzing permissibility of government speech subsidies based on the nature of the subsidy); Steven Shiffrin, Government Speech, 27 UCLA L. REV. 565 (1980) (arguing for an "eclectic" approach that balances the values counseling in favor of restricting speech against the government's legitimate interests in communicating); YUDOF, supra note 36 (arguing, inter alia, that legislators should be wary of the problem of indoctrination when deciding what speech to authorize and prohibit and that courts should consider that problem when making traditional free speech decisions).
of the impact of government communications. In particular, each view reflects an understanding of the government’s persuasive powers, or, from another perspective, the ways in which people respond to government communications. Despite its significance in any analysis of government communications and their proper place in public debate, this dynamic has received little attention from courts and commentators. That is, the existing commentary lacks critical reflection on the ways in which government communications actually affect the public. Instead, most approaches tend to assume, without acknowledging, one of three basic conceptions of the public in its relation to government communications.

The implicit assumption in contemporary Supreme Court doctrine is that the public approaches government communications as message-focused evaluators. That assumption is most evident in the Court’s general confidence that, so long as government does not suppress speech, democratic mechanisms of political accountability will ensure that government communications reflect the will of the people. As the Supreme Court explained in Board of Regents of the University of Wisconsin System v. Southworth, “When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.” In other words, the government disseminates its views, and the public, in turn, focuses on the messages presented, evaluates those messages, and then registers its agreement or disagreement through the political process. Whatever the polity decides, the government will reconsider and, if necessary, refine its future positions to be more in line with the citizenry.

Sharing an expansive view of the proper role of government participation in public debate, Abner Greene also tends to assume that individuals will focus on the messages presented. As long as the government does not coerce individuals to agree with its position or monopolize the relevant speech market, the government will simply

42. See Rust v. Sullivan, 500 U.S. 173, 192 (1991) (suggesting that the government can say whatever it likes so long as it is not “suppressing a dangerous idea”) (internal quotations omitted).
44. This approach assumes an effective translation of both the government’s position to the public, and the public’s position to the government. It also assumes that electoral choices serve as a relatively accurate representation of the citizenry’s attitudes or beliefs. For a critique of such assumptions, see, e.g., DANIEL A. FARBER & PHILIP P. FRICKLEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); see also Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371, 371-73 (1983).
45. Greene also discusses ventriloquism (which raises similar concerns to transparency) but only
compete with other speakers to persuade the public to accept its views.46 "The government's favored view will be one among many views worth supporting," and individuals will decide which views are most worthy.47 While Greene acknowledges that, at times, government speech can "carry great weight,"48 or, in other words, that individuals may be influenced by factors other than the arguments presented, he nonetheless expresses confidence that the public will ultimately evaluate messages on their own terms: "we should consider even quite persuasive government speech to be just that, quite persuasive."49 In other words, we should remain quite optimistic about people's abilities to determine whether to accept the government's views.

By contrast, much of the legal scholarship takes a rather dim view of people's abilities to evaluate or resist governmental messages. A recurring conception of the public in relation to unrestrained government communications is of passive recipients or sponges.50 Concerned with the tendency of government to "drown out" other voices or "skew" or "distort" public debate, numerous scholars warn of the danger of "thought control" or "indoctrination." Government has the power to "penetra[t]... more and more aspects of modern life" and thereby "nullify the effectiveness of criticism" and "mold[] thought and expression in a democratic society."51 Arguing for the need, among other things, to "distinguish government propaganda and indoctrination activities from government information, research, education, and leadership activities,"52 Mark Yudof, for example, cautions that the government may "dominate[] the minds of individuals, suppressing their ability to think critically about government leaders and policies."53

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46. Greene, supra note 37, at 34.
47. Id.
48. Id. at 45.
49. Id. at 43. At times, Professor Greene appears to retreat from that position. For example, although he generally argues that there is a clear line between persuasion and coercion (as evidenced by the actual imposition of sanctions or withdrawal of benefits), see id. at 41-49, he also suggests that the government's improper invocation of expertise may constitute coercion. See id. at 51-53. To the extent that he advances the latter view, he appears to support greater restrictions on government speech than simply ward off coercion (as he narrowly defines that term) and monopolization.
50. See, e.g., YUDOF, supra note 36, at 152, 156; Cole, supra note 41, at 704-08; Robert D. Kamenshine, The First Amendment's Implied Political Establishment, 67 CAL. L. REV. 1104, 1104-06 (1979); Redish & Kessler, supra note 41, at 562-63. Along these lines, Professor Kamenshine has gone so far as to argue that the First Amendment ought to be interpreted to embody, similar to the express prohibition against religious establishment, an implied prohibition against political establishment. See Kamenshine, supra, at 1104.
51. Kamenshine, supra note 50, at 1104 (quoting Thomas I. Emerson & David Haber, The Scopes Case in Modern Dress, 27 U. CHI. L. REV. 522, 522 (1960)).
52. YUDOF, supra note 36, at 166.
53. Id. at 159. It should be noted that Yudof does look to communications research to examine
Likewise, David Cole maintains that, through "selective support of speech," government may "indoctrinate the audience." In other words, in a regime with insufficient restrictions on the government's ability to inject its views into the marketplace, individuals may lack the means to evaluate the government's positions critically, and instead may simply absorb those positions as their own. The views of the government become the views of the public.

A related, although less extreme, conception envisions the public as made up of not passive recipients, but rather vulnerable recipients. As noted above, many scholars argue that the government should refrain from embracing a particular vision of the good life, or at least from taking positions on controversial social issues. Implicit in some of these accounts is the assumption that, when the government promotes its conception of the good life, it interferes with people's abilities to make their own, independent moral calculations. Another assumption is that the government may exercise special or distinctive persuasive powers, or, put another way, that a unique impact or harm may result when the government, as opposed to a private party, embraces a particular value or idea. Stephen Gardbaum, for example, argues that "the state is

the process of government persuasion. See id. at 71-89. After finding that that research shows that governments were sometimes persuasive, and sometimes less so, he nonetheless bases his theory on the "intuitive appeal" of the idea that governments may manipulate and indoctrinate audiences. See also Frederick Schauer, Is Government Speech a Problem?, 35 STAN. L. REV. 373, 377 (1983).

See Cole, supra note 41, at 704.

See generally Schauer, supra note 53 (critiquing this argument). Some might argue that these scholars fear that the act of drowning out private speakers alone, rather than the fact that the government is the speaker, will cause indoctrination. While these scholars are undoubtedly concerned in significant part with the "drowning out" problem, their discussion of the problem suggests that they fear more generally the government's particular tendency to indoctrinate. Professor Cole, for example, argues that selective subsidies can "dominate the marketplace or indoctrinate its citizens." Cole, supra note 41, at 705 (emphasis added). Professor Yudof's distinction between "propaganda and indoctrination activities" and "information, research, education and leadership activities" suggests that certain forms of governmental speech may be inherently troublesome. See YUDOF, supra note 36, at 166. Moreover, the authors' prescriptions for limiting speech generally go well beyond simply prohibiting governmental monopolization of speech markets, and thus suggest that their concern with indoctrination is based on more than simply the "drowning out" problem. See, e.g., Cole, supra note 41, at 731-47 (arguing for neutrality in certain government-funded institutions); Kamenshine, supra note 50 (arguing for implied political establishment clause).

See supra text accompanying notes 39-40.


Stephen Gardbaum, Liberalism, Autonomy, and Moral Conflict, 48 STAN. L. REV. 385, 398 (1996); see also Greene, supra note 37, at 44 ( canvassing arguments that "government speech may be improperly persuasive" because "people will grant too much deference to the government"); YUDOF, supra note 36, at 156 ("There is the danger that the prestige and status of government will give its utterances an advantage in competition with private-sector communications.").
special because it cannot purport to act nonauthoritatively. A way of life that the state endorses and promotes, even through symbolic or persuasive means, is an 'authorized' way of life.59

As these three conceptions reveal, the existing doctrine and literature generally have not paid much attention to the ways in which people actually experience and receive government communications. They assume that people simply focus on the content of government messages, or that people generally succumb to them. Since those assumptions often underlie the normative vision of government communications proposed by such theories, the assumptions should be accurate and well-grounded. But as the next Part demonstrates, people evaluate government messages in more complex ways than are suggested in the existing doctrine and literature.

II. UNDERSTANDING THE GOVERNMENT'S POWER TO PERSUADE

To understand the significance of government speech and to analyze its effect on the citizenry, one must first understand more generally how individuals process persuasive messages and reach judgments on public affairs. That is, how do citizens evaluate the many, often conflicting, ideas and arguments about matters of public importance? An extensive body of literature in the social sciences, particularly in the fields of social psychology, political science, and communications, provides insight into the cognitive processes of receiving and analyzing arguments and making judgments about them. This Part gives a brief overview of the processes of persuasion.

A. BEYOND MESSAGE CONTENT

Contrary to the unrealistic assumptions underlying the vision of the message-focused evaluator—and indeed the assumptions underlying many deliberative models of democracy60—messages derive their persuasive powers not only from their content and the quality of their supporting argumentation. As we recognize in our daily lives, individuals often pay little attention to the substance of arguments, and focus instead on ultimate conclusions. Individuals process persuasive messages by taking into account a variety of factors, including source, message, recipient, and context.61 The degree to which a message, or the beliefs or

59. Gardbaum, supra note 58, at 398.
attitudes expressed therein, finds acceptance will vary significantly depending on who delivers the message, who receives it, and the context in which the communication occurs.

The dominant models of persuasion research describe the processing used to evaluate messages in terms of two ideal types. The first, which I shall call argument-based, corresponds to the vision of communicative interchanges espoused by most deliberation theorists. In this view, individuals pay careful attention to the information and arguments presented, and expend considerable effort in assessing the merits of the position advocated. "They actively attempt to comprehend and evaluate the message's arguments as well as to assess their validity in relation to the message's conclusion." If listeners find the arguments under scrutiny strong and convincing, they reconsider their own views and adjust them to be more in line with the position advocated. If listeners deem the underlying arguments "weak and specious," then they will reject the message's conclusion, and in some instances, adopt the opposing view.

The second ideal type, which I shall refer to as cue-based, does not involve diligent consideration of the merits of an issue. Rather than absorbing and evaluating a message's content, individuals "may rely on (typically) more accessible information such as the source's identity or other non-content cues in deciding to accept a message's conclusion." Individuals, consciously or unconsciously, adjust their attitudes on an issue in response to positive or negative cues, or to simple decision rules.

62. The two models that dominate current research on persuasion are the elaboration-likelihood model and the heuristic-systematic model. See James M. Olson & Mark P. Zanna, Attitudes and Attitude Change, 44 ANN. REV. OF PSYCHOL. 117, 135 (1993); Daan Van Knippenberg, Group Norms, Prototypicality, and Persuasion, in ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLE AND NORMS OF GROUP MEMBERSHIP, supra note 61, at 158. Both models differentiate the two modes of message processing described here. For a detailed comparison of the two models, see A. H. Eagly & Shelly Chaiken, THE PSYCHOLOGY OF ATTITUDES 305-50 (1993).

63. The elaboration-likelihood model refers to this type of message processing as central route processing while the heuristic-systematic model refers to it as systematic processing. See, e.g., Shelly Chaiken & Durairaj Maheswaran, Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment, 66 J. PERSONALITY & SOC. PSYCHOL. 460 (1994).


65. Chaiken, supra note 64, at 752.
66. See Petty & Cacioppo, Central and Peripheral Routes, supra note 64, at 70.
67. Id.

68. The elaboration-likelihood model refers to this type of message processing as peripheral route processing while the heuristic-systematic model refers to it as heuristic processing. See Chaiken & Maheswaran, supra note 63, at 460.

69. Chaiken, supra note 64, at 752.
associated with those cues.\textsuperscript{70} For example, a person may accept a position advocated simply because it is presented during a pleasant lunch or by an expert source.\textsuperscript{71} That is, the person accepts the advocacy because she associates the message with good food, or relies on the heuristic that experts are usually correct. Similarly, a person may reject a position simply because it represents an unpopular view, or its advocate is an unattractive or untrustworthy source. In relying on such cues, individuals may reach judgments on issues "without the need for engaging in any extensive thought about the arguments presented."\textsuperscript{72}

Although argument-based and cue-based approaches suggest two distinct ways in which individuals evaluate messages, they are not mutually exclusive and indeed often occur at the same time. The two ideal types, in fact, represent opposite ends of a continuum, and, in any given instance, message processing may correspond with any point along that continuum.\textsuperscript{73} Even when individuals focus in detail on the substance of arguments, they may also be influenced by cues that have nothing to do with the arguments.\textsuperscript{74} Such cues may affect listeners' expectations about the probable validity of persuasive messages and thus bias their perceptions and evaluations of the arguments contained therein.\textsuperscript{75} "[I]f a message is delivered by an expert," for example, "its arguments may be perceived as stronger and elaborated on more positively than if the message is delivered by a nonexpert."\textsuperscript{76} The persistence of bias in argument-based processing renders "persuasion contingent on both the quality of the message and on a predisposition to respond in a certain way."\textsuperscript{77} The likelihood of this biasing effect is greater, moreover, when argumentation and information are relatively ambiguous and thus more amenable to different interpretations.\textsuperscript{78}

Argument-based processing will generally lead individuals to reach judgments that are most consistent with their actual beliefs or understandings. Yet that does not necessarily make it more socially desirable or efficient than cue-based processing. The usually unconscious choice between the two modes of processing is essentially a trade-off between reliability and economy.\textsuperscript{79} While the former may be more

\textsuperscript{70} See Petty & Cacioppo, Central and Peripheral Routes, supra note 64, at 70.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} See Richard E. Petty & John T. Cacioppo, Communication & Persuasion: Central and Peripheral Routes to Attitude Change 7–10 (1986) [hereinafter Petty & Cacioppo, Communication].
\textsuperscript{74} See Chaiken & Maheswaran, supra note 63, at 461; Van Knippenberg, supra note 62, at 163.
\textsuperscript{75} Chaiken & Maheswaran, supra note 63, at 461.
\textsuperscript{76} Id.
\textsuperscript{77} Van Knippenberg, supra note 62, at 163.
\textsuperscript{78} Chaiken & Maheswaran, supra note 63, at 461.
\textsuperscript{79} Chaiken, supra note 64, at 753–54.
reliable, it also requires the investment of considerably more time and effort to receive and scrutinize argumentation. While the latter may prove less reliable, it requires only a minimum of effort and resources. In light of the barrage of arguments and appeals confronting individuals on a daily basis, the desirability, and indeed sometimes necessity, of such economy is considerable. In evaluating messages, individuals apply what has been called the sufficiency principle: they will use the more resource-intensive argument-based method only enough to satisfy their reliability concerns.

In a given case, the degree to which reliability or economy matter turns largely on two factors, motivation and ability. With regard to motivation, when individuals believe it is important to construct a highly accurate judgment, reliability concerns take precedence. That is, when individuals receive messages on topics perceived to be personally relevant, or when they believe that their evaluations and opinions on an issue presented will have important consequences for themselves or others, they are more likely to engage in detailed and deliberate consideration of message content. In contrast, when individuals encounter arguments on topics perceived to be unimportant, or when they believe that their responses will be inconsequential, they may be less willing to exert more than a minimum of effort and resources in reaching judgments on those topics.

Yet even if individuals are highly motivated, economy concerns may nonetheless dominate because of limitations on ability. Individuals will vary in terms of the resources that they may call forth, or rely on, in evaluating a message. For example, some individuals may lack the cognitive sophistication to analyze particularly complex messages in a rigorous fashion. Also, time constraints or distractions may prevent individuals from focusing and critically and systematically evaluating the arguments presented. Absent the ability to engage in heightened cognitive work, individuals are more likely to defer to external cues or simple decision rules in reaching judgments.

In short, the social science literature confirms, contrary to the
assumptions underlying much legal writing and deliberation theory, that people do not uniformly respond to communications as message-focused evaluators. Whether people accept messages, including those advanced by the government, may have as much to do with external cues as with the messages' content. This is especially so for complex messages, or messages that people perceive to have less immediate relevance to their daily lives. Thus, the extent to which some messages, including governmental messages, gain public approval may ultimately have little to do with people's assessments of the ideas and arguments presented.

B. The Government Cue

Persuasion research also undermines the common assumption that individuals are passive or vulnerable recipients of government communications. Such research reveals that listeners do not accept messages more readily because the government disseminates them. Rather, government authorship functions as a source cue, the significance of which varies from context to context. Although there are numerous characteristics of a source, for example, likability, similarity, and attractiveness, that may affect its persuasiveness, I focus on credibility because it usually is the most significant factor and, unlike the other characteristics, applies more generally to institutions as well as individuals.

Credibility refers to “the judgments made by a perceiver (e.g., a message recipient) concerning the believability of a communicator.” Though multiple factors inform those judgments, the speaker's perceived competence and trustworthiness consistently emerge as the primary elements. Listeners assess a speaker's competence by focusing on how the communicator knows what she is discussing. That assessment turns on whether they see her as having the requisite intelligence, experience, or sensitivity to determine the truth or correctness of a matter. An evaluation of trustworthiness examines why a communicator takes the position that she does. It depends on "perceptions of the source's

89. The phenomenon of cue-based processing has been confirmed not only at the individual level, but at the aggregate level as well. See Jeffrey J. Mondak, Source Cues and Policy Approval: The Cognitive Dynamics of Public Support for the Reagan Agenda, 37 AM. J. POL. SCI. 186, 205 (1993).

90. See PERLOFF, supra note 61, at 136-53.

91. O'KEEFE, supra note 61, at 130-31.


intention” or “attributions of the communicant’s behavior.”

Perceived shortcomings in competence or trustworthiness can diminish a source’s credibility. Even if audiences see a communicator as having the proper expertise to understand and report on a matter, if they believe that “the pressures of a situation have compromised a communicator’s willingness to be open and honest,” then they will find her lacking in credibility. Likewise, even if audiences perceive a speaker to be honest, acting with the best of intentions, if they do not believe he has the requisite knowledge and experience to analyze an issue, they will not find him credible. Litigators apparently understand the impact of perceived shortcomings in these areas, for when they impeach witnesses, they focus on precisely these points: “possible self-interest and bias on the part of the witness,” and “the witness’s incompetence to testify about issues.”

In analyzing the government’s credibility as a speaker, it is important to remember that the “government” is not a monolithic entity. It consists of a variety of entities and individuals. The credibility of those myriad units is not uniform but varied. Thus, when we refer to the credibility of the “government,” we could be referring to the credibility of a particular individual, like a city councilman or the Food and Drug Administration Commissioner, or of an entity, like a police department or the military. Public perceptions of these individuals and institutions, both in terms of their competence and trustworthiness, vary significantly. What has been referred to as the “paradox of distance” with respect to public perceptions of government markedly illustrates that point. Studies have found that while the public tends to trust and respect the specific government agencies or employees with which they have had personal dealings or encounters, they tend to distrust and disparage the government and its employees in the abstract. As such perceptions inform credibility determinations, it thus appears that while some parts of government may be viewed as highly credible, others may be

94. PERLOFF, supra note 61, at 143. Common research scales used to ascertain trustworthiness (also called character, safety, or personal integrity) include “honest-dishonest, trustworthy-untrustworthy, open-minded-closed-minded, just-unjust, fair-unfair, and unselfish-selfish.” O’KEEFE, supra note 61, at 132.

95. O’KEEFE, supra note 61, at 144.

96. This is sometimes referred to as a reporting bias. See O’KEEFE, supra note 61, at 133, 137–38; PERLOFF, supra note 61, at 143.

97. This is sometimes referred to as knowledge bias. See O’KEEFE, supra note 61, at 133, 137.


99. Also, the government communicates in a variety of ways, and not always through official government organs. This issue is discussed supra in Part III.


101. Id.
perceived as less so. Thus, listeners may find the "government" more credible when it speaks through individuals with whom listeners have personal experience, and less credible when it speaks through pronouncements from a distant, faceless bureaucracy.

Even with respect to any specific government agency or official, moreover, credibility is not constant. As credibility is not an intrinsic property of a communicator, but rather a function of the ways in which the communicator is perceived, the credibility of any speaker varies significantly from context to context. This situational variation in credibility appears when the government speaks. For example, in a study of community responses to risk contamination assessments provided by government officials, researchers found that the extent to which communities accepted, or were persuaded by, the officials' assessments turned in large part on the conditions that gave rise to the communication. In communities where government officials discovered contamination in the process of routine testing and "where residents themselves had no reason to suspect a problem, public reaction to the announcement of the chemical contamination and information on possible health risks was... calm." By contrast, "[i]n communities where residents themselves first suspected a problem and had to call it to the attention of officials, the risk information subsequently given to them by the officials was perceived as an understatement of the real dangers or even a 'whitewash.'" Accordingly, contrary to notions implicit in government communications theories assuming passive or vulnerable recipients, the government is not necessarily distinctly persuasive, but may sometimes be distinctly unpersuasive.

The relationship between the position advocated and the communicator's perceived interest in that position will also significantly affect credibility. Not surprisingly, advocating positions against one's self-interest enhances one's credibility. This is especially true for low credibility speakers. Researchers have found, for example, that a high-credibility prosecutor, who, consistent with his best interests, argued in favor of expanding prosecutorial powers, was much more persuasive than a low-credibility convicted criminal, who, consistent with his best interests, argued for restricting court power. When the prosecutor and criminal changed their positions and advocated positions against their

103. Id. at 95.
104. Id.
105. See O'KEEFE, supra note 61, at 136–37.
107. Id.
self-interest, however, they were almost equally persuasive. While both were more persuasive when arguing against their perceived interests, the increase in the criminal’s credibility was far more substantial. Even when the government is perceived to be highly credible on an issue, therefore, it may not necessarily be highly persuasive. When a government speaker advocates a position that advances the government’s interests, listeners may find her less convincing than a non-governmental speaker who espouses the same position, particularly if that speaker’s interests appear to be in conflict with the government’s.

Sometimes credibility and persuasion are inversely related. Communicators generally benefit from high credibility when they advocate counter-attitudinal positions, or views that are contrary to, or in tension with, the views previously held by audiences. Individuals appear more open and willing to question and reconsider their own views if a highly competent and trustworthy speaker takes an opposing stand. Yet the impact of high credibility diminishes when speakers assert pro-attitudinal positions, or those in line with the audience’s positions. Indeed, low-credibility communicators sometimes prove more persuasive than high-credibility ones in reinforcing audience’s previously held views. One explanation for this phenomenon is that someone listening to a low-credibility speaker may be “more inclined to ‘help out’ the communicator in defending their common viewpoint, and hence... might be led to think more extensively about supporting arguments.” Thus, if the government is highly credible on an issue and is trying to maintain and reinforce views already held by audiences, it may not be particularly persuasive.

In short, the social science research shows that it is a mistake to assume either that listeners focus primarily on the content of government communications, or that they tend to accept or defer to such communications. Rather, as this Part has illustrated, the ways in which people process and respond to all messages, including those emanating from the government, turn on a complex interplay of a variety of factors, including message, speaker, recipient, and context; none of those factors alone is necessarily controlling. Thus we ought to question seriously any theory of the proper role of government communications in public debate premised on the idea that listeners primarily evaluate

108. Id.
109. Id.; see also O’KEEFE, supra note 61, at 137.
110. See O’KEEFE, supra note 61, at 142–43.
111. See id.
112. See O’KEEFE, supra note 61, at 142–43; Sternthal, Phillips & Dholaki, supra note 92, at 290–91.
113. See O’KEEFE, supra note 61, at 142–43.
114. Id. at 143. Sometimes, in other words, when speakers advocate counter-attitudinal positions, source credibility functions as a cue to stimulate, rather than replace, argument-based processing.
governmental messages on the basis of their content. Similarly, we should be skeptical of any approach that assumes that active governmental participation in the marketplace of ideas is likely to indoctrinate or otherwise overpower listeners. A properly nuanced theory of government communications must instead take into account the complexity of the ways in which listeners evaluate governmental communications. Part III begins this task.\textsuperscript{115}

III. TRANSPARENCY AND GOVERNMENT PERSUASION

To develop an account of the role of government communications in public debate, and the proper limits, if any, on that role, it is necessary to understand how listeners actually receive or experience such communications. Although many important factors affect that process, I focus on transparency, a factor that the existing commentary on government communications has largely neglected.\textsuperscript{116} By "transparency," I refer to the extent to which recipients understand the government to bear responsibility for a message. This Part argues that developments in technology and society are making transparency in government communications increasingly elusive, while the importance of transparency in ensuring accountability and responsiveness remains undiminished. In explaining why government communications should be transparent, this Part relies not simply on general political theory, but also on relevant social science research illustrating some of the likely effects of non-transparent government communications.

A. TRANSPARENCY IN GOVERNMENT COMMUNICATIONS

When a government speaks, it is often reasonably clear to the listener that the government bears responsibility for the message. For example, when a government official delivers a speech in his official capacity, members of the audience will generally understand the government (or its representative) to be speaking. Similarly, when signs on government buildings proclaim the virtues of justice and equality, a passerby generally understands such proclamations to be the government's. Even when the government communicates without using its officials or property, well-established practices or common usages often make clear that the speaker is the government. An observer of a

\textsuperscript{115} It is noteworthy that my reliance on social science research may serve as a cue for, or may bias, some readers when they evaluate the theory of government communications developed here. In particular, I refer to the fact that the "expertise of social science" cue may influence, either positively or negatively, some readers.

billboard advertisement seeking recruits for the United States Army, for instance, reasonably would perceive the federal government, rather than the owner of the billboard or the advertising agency that created the image, to be speaking.

But a government also speaks in ways that do not reveal its identity. With such "non-transparent" communications, listeners may not perceive that the government bears responsibility for the speech. That lack of clarity arises either because it is difficult to ascertain who is speaking at all (as in the case of anonymous speech), or because an entity other than the government appears to be speaking (as in the case of pseudonymous speech). In the latter context, the audience may not realize that the entity has any affiliation with the government, and therefore assumes that the entity is speaking for itself, not at the government's behest. Alternatively, the audience may understand that the entity is a part of the government, or receives public support, but may nevertheless assume that the entity speaks of its own accord and on its own account, at least with respect to some universe of matters. For example, students at a state university know that their professors are paid by the government, but nevertheless may perceive the professors' scholarly writings and classroom lectures to represent their own views, independent of government influence.

Transformations in social and political life suggest that the presence or absence of transparency is likely to have increasing significance with respect to government communications. First, new communications and media technologies make it far easier for anyone, including a government speaker, to communicate anonymously or pseudonymously. The internet, for example, has facilitated a burgeoning of expression among people who have little knowledge about one another. In online chat groups or bulletin boards, people can engage in ongoing conversations, transcending time and space. Where the absence of face-to-face interaction is the norm—or, more to the point, where anonymity, or pseudonymity, is a default condition of communication, rather than a condition to be actively achieved or maintained—speakers have increased opportunities (at least vis-à-vis the general internet participant) to mask their identities or to create new ones.

Other technological innovations make possible another form of anonymity, one that can hide the actual extent of authorship. Digital

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118. See generally Jerry Kang, Cyber-Race, 113 HARV. L. REV. 1130 (2000). Much attention has also been given to the fact of increased potential for surveillance on the Internet, and the fact that people may assume that they are interacting anonymously or pseudonymously when in fact they are not. See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 30–62 (1999); Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1242–43 (1998).
technologies now allow the creation or alteration of voices and images in a manner that makes the resulting product seem “natural” or “real.” As a result of such seamless alterations, recipients assume that an image or recording represents “truth” or “reality,” rather than the creator’s fictional construction or re-construction of events. Digital technologies, therefore, allow a heightened form of anonymity: one has the capacity to communicate one’s views without others even knowing that one is communicating.

Second, the ongoing blurring of the distinctions between the public and the private heightens the potential that a government’s control of, or responsibility for, the dissemination of its favored views will go unnoticed. Today, governments are increasingly relying on and establishing partnerships with the private sector to perform traditional governmental functions, such as the operation of schools or prisons, and to provide a wide range of other types of services, such as managing the national waitlist for organ donation or administering state welfare programs. Included as part of such sought-after services is the dissemination of the government’s favored views. The government


120. Of course, every image or recording represents a particular view of the truth. My point here is to note the increasing ease with which one can now use technology to expand even further one’s creation or re-creation of events.

121. Such technologies make event reconstructions, like the one described by Milan Kundera in his novel The Book of Laughter and Forgetting, much easier to achieve. According to Kundera, Vladimir Clementis, the Foreign Affairs Minister of Czechoslovakia in the early days of the Communist regime, was hanged in 1952 on trumped up charges of treason. The authorities immediately airbrushed Clementis’ image out of a famous photo that showed him standing next to the Communist leader Klement Gottwald during a triumphal party rally in 1948. MILAN KUNDERA, THE BOOK OF LAUGHTER AND FORGETTING 3 (Michael Henry Heim trans., Alfred A. Knopf 1980). It may be that increasing public awareness of these technologies will alter intuitive assumptions about whether an identifiable person is communicating.

122. See Dale Mezzacappa, After 10 Years, Edison Schools Still Struggling to Prove Itself, PHILADELPHIA INQUIRER, Nov. 10, 2002, at C2 (describing private for-profit company managing about 120 public schools).


124. The federal government contracts with the United Network for Organ Sharing, a private non-profit organization, to provide this service. See http://www.unos.org.


126. See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (permitting government subsidies on the condition that doctors and counselors provide family planning counseling without discussing abortion); Stephen J. Hedges, U.S. Pays PR Guru to Make Its Points, CHI. TRIB., May 12, 2002, at C1 (describing a public-relations firm that “shapes and relays” messages for federal government); Kurtz & Waxman,
secures the private sector’s assistance through, for example, contracting, using vouchers and tax credits, or promoting public/private partnerships. As the government enlists a wide array of traditionally non-governmental bodies to assist it in spreading its views, it becomes increasingly difficult for listeners to understand who bears responsibility for a message, and in particular whether the government does so.

The federal government’s recent efforts to combat terrorism provide a vivid example of the ways that these two trends—technological innovation and the blurring of the public/private distinction—may reduce transparency in government communications. Soon after the September 11 attacks, it was widely reported that the federal government was preparing to create a new office within the Pentagon, the Office of Strategic Influence, to spread pro-American messages to civilians abroad, both in friendly and unfriendly countries. Although the office would have used e-mail, among other means, to spread its messages, one government official said that the e-mail likely would not identify the government as the sender: “the return address will probably be a dot-com, not a dot-mil [the military’s Internet designation].” There were also reports that the office would send deliberately false messages to the foreign press. In response to a barrage of criticism, one high-ranking official stressed that no federal officials would lie, but “he declined to rule out the possibility that that Pentagon might give outside contractors the authority to disseminate false or misleading information to foreign news agencies.” The federal government ultimately announced that it was abandoning plans for the office.

B. THE CONSEQUENCES OF NON-TRANSPARENCY

When a government communicates in a non-transparent fashion, the consequences are manifold. Most obviously, it interferes with people’s

supra note 1, at A1 (noting that television networks promote anti-drug messages).


130. There have been some suggestions that only the office’s planned name was dropped while the planned programs were nonetheless carried out. See, e.g., Press Release, Fairness & Accuracy in Reporting, Media Advisory: The Office of Strategic Influence is Gone, But Are Its Programs in Place?, at http://www.fair.org/press-releases/osi-followup.html (Nov. 27, 2002).
ability to determine what a government is saying. When people receive a particular message, they may not attribute it to the government. Also, when people consider the universe of messages, they misperceive which ones were spread by the government. Even if people know a great deal about the views or positions taken by a government, moreover, they may not know the extent to which the government has undertaken means to persuade or influence them or others to adopt those views or positions. If the government communicates non-transparently, people may not know how, when, and where the government is disseminating its views.

Beyond impairing people's ability to identify the government's dissemination of messages, non-transparent communications may also mislead people about the views of other, non-governmental parties. When speakers advocate the government's views without making clear that they speak for the government, audiences may incorrectly attribute the speech to that identifiable speaker rather than to the government. This misperception may result even if neither the government nor the identifiable speaker intends to mislead.\(^3\)

Non-transparent communications are worthy of attention and concern not only because they make it more difficult to determine who is saying what. Equally important, this form of communication may actually enhance the government's persuasive powers. By masking its identity as speaker, the government (or in fact any speaker) can use a variety of cues that ultimately increase its persuasiveness.\(^3\) Such heightened persuasive powers result not from a straightforward appeal to people's thoughts or values on the subjects under discussion—from recipients' argument-based processing—but instead from the operation of cues that may have little to do with the content of the communication—from cue-based processing. Three cues are particularly relevant in the context of non-transparent communications.

The first cue is source credibility. As discussed above,\(^3\) contrary to widely held assumptions, the government is not always highly credible. A government's many "speakers" have varying degrees of credibility, and the credibility of each may change from context to context. For these reasons, and also because a speaker's credibility does not always make him or her more persuasive, government speakers, like other speakers, may sometimes have strong incentives to rely on, or appropriate, the credibility of others.

Where the government and its identifiable representatives have low credibility, the government's persuasive powers may increase. This increase in persuasiveness may not be straightforward or based on argument or values. Instead, it may be based on cues that are not directly related to the content of the message. Three such cues are particularly relevant in the context of non-transparent communications.

131. Sometimes the private speaker may fully agree with the message. The speaker's failure to identify her role in spreading the government's views nonetheless has adverse consequences for political accountability. See infra text accompanying notes 250–51.

132. Concealing its identity as speaker may also, of course, serve to decrease the government's persuasive powers. See infra text accompanying note 232.

133. See supra Part II.B.
or moderate credibility on a particular topic, the government may wish to speak under the guise of another speaker with greater credibility. For example, in matters of personal medical and health-related advice, patients may sometimes be unlikely to find advice from a centralized bureaucracy to be especially credible or persuasive. Such listeners may be more likely to credit personalized advice from their own physicians or health care providers. In Rust v. Sullivan, the Court held that doctors' advice to patients on family planning matters was simply that of service providers in a federally funded program. Yet, to the extent that the patients understood doctors to be speaking, the persuasiveness of the government's message was likely to be heightened by the patients' perceptions of the doctors' expertise and trustworthiness, and their corresponding tendency or willingness to defer to the doctors' judgment.

When the government is highly credible on an issue, it may choose to communicate openly, without masking its identity as speaker. Yet, even when its credibility is high, it may nonetheless seek to enlist the services of low-credibility speakers. The study discussed above concerning the persuasiveness of prosecutors and defendants provides a relevant example. That study revealed that although prosecutors generally were very credible and persuasive, low-credibility defendants could also be quite persuasive, particularly when advocating views ostensibly against their own interests, in line with those of the government. Thus, when seeking support for positions that are perceived to be in its own interest (e.g., greater prosecutorial power), the government may be more successful in persuading the public to adopt its views if it can enlist others, including low-credibility speakers whose interests are perceived to be in conflict with the government, to speak out in favor of the government's position.

The second cue with particular significance in the context of non-transparent communications is popularity. The phenomenon of popular influence is well-established in the social science literature, which shows that ideas perceived to have achieved broad acceptance are generally more persuasive. In his pioneering studies involving group research, Muzafer Sherif found powerful evidence of the tendency toward social conformity. Participants were asked to report the distance moved by a

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134. In some cases, the opposite may be true. For example, individuals may sometimes be more receptive to medical and health-related advice from government agencies such as the Centers for Disease Control and Prevention or the local health department, than from their own personal doctors.
136. Of course, legal or political considerations, wholly distinct from issues of believability, may also influence the government's decision to reveal or conceal its identity as speaker.
137. See supra text accompanying notes 107–09.
138. See id.
139. See Mackie & Queller, supra note 61, at 137 (citing MUZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS (Harper & Brothers 1936)).
small speck of light, which was stationary but appeared to move because of a perceptual illusion. Unlike the responses of those tested individually, the responses of those tested in the presence of others tended to converge. This uniformity of responses persisted even after the participants were separated and tested in isolation again.

In another set of classic studies, Solomon Asch presented subjects with lines of varying lengths and asked them to identify which line was the same length as a target line. Subjects questioned alone identified the correct line in 99% of the trials, but those questioned in the company of others, who, unknown to the subject, were instructed by Asch to give the identical incorrect response, went along with the others’ incorrect responses in approximately 33% of the trials. Asch’s study demonstrated that the consensus opinion of others can exert an influence so powerful that individuals may revise even what they observe to be true in the physical environment. While Sherif’s and Asch’s studies focused on the influence of others in close proximity, or in the same reference group, other studies have confirmed similar findings in contexts beyond those of small groups. Taken together, these studies reveal that a position perceived to be accepted or popular is likely to have greater influence.

Individuals tend to adopt views perceived to be popular or widespread for three types of reasons. First, especially when lacking information on a particular matter, individuals see popular views as providing information as to what is correct or true. Ambiguous or complex social situations tend to enhance that effect. Second, individuals associate popular views with reward from others, such as social acceptance or material benefits. Even if individuals do not necessarily personally agree with a position, they may at least publicly represent that they do in order to reap social benefits. Third,

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140. See id.
141. See id.
142. See id.
144. See id. at 16.
147. See id. at 5 (citing L. Festinger, A Theory of Social Comparison Processes, 7 HUM. REL. 117–49 (1954)).
149. See id.
individuals espouse popular views for purposes of *identification*.\(^5\) Being in sync with the majority, for example, can enhance feelings of power and self-esteem.

By participating in public debate, the government makes its favored ideas or viewpoints more popular or widespread. It accomplishes this not simply by advocating views on its own, but also by using subsidies and other incentives to enlist or encourage others to communicate ideas that they might not otherwise have expressed.\(^2\) Because individuals who convey the government's ideas are not necessarily taking positions with which they disagree (although some might), such practices do not infringe on the speaker's autonomy. Even though individuals are free to decide whether to communicate the views of the government, however, the fact remains that the government's allocation of resources in support of a view makes it far more likely that individuals will more frequently and widely express that view.\(^5\) And as that idea becomes more accepted, the popularity cue may generate even more adherents.\(^5\) Furthermore, by participating in public debate in this way, the government may stifle the expression of some ideas that would otherwise have been aired.\(^5\) These ideas disappear from debate not as a result of any direct suppression by the government, but because of the additional incentives to produce one idea rather than the other.\(^5\) This silencing effect will likely have a greater impact on ideas or positions about which people do not have strong feelings.

When the government communicates in a transparent fashion, the public understands when and how the government is injecting its views into public debate, and thus perceives the government's role in making certain positions popular.\(^5\) By communicating in a non-transparent manner, however, the government can make its favored positions appear

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\(^3\) See generally Redish & Kessler, *supra* note 41 (discussing impact of various types of subsidies).

\(^4\) See *id.*

\(^5\) See Redish & Kessler, *supra* note 41, at 554 (discussing impact of various types of subsidies).

\(^6\) See *id.*

\(^7\) There may be another type of transparency problem even when individuals understand the government's responsibility for a message. The government may speak at the behest of private interest groups or their lobbyists, and the public may be unaware of that connection or relationship. This possibility raises serious concerns, especially in contexts in which citizens may be more apt to assume that the government is trustworthy (e.g., in issuing appropriate safety guidelines). Yet, insofar as members of the public find the government's messages objectionable or unacceptable, citizens may hold the government accountable for the messages.
more popular than they really are. Non-transparent communications leave the public unaware of the government's role in shaping public debate, and thereby create the misleading impression that the relevant realm of public debate is unaffected by government participation. By masking its responsibility for a particular position, therefore, the government can exploit the popularity cue to its advantage while avoiding any potential costs associated with openly taking that position.

This criticism—or caution—about government participation in public debate is distinct from the concern, expressed frequently in the relevant literature, that government speech may threaten democracy by skewing public debate. Those arguments tend to assume that government communications threaten to dominate or reshape public debate. By contrast, this cue-based concern focuses on the harm that results when non-transparent government communications make an idea seem more popular or accepted than it really is. In other words, the concern here is not simply with government efforts to overwhelm debate or to affect private speakers' choices about what views to express (or not to express), but instead with governmental efforts to skew perceptions of public debate.

The third cue, multiple sources, is related to the popularity cue, but distinct from it. By multiple sources, I refer not to the number of individuals who deliver a message, but to the number of social entities that bear responsibility for a message. "A social entity is defined as an individual or group of persons who are perceived to be a unit, distinct from others present." Thus, while ten individuals might be considered ten distinct entities, to the extent that any are perceived as non-independent and acting in coordination with one another, those same ten individuals might be understood to constitute a fewer number of social entities. Multiple source influence describes the observed phenomenon that if a message is perceived to have the support of more social entities, greater persuasion will likely result. Evidence supports this conclusion even when the total number of individuals perceived to support a message remains constant.

A study by Stephen Harkins and Richard Petty illustrates this point. College students received three strong arguments in favor of senior

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158. See YUDOF, supra note 36, at 145-207; Cole, supra note 41, at 705; Redish & Kessler, supra note 41, at 554.

159. See YUDOF, supra note 36, at 145-207; Cole, supra note 41, at 705; Redish & Kessler, supra note 41, at 554.


162. See Harkins & Petty, supra note 161, 163-70.
comprehensive exams.\textsuperscript{163} The arguments were presented in one of three ways: by one speaker; by three independent speakers, each of whom presented one argument; or by three speakers, each giving one argument, who were presented as belonging to a committee that had worked together in generating their arguments.\textsuperscript{164} The study found that the three independent speakers proved more persuasive than either the single speaker or the three speakers made to appear non-independent, and that the non-independent three speakers were no more persuasive than the single speaker.\textsuperscript{165} Consistent with the phenomenon of multiple source influence, the fact that there were three speakers rather than one advocating a message proved significant only when listeners perceived the speaker to constitute three distinct social entities.

One account explains multiple source influence by focusing on the differences in credibility assigned to several entities as compared to a single entity, and to individuals acting as parts of social entities as opposed to individuals acting on their own.\textsuperscript{166} Listeners assume that members of the same social entity are more likely to be influenced by one another than will members of different social entities. Listeners may surmise, for example, that members of the same social group share a view on a matter simply in the interest of reaching an agreement or as a result of the same, sometimes flawed, reasoning. When members of different social groups hold the same view, however, message recipients are more likely to conclude that that view was the result of deliberate, independent analysis.\textsuperscript{167} In other words, the shared views of independent entities are more informative and credible—\textit{i.e.}, there is “more reason” to adopt those views—than the same views espoused by members of a single entity.

A related explanation also emphasizes the tendency of individuals to infer that information from several independent entities is likely to be based on different perspectives or independent pools of knowledge.\textsuperscript{168} That account, however, maintains that such inferences lead individuals not simply to accept without scrutiny the views held by multiple sources, but instead to pay more attention to the arguments presented. “If arguments from multiple sources are perceived as representing independent perspectives on an issue, then this information may be more worthy of diligent consideration than information from only one perspective.”\textsuperscript{169} This hypothesis of an increased motivation to put effort

\begin{footnotesize}
\begin{itemize}
\item[163.] See \textsc{Petty \& Cacioppo, Communication, supra} note 73, at 100.
\item[164.] \textit{Id.}
\item[165.] \textit{Id.}
\item[166.] \textit{Id.} at 97–98 (discussing views of others).
\item[167.] See \textit{id.}
\item[168.] See \textit{id.} at 100.
\item[169.] \textit{Id.}
\end{itemize}
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into message processing finds support in evidence indicating that multiple sources, as compared to a single source, not only prove more persuasive when presenting cogent arguments but also prove less persuasive, or generate more unfavorable thoughts, when presenting specious arguments.170

Regardless of which explanation is more accurate, and indeed it may well be that both mechanisms are at work, the appearance of uniformity or variety among speakers will likely affect speaker persuasiveness. This phenomenon is particularly relevant to the issue of government communications because it reveals how transparency can affect the government’s persuasiveness. If listeners are unaware that speakers are all communicating the government’s message, the government may foster the impression that a composite of separate and independent entities, rather than interrelated ones, are all advancing the same position. In other words, the lack of transparency may lead message recipients to misperceive the relations among speakers and may thus enhance the government’s effectiveness, insofar as it is presenting relatively cogent arguments, in inducing persuasion.

Thus, the lack of transparency in government communications can have significant implications for public debate. First, people will not be able to identify what the government is saying and how it is doing so. Second, people may incorrectly attribute to specific individuals messages that they may not hold. Third, and relatedly, the government can heighten its persuasiveness by making use of source cues. By masking its responsibility for speech, the government can lead people to believe that high-credibility or otherwise particularly persuasive speakers hold a certain view, or that more people, making wholly independent decisions, share that view. Although these three conditions may equally result when private parties communicate non-transparently, a different set of concerns apply to government communications. The next Part addresses those concerns.

IV. THE CONSTITUTIONAL DIMENSION OF THE TRANSPARENCY PRINCIPLE

Part III introduced the concept of transparency in government communications and discussed how the absence of transparency may affect both the polity’s ability to determine what views the government is disseminating and the government’s ability to persuade. This Part explains why the principle that governments should communicate transparently has a constitutional dimension. First, it argues that the constitutional commitment to political accountability calls for transparency in government communications. Then, acknowledging the First Amendment rights of private speakers to speak anonymously or

170. See id.; Harkins & Petty, supra note 161, at 169.
pseudonymously, it explains why the rationale for protecting private speech does not extend to government speech.

A. GOVERNMENT COMMUNICATIONS AND POLITICAL ACCOUNTABILITY

The commitment to political accountability stands as a bedrock principle of our Constitution. It is reflected throughout the Constitution’s text including, most obviously, the numerous provisions setting forth the requirements for regular federal elections, the multiple amendments expanding the nationwide franchise, and the Seventeenth Amendment providing for the direct election of Senators. In establishing a representative democracy, those provisions reflect the basic concept that government officials shall be directly responsible to the citizenry.

The First Amendment Speech Clause also embodies, in significant part, this commitment to political accountability. As the Supreme Court has stated, “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means... is a fundamental principle of our constitutional system.” By protecting public debate and in some instances mandating a right of access to government proceedings, the First Amendment allows open discussion and criticism of governmental policies and practices and thereby creates the conditions enabling an informed and critical electorate. In other words, coupled with the right to vote, the First Amendment provides a means by which the citizenry can “check” and ultimately direct governmental power.

The Accounting Clause, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,” is another example of the commitment to political accountability. In requiring such publication, the Clause enables the public to learn of the federal government’s uses of the

171. See U.S. Const. art. I, § 2, cl. 1 (popular election of Members of the House of Representatives every two years); id. art. I, § 3, cl. 2 (election of one-third of the Senators every two years); id. art. II, § 1, cl. 1 (elections of President and Vice President every four years).

172. See id. amend. XV, § 1 (race, color, or previous condition of servitude); id. amend. XIX, § 1 (sex); id. amend. XXIV, § 1 (failure to pay any poll tax or other tax); id. amend. XXVI, § 1 (age, for citizens who are eighteen years of age or older).

173. See id. amend. XVII.

174. See id. amend. 1.


public fisc and to hold the government answerable for those uses through the electoral process. The history of the Clause suggests that at least some of the Framers espoused that intention. George Mason, who initially moved to include an accounting requirement at the Federal Convention, later explained during the Virginia debates that "[t]he people... had a right to know the expenditures of their money." Similarly, James McHenry stated during the Maryland debates, "[t]he People who give their Money ought to know in what manner it is expended." Stressing the significance of the accountings to electoral politics, William Livingston stated in the New York debates, "Will not the representatives... consider it as essential to their popularity, to gratify their constituents with full and frequent statements of the public accounts? There can be no doubt of it."

Some controlling principles of constitutional law also emerge from the “essential postulate[s]” of “the structure of the Constitution.” In explicating the constitutional design of state and federal relations, the Supreme Court has repeatedly emphasized the centrality of political accountability. In Alden v. Maine, for example, the Court struck down a federal law authorizing private actions against non-consenting States in state courts because the law impeded “the States’ ability to govern in accordance with the will of their citizens.” When the federal government disregards the States’ sovereign immunity, the Court explained, “the course of [the States’] public policy and the administration of their public affairs may become ‘subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.’" In so doing, the federal government “strikes at the heart of the political accountability so essential to our liberty and republican form of government.”

180. See id. at 199 (Douglas, J., dissenting) (citing 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 618 (1911)).
181. Id. (internal quotations omitted) (quoting 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 459 (1836)).
182. Id. (internal quotations omitted) (quoting 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 150 (1911)).
183. Id. at 190–200 (internal quotations omitted) (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 347 (1836)).
186. 527 U.S. at 706.
187. Id. at 750–51, 754.
188. Id. at 750 (quoting In re Ayers, 123 U.S. 443, 505 (1887)).
189. Id. at 751.
According to the Supreme Court's anti-commandeering cases, the federal government must refrain not only from interfering with the States' accountability to their citizenries, but also from obstructing its accountability to its own citizenry. In *New York v. United States*, the Court invalidated federal legislation requiring state governments either to take title to radioactive waste generated within their borders or to regulate that waste according to Congress' instructions. In stressing the importance of public perceptions of the state and federal governments—and hence providing an account of particular relevance here—the Court explained:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making [a] provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share that view.... [If the Federal Government pre-empts the States, the Federal Government] makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.\(^1\)

In striking down federal legislation requiring state law enforcement officers to help administer a federal gun control program, the Court in *Printz v. United States* adopted a similar rationale: the law impermissibly "reduce[d] [the States] to puppets of a ventriloquist Congress."\(^2\)

Applied in the government speech context, the political accountability principle calls for governments to speak "in full view of the public." This means that governments ought not to have the same freedom to speak as private parties. Whereas private parties may generally decide to express their views anonymously, in a manner that allows them to avoid responsibility for their speech, governments, consistent with constitutional commitments, ought to speak in a manner

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190. 595 U.S. at 144.
191. *Id.* at 169-77, 188.
192. *Id.* at 168-69 (emphasis added).
194. *Id.* at 928 (internal quotations omitted) (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)). The Court explained:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

*Id.* at 930.
that permits the polity to hold them accountable. As discussed above, the Supreme Court has repeatedly counseled that the legitimacy of government communications, and the use of public resources to support them, resides in mechanisms of democratic accountability. Insofar as the government is responsive and accountable to the electorate, the government speaks at the will of the people. A necessary condition of this justification, of course, is that the people know of the government’s communications—that the people have a basis for evaluating, and responding to, the government’s specific communications as well as its overall communicative agenda. Transparent government communications are indispensable to that condition.

As Mark Yudof and others have pointed out, democratic government rests on the premise of the consent of the governed, and government communications help to legitimize that premise. They inform people of the government’s policies and priorities, and explain why those policies and priorities are correct or desirable. They assist the citizenry in evaluating the government’s performance and ultimately determining whether to give or withhold consent. Yet the risk of government communications, Yudof warns, is that they may lead to “false consent.” As this Article has shown, when the government communicates in a non-transparent fashion, it may, in some sense, engineer “false consent.” It may mislead the public to believe, for example, that the government’s favored views are more widely and strongly held than they really are, or held by more authoritative and esteemed individuals when in fact they are not.

But the argument here is neither that the government is dominating people’s minds or indoctrinating them, nor that the government is exercising unique or heightened persuasive powers. Indeed, any speaker can engage in such non-transparent communications and “manipulate” source cues. The argument to restrict the government’s ability to communicate without identifying itself flows not from the claim that government communications have a different impact than do private communications. Rather, it rests on the claim that government speakers, as a matter of constitutional principle, operate under obligations that do not constrain private speakers. In other words, some types of speech by governmental agencies and officials implicate constitutional values in

195. See cases cited supra note 43.
196. The citizenry may in some circumstances perceive non-transparent communications to be more effective and hence more desirable. But the fact that the citizenry might agree to measures that would inhibit its ability to hold government accountable should not on its own justify those measures. For further discussion of this issue, see infra text accompanying notes 228-33.
197. See Yudof, supra note 36, at 20-32, 141-57; see also Cole, supra note 41, at 702-04.
198. See Yudof, supra note 36, at 152; see also Cole, supra note 41, at 704-08 (noting “specter of government domination”).
ways that speech by private parties does not. For the government to mislead the polity through non-transparent communications is ordinarily inconsistent with constitutional principles.

This Article calls for transparency in government communications, not transparency in government generally. Although a lack of openness in government raises serious accountability issues, non-transparent communications interfere with accountability in a distinct, and in some ways more troubling, manner. In the former context, the government withholds information and thereby generally seeks to prevent discussion of certain matters. In the latter context, the government withholds its identity while actively disseminating information or ideas to the public. While both types of non-disclosure can have significant consequences for public debate, the latter causes particular concern in that it involves affirmative efforts by the government to mislead or manipulate the public.

Although there are strong arguments that the government generally ought not to mislead its citizens, this Article calls for a narrower principle that would simply limit the government from misleading citizens through non-transparent communications. The distinct harm to political accountability that results when government misleads by speaking through undisclosed agents or otherwiseopaquely becomes apparent when examining more closely the problem of misleading through false communications. When a government misleads by disseminating false communications under its own name, the citizenry may evaluate those communications. If the citizenry finds them to be false, it may hold the government accountable for the deception. In some cases, the people may decide that the government had an adequate justification for lying; in other cases, they may decide otherwise. Moreover, the very fact that the government is speaking will likely lead at least some people—for example, its political opponents or the news media—to scrutinize more carefully what the government is saying. That expectation of scrutiny may deter governments from disseminating falsehoods in the first place. But when the government speaks without identifying itself, its statements are more likely to escape such heightened scrutiny. Thus, if the government misleads by speaking falsely through undisclosed surrogates, its falsehoods are more likely to go unchallenged and uncorrected. And even if people find the communication to be false, they will have no reason to hold the government accountable.

199. Analogously, the Constitution prohibits governmental actors from doing many things that it permits private parties to do with impunity.

200. See Christopher v. Harbury, 536 U.S. 403 (2002). Plaintiff sought relief based on alleged deceit by the federal government about the circumstances of her husband's death, id. at 405, but the Court dismissed the claim, on grounds unrelated to the propriety of the alleged deceit. Id. at 418-22.
The law recognizes in many other contexts the importance of information about the speaker to prevent forms of misleading. Consumer protection statutes, for example, require sellers or advertisers to disclose their identities as a means of preventing fraud. Similarly, election laws often mandate disclosure not only to prevent corruption, but to ensure that people do not mistake individuals to be acting independently when they in fact are not. Colorado law, for example, requires persons gathering signatures for ballot initiatives to wear badges indicating whether they are "paid" or "volunteer," presumably so that people will not assume that gatherers are acting simply on their own accord. Indeed, the Supreme Court has recognized that the listener's need for information about the speaker may sometimes justify limitations on First Amendment free speech rights: "[i]dentification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected."

Yet justifications for such disclosure requirements often rest on the idea that the additional information will enhance reasoned decision-making, or, in other words, improve people's ability "to evaluate the arguments." This Article makes no such claim. In some cases, individuals may respond to the fact of government authorship by engaging in more argument-based processing; they may, for example, decide that a message disseminated by the government merits further reflection, or ought to be considered with greater scrutiny or care. In other cases, however, transparency may stimulate no additional argument-based processing. The fact of government authorship may simply encourage cue-based processing, with individuals reaching decisions on the basis of inclinations, or assumed agreement or disagreement, rather than critical reasoning per se.

Similarly, people often argue in favor of disclosure requirements because they expect that certain disclosures will lead people to be more critical, or wary, of the message presented. For example, the Colorado "paid/volunteer" badge law likely rests on the assumption that people asked to sign petitions will view more skeptically requests for signatures


from people wearing "paid" badges, as opposed to "volunteer" badges. Likewise, disclosure laws requiring fundraisers to inform those asked for charitable contributions of the percentage of funds that will actually reach the charity likely rest on the assumption that the lower the percentage, the less likely people will contribute. Here again this Article makes no such claim. It makes no assumption about the likely directional impact of a particular disclosure of governmental authorship. As discussed above, the fact of government authorship sometimes may enhance a message's persuasiveness, and at other times may diminish it.

Yet abiding by the transparency principle would have significant implications for the government's overall ability to persuade. Ignoring this principle, the government would be free either to clarify or to obscure its identity as speaker. It is likely to do the former only when its identity enhances, rather than diminishes, its persuasiveness. As a result, left to its own devices, the government would most likely make its authorship relevant only when it serves as a positive cue. By contrast, when following the transparency principle, a government would not be free to reveal or conceal its responsibility for a given message selectively. Under such conditions, the government authorship cue is more likely to function positively in some circumstances and negatively in others. Therefore, the transparency principle would provide a structural limitation on a government's overall ability to persuade.

In light of the political accountability rationale, one might argue that just as the government's speech must be transparent, so too must the government's actions. Such an argument would generally be consistent with the one advanced here. Yet, for at least two reasons, non-transparent government communications trigger greater concern than do non-transparent government actions. First, as an empirical matter, governments seem more likely to engage in non-transparent communications. As discussed above, governments communicate in a non-transparent manner on a broad range of matters, and changes in society and technology suggest that this practice will likely grow. By contrast, governments probably act non-transparently in a narrow range of areas. Insofar as governments secure nongovernmental actors to undertake traditional government functions, individuals are more likely

204. See Garrett, Money, supra note 201, at 1882-84.
205. In Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781 (1988), the Supreme Court struck down a North Carolina law requiring professional fundraisers to disclose to potential donors, before asking for contributions, the percentage of the prior year's charitable contributions the fundraisers had conveyed to the charity. See id. at 795, 800. It noted with approval, however, the obligation, under North Carolina law, for fundraisers to disclose contribution percentages when asked about the practice by a potential donor. See id. at 799.
206. In many contexts, of course, it is difficult to draw a meaningful distinction between speech and action. See generally Frederick Schauer, Free Speech: A Philosophical Enquiry (1982).
207. See supra Part III.A.
to assume that those nongovernmental actors act at the direction, or under some degree of supervision, of the government. Further, it bears emphasis that although "secret" activities, such as covertly funding Nicaraguan rebels, may be non-transparent in the traditional sense of the word, they are not non-transparent as the term is employed here. In those situations, the public is completely unaware of the government actions taking place; in other words, it is not the case that the public knows of the actions but does not know of the government's responsibility for them. Law enforcement or undercover intelligence operations, in which private individuals interact with government agents but believe them to be nongovernmental, probably account for the majority of non-transparent government actions. In those situations, governments' failure to disclose their identities to the misled individuals does not generally raise the type of political accountability concerns herein discussed.

Second, non-transparent government communications may impede political accountability to a greater extent than do non-transparent government actions. Consider the consequences associated with the public revelation of the government's responsibility for a particular instance of non-transparent action as compared to those for a specific instance of non-transparent speech. In the former situation, the government's identity becomes publicly known, and the government must then confront or deal with the public reaction to that revelation. Put another way, the public can hold the government accountable for the action. In the latter situation, by contrast, once the government's identity becomes unveiled, more non-transparent government communications may become part of the debate about the propriety of the original non-transparent communications. In other words, the government may continually employ more anonymous or pseudonymous communications to defend the prior anonymous or pseudonymous communication that was discovered, or even to put into doubt the discovery. This potential for a type of recurring Escher-like deception suggests that non-transparent speech, as opposed to non-transparent action, is more far-reaching in terms of governments' potential to evade political accountability.

B. Anonymous Government Speech?

To establish that our constitutional regime calls for transparency in government communications, this Article must address the fact that our regime also recognizes the value of non-transparent communications. The Supreme Court has repeatedly recognized anonymity as an important component of the free speech right, and, on that basis, has struck down several laws compromising speakers' ability to communicate
Notwithstanding the fact that government communications are not ordinarily entitled to any First Amendment protection, some might argue that we should proceed with caution before advocating the transparency principle for any speaker, including the government. An examination of the rationale for protecting anonymous speech, however, suggests that society's interest in preserving anonymity extends primarily, though not exclusively, to private speakers rather than the government.

There are four primary justifications for protecting the right to anonymous, or pseudonymous, communications. First, anonymity promotes speech by insulating speakers from retaliation. As the Supreme Court has stated, anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." Anonymity encourages the free expression of ideas because it enables those with unpopular views to escape not only physical and economic reprisals but also belittlement or social ostracism. Indeed, the drafters of the original antecedents of the First Amendment wrote anonymously. The real threat of violence for supposedly "free" speech, as evidenced during the 1960s civil rights movement, provides a compelling reason against transparency, in favor of anonymity.

Second, anonymity encourages speech from those who wish to avoid self-revelation. Some people, for example, those who are shy or who question their communication abilities, hesitate to speak because they


209. See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 & n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression."); Block v. Meese, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) (First Amendment does not constrain government expression of political views). The First Amendment might protect state government communications from federal restriction. See, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) (recognizing a First Amendment claim of a state university to design its educational program). The First Amendment might also protect speech by government employees on behalf of the government from restriction by that same government. See, e.g., Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1055 (6th Cir. 2001) (holding that public elementary school teacher's curricular choice constituted speech protected by the First Amendment); Yniguez v. Arizonans for Official English, 69 F.3d 920, 947 (9th Cir. 1995) (en banc), vacating as moot, 520 U.S. 43 (1997) (holding that an English-only language restriction on a state employee's speech used in handling medical malpractice claims violated the First Amendment).


211. McIntyre, 514 U.S. at 357.


are wary of revealing "too much" about themselves. Empowered through anonymity, those individuals may gain the confidence to speak. Others want, or need, to talk about intensely personal or private matters, but will not do so unless they can speak anonymously. The proliferation of confidential hotlines provides evidence of the success of anonymity in enabling those who are, for instance, victims of sexual or substance abuse to communicate their concerns and to seek assistance. Still others do not dread speaking in public or seek to discuss personal matters, but simply wish to avoid being publicly associated with an idea. For them, the availability of anonymity leads them to express ideas or opinions publicly when they otherwise might remain silent.

Third, anonymity may further the unbiased evaluation of speech. It is often assumed that identification of the speaker enhances people's ability to assess the truthfulness or accuracy of speech because they can discern the speaker's basis of knowledge or reputation for truthfulness. Yet knowledge of a speaker's identity may also diminish listeners' evaluative capacities. People may have positive or negative preconceptions, based on factors unrelated to the issue under discussion, about certain speakers that can lead them to pay less attention to the ideas presented. As discussed above, instead of evaluating the merits of a claim, sometimes people overvalue the source and undervalue the argument. People therefore may be more likely to accept statements made by high-status speakers and to reject those by low-status speakers prematurely. By contrast, under conditions of anonymity, listeners are unaware of the speaker's status characteristics, and "the concomitant biases and prejudices that tend to advantage dominant groups while disadvantaging marginal others then become mitigated."

Fourth, anonymity encourages speech at the margins. When certain types of speech can bring criminal or civil liability, individuals may speak with "excess caution" because of the potential adverse consequences. That is, individuals may refrain from engaging in legally protected speech if they mistakenly fear it will lead to liability. Through making it more

215. See id. at text accompanying notes 10–11.
220. See id. at text accompanying notes 27–28.
difficult for a government or others to enforce laws regulating speech, or, in other words, enhancing people's ability to escape liability by evading identification, anonymity minimizes the chilling effect of speech-restricting laws.

Those four justifications apply with varying force to government communications. In some respects, it is precisely against society's interest to insulate government speech from retaliation. In light of democratic commitments to responsive governance, it will often be desirable for governments to refrain from expressing unpopular views or to face social condemnation for doing so. Indeed, the people's ultimate "retaliation"—holding governments accountable for undesirable action and expression by "voting the bums out"—is a fundamental feature of democracy. When the government must, or should, take unpopular positions, as the federal government had to do in the Reconstruction South, it usually has ample resources to defend itself and its views. It has, for instance, significant means to identify those responsible for unlawful retaliatory measures and to initiate a civil or criminal action for any illegality associated with those measures. Awareness of the government's resources, moreover, makes it less likely that individuals will respond to government communications in a threatening, or violent, manner.

Yet society has a strong interest in preserving anonymity to prevent retaliation for at least some government speakers. In particular, anonymity can empower government whistleblowers, those officials and employees who wish to expose public corruption but risk retaliation for doing so. Although the public may rely on other means to encourage speech from whistleblowers—for example, offering financial or other incentives, or providing statutory penalties for retaliation—some risk-averse whistleblowers may speak only on the condition of anonymity. Given its expected content, whistleblower speech, even if anonymous, likely enhances, rather than undermines, the public's ability to hold governments accountable for their actions. In light of the fundamental importance of bringing governmental wrongdoing to light, it may be that the interest in encouraging whistleblower speech trumps the interest in having the government speaker self-identify.

The general inapplicability of the self-revelation concern for shy or

222. Although one might question whether such individuals speak in their private or official capacities—a difficult question applicable to any government official or employee in certain cases, see infra text accompanying notes 240-46—it seems clear that exposing government fraud or misconduct falls, or at least ought to fall, within the scope of employment of most public servants.


224. As discussed below, the transparency principle is not absolute. See infra text accompanying notes 260-61.
reserved speakers, or for personal or private matters, to government communications requires little discussion. A government agency or official usually has strong incentives to speak publicly and is not likely to suffer from the type of shyness or heightened reserve that might silence some private individuals. Nor does it generally make sense to conceive of government matters as personal or private (though they may be confidential). The other self-revelation concern—the desire to avoid being publicly associated with certain speech—does apply, however, particularly in the context of anonymous leaks of sensitive or confidential information. Sometimes when government employees leak confidential or classified matters, they act on their own initiative, without the approval of their superiors. Insofar as they leak for whistleblower-like purposes, it may be that their ability to do so anonymously ought to be protected. To the extent that they leak largely for personal gain, they are best understood to speak as private individuals, rather than on behalf of the government. Sometimes, by contrast, government employees leak information at the direction, or with the consent, of their superiors. In those circumstances, involving “controlled leaks,” government speakers may speak anonymously to avoid not retaliation or bias, but association with the views expressed.

The question whether “controlled leaks” ought to be encouraged, or at least tolerated, is a difficult one. Controlled leaks may be a useful government tool, and in some cases may actually serve to enhance the possibilities for political accountability. For example, government officials may use controlled leaks as trial balloons, as a means of taking public sentiment into account before embarking on a proposed course of action. Absent the ability to do so, the government simply might not risk seemingly unpopular action of which the public might actually approve, or might persist with unpopular action because of a reluctance to retreat from a publicly declared course. Also, controlled leaks provide the public with at least some information from, or about, the government, and if the choice is between controlled leaks and no leaks, the former might better serve the purpose of accountability.

But controlled leaks also hinder accountability. As with most forms of anonymous government communications, controlled leaks involve


226. See Hess, supra note 225, at 75–78.

227. Stephen Hess notes that some people refer to authorized leaks as “plants,” rather than “leaks.” Id.

228. See id. at 77; Abel, supra note 225, at 20–21; Linsky, supra note 225, at 195.
instances in which the government ultimately seeks to influence or persuade the public without the public's knowledge. The government can selectively choose the information it seeks to disclose while avoiding criticism for the information's content or release.\textsuperscript{229} It is true that many press reports indicate when information comes from an anonymous government official, and that that mitigates some accountability concerns. The lack of identification of the specific source, however, undermines the public's ability to hold a specific individual or part of government responsible. Controlled leaks generally involve situations where the government seeks to have it both ways. The government categorizes information as sensitive or confidential and therefore prevents its dissemination, yet, when disclosure may reap some benefit, it secretly releases the information, while publicly continuing to insist on the information's sensitivity. The availability of controlled leaks, therefore, may actually dampen the government's incentives to make information freely and fully available. Ultimately, the government likely makes many controlled leaks for reasons of "politics," rather than "policy," and it is unclear whether such political maneuvering generally ought to be protected or encouraged.\textsuperscript{230}

The argument that anonymity may further the unbiased evaluation of speech has some force with respect to government speech. Individuals may sometimes be suspicious or skeptical of the government. Allowing the government to communicate anonymously or pseudonymously will diminish the likelihood that its positions will be dismissed out of hand as mere propaganda, or be subject to negative preconceptions.\textsuperscript{231} So, if some teenagers were to ignore official governmental warnings about drunk driving simply because they think the government is "uncool," then there would be some value in allowing the government to communicate its message anonymously or pseudonymously through television programs such as "E.R." or "Beverly Hills 90210." In other words, for some messages, it may be desirable to eliminate anti-government bias.

Sometimes individuals may not be skeptical of the government view, but, to the contrary, be predisposed to accept it. In those cases, society might prefer anonymous government communications because individuals will be less likely to accept uncritically, or defer to, official views. In some cases, individuals may see the government as especially

\textsuperscript{229} See Hess, supra note 225, at 75 (referring to a "beneficial leak" or "plant" as "premature authorized partial disclosure" (emphasis added)).

\textsuperscript{230} This account should in no way suggest that leaks in general are bad or undesirable. Indeed, insofar as they make government policies and practices more transparent, they play an invaluable role in democratic government. This account focuses instead on leaks sanctioned by the government, which are less likely to play such a transparency-enhancing role.

\textsuperscript{231} Of course the fact of anonymity may itself function as a cue, and people may be more skeptical or more likely to examine critically an anonymous communication.
competent or trustworthy, and may thus be all too willing to adopt official views as their own. For example, if a local environmental agency, at the direction of a mayor captured by pollutant donors, issues a statement finding air pollution levels to be non-toxic, then the government-labeled message might hinder critical evaluation because citizens might unduly defer to the apparent expertise of the agency.

In other cases, individuals may defer not so much because they trust or respect the government, but because they fear it. When the government identifies speech as its own, some individuals, particularly vulnerable ones, may fear (real or imagined) consequences of rejecting the speech and may adopt the suggested point of view not because they agree on the merits but because they associate the view with the government. Upon seeing a government poster warning of the risks of abortion, for instance, a recent immigrant might infer (even if incorrectly) the linkage of unrelated government benefits with acceptance of the government’s position. The risk and severity of such perceived pressure will likely vary depending on the subject matter and the political climate.

In terms of reducing undue bias, a general prohibition on anonymous and pseudonymous government communications then will surely have its costs. Yet, because of the strong accountability interest in informing the citizenry of government communication efforts, adopting the transparency principle may well be worth the costs. Also, in light of the relative difficulty of identifying with any precision the circumstances under which governments ought to and ought not to be permitted to communicate anonymously, it seems preferable generally to forbid governments from doing so than to permit them the choice of whether and where to do so. As discussed above, when the government can choose to communicate anonymously, it will likely do so only when it believes that its identity will handicap, rather than enhance, its persuasiveness. Giving the government, or indeed anyone, the choice of whether to communicate anonymously will not evenhandedly decrease biases and prejudices, but instead will decrease only negative biases or prejudices.

The argument for anonymity based on the potential for decreasing bias is most compelling in contexts in which the universe of speakers includes speakers whose contributions are chronically devalued. It seems implausible to assert that governments in contemporary social and political life generally fall within that category of speakers. Even if they were so perceived, the encroaching nature of government power generally would call for institutional arrangements that encourage, rather than diminish, people’s tendencies to evaluate government

232. I thank Seana Shiffrin for stressing the importance of making this point.
communications critically.\textsuperscript{233} That removing anonymity as an option for government speech could sometimes place a heavier burden on governments, as opposed to private speakers, to make a convincing case on a matter thus seems appropriate, and indeed desirable.

The fourth argument in favor of anonymity, encouraging speech at the margins, is less salient in the government speech context. As governments retain primary responsibility for the enforcement of the laws, many speech restrictions that might chill private speech will have no effect on government speech. To the extent that a government might be sued for violating a speech restriction—either by a private party or another governmental entity (for example, the federal government might sue a state or local government)—there already exist many structural and institutional accommodations, such as the doctrines of sovereign immunity or other types of immunities, that protect the abilities of governments to express their views.\textsuperscript{234} In \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank},\textsuperscript{235} for example, the Supreme Court recently held that the Eleventh Amendment precludes Congress from relying on its Article I powers, including its power under the Patents and Copyrights Clause, to authorize private parties to bring damages actions against states for patent infringement.\textsuperscript{236} Based on the Court's reasoning in that case, courts have likewise held that, absent its consent to suit, a state also may not be held liable to private parties for copyright infringement.\textsuperscript{237} Even in the absence of applicable immunities or protections, moreover, in light of the unique and competing incentives in the political sphere, it remains a substantial question whether, and to what extent, the risk of damages liability in any given instance would chill government communications.\textsuperscript{238}

In sum, the reasons for according anonymity to private speakers do not apply with equal force to governments. Whereas private parties would suffer significantly in their ability to express their ideas freely and fully absent the veil of anonymity or pseudonymity, governments generally would not be so hindered. While the government may of course sometimes have compelling interests in communicating in a non-

\textsuperscript{233} Cf. Blasi, supra note 177 (discussing the "checking" value of the First Amendment).
\textsuperscript{234} See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982).
\textsuperscript{235} 527 U.S. 627 (1999).
\textsuperscript{236} Id. at 636.
\textsuperscript{237} See, e.g., Chavez v. Arte Publico Press, 204 F.3d 601, 607 (5th Cir. 2000) (upholding states' Eleventh Amendment immunity from copyright infringement where Congress did not abrogate immunity under Section 5 of the 14th Amendment); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73 n.16 (1996) (suggesting federal copyright statute did not abrogate state sovereign immunity).
transparent manner, non-transparency ought to be the rare and difficult exception, rather than the taken-for-granted rule. Transparency plays an essential role in enabling the accountability, and hence legitimacy, of government communications. Thus, as the First Amendment implicitly protects the rights of private parties to speak anonymously, the Constitution as a whole implicitly suggests governments should not so speak.

V. Transparency in Practice

This Part turns to the practical implications of the transparency principle. Two basic questions emerge. First, what are the contours of this principle? When does it apply, and what does it demand? Second, what role, if any, should the courts play with respect to this principle? Is the transparency principle simply a constitutional ideal that all those sworn to uphold the Constitution ought to respect, or does it also have implications for the work of the courts? In other words, are there instances where courts ought to examine the issue of transparency in government communications? This Part considers these questions in turn.

A. The Contours of Transparency

According to the transparency principle, whenever the government seeks to communicate its view, it should identify itself, so that listeners understand that the message emanates from the government. Most listeners generally attribute speech to the individual delivering a message, or to the institution that the individual represents. If, for example, a local health department official identified as such delivers an anti-alcohol message, absent a disclaimer, most audiences will interpret that message to come from the health department and the government. But if a government contractor who appears independent delivers that same message without disclosing its relationship with the government, most audiences will understand the message to be from the contractor, not the government. The transparency principle becomes particularly relevant in the latter context, requiring individuals or institutions that convey governmental views, but are not readily identifiable as being connected with the government, to disclose the fact of government authorship or control.

Following this principle, of course, is not always so straightforward. As an initial matter, even when government officials or employees speak, it is not always so clear whether they speak in their official or personal capacities. Consider, for instance, one of the examples referred to at the beginning of this Article, Chief Justice John Marshall’s pseudonymous

239. See infra text accompanying notes 256–61.
defense of *McCulloch v. Maryland*. Shortly after *McCulloch*’s issuance, several pseudonymous newspaper essays attacked its reasoning as endorsing a virtually unlimited central authority. 240 Publishing a series of essays in response under the pen names “A Friend to the Union” and “A Friend of the Constitution,” Marshall denied the charge of consolidation and “insist[ed], with more emphasis than in *McCulloch* itself, that those principles did not give Congress carte blanche, that they did preserve a true federal system in which the central government was limited in its powers—and that the limits were capable of judicial enforcement.” 241 Motivated by fear that “the constitution would be converted into the old confederation,” 242 John Marshall, Gerald Gunther observes, “had a passionate personal commitment to the principles of *McCulloch*.” 243

There, it is unclear whether Marshall wrote as a government official or a concerned private citizen. It may be that he wrote as both. Because of the interest in safeguarding the private individual’s First Amendment right to speak anonymously or pseudonymously, we should err in favor of protecting that right and assume in close cases like Marshall’s that a government employee or official speaks as a private party, to whom the transparency principle would not apply. As the Supreme Court has recognized, individuals who work for the government do not forfeit their First Amendment rights by virtue of the fact of public employment. 244 Employees should generally be able to communicate their private or personal views anonymously or pseudonymously as long as doing so would not unduly interfere with the government’s “effective and efficient fulfillment of its responsibilities to the public.” 245 Although some might argue that speakers should disclose at least their employment status with the government, the significant likelihood that any meaningful disclosure would compromise the individuals’ identities—meaningful, in the sense that message recipients would then be able to hold the appropriate governmental bodies accountable—counsels against calling for the disclosure.

The assumption in favor of anonymity for government employees or

240. *See John Marshall’s Defense of McCulloch v. Maryland*, supra note 4, at 13–16 (discussing articles in the Richmond Enquirer written under the pen names Amphictyon and Hampden, and attributing the former to Judge William Brockenbrough and the latter to Judge Spencer Roane, both of whom sat on Virginia state courts).


242. *Id.* at 15 (quoting Marshall’s correspondence to Justice Joseph Story).

243. *Id.* at 18.


245. Connick v. Myers, 461 U.S. 138, 150 (1983); *see also* Pickering, 391 U.S. at 568 (recognizing the government’s ability to restrain the speech of its employees if that speech interferes with the government’s ability to carry out its responsibilities).
officials should apply only to those cases in which a reasonable argument can be made that the individual speaks in her personal capacity. Applying the assumption more broadly would otherwise undermine the transparency principle. While determining the assumption’s applicability would involve a context-specific inquiry, several factors should receive heightened consideration. First, does the speech fall within the scope of the speaker's official duties? Second, does the speaker use government resources to develop or disseminate the message? Third, does the speaker receive official recognition or reward for the message? Fourth, must the speaker secure official approval before disseminating the message? While none of those factors alone, or in combination, should be dispositive, the more factors indicating the speaker's or speech's independence from her governmental role, the more likely, of course, it would be reasonable to conclude that the employee speaks in her personal capacity.

The other context raising thorny issues about the contours of the transparency principle involves government subsidies. There, a similar question arises as to when one should attribute to the government views expressed by private parties. Sometimes, the issue seems relatively straightforward. When the government subsidizes the expression of a specific idea (e.g., “capital punishment is necessary” or “smoking is bad”), or, in common First Amendment parlance, imposes viewpoint-based restrictions on government subsidies, it seems likely that the government seeks to advance that particular perspective, or at least ascribes value to its dissemination. In that circumstance, it would be appropriate to assume that the government seeks to communicate a view for which it should be held accountable. By contrast, when the government subsidizes expression on a basis that has no connection with the idea expressed (e.g., on a first-come, first-served basis), or, in other words, on a content-neutral basis, it seems more likely that the government aims not to communicate any particular idea or view, but instead simply to increase speech opportunities. Although that choice itself reflects fundamental value judgments (e.g., more speech is desirable), for which governments might be held accountable, it would be less appropriate in such instances to characterize the government as seeking to communicate its views.

The issue of characterization becomes more difficult when the government subsidizes expression about a particular subject matter, but imposes no limitations on the viewpoints that can be taken on that

246. It is not uncommon, for example, for employees in the intelligence field to agree to official prepublication clearance of all personal writings having any relation to their employment. See, e.g., Snepp v. United States, 444 U.S. 507, 509 n.3 (1980). That the employees must secure governmental approval does not necessarily mean that they speak in their official, rather than personal, capacities.

247. See generally Redish & Kessler, supra note 41 (distinguishing types of government subsidies).
matter, or, in other words, when the government adopts content-based, rather than viewpoint-based, subsidy restrictions (e.g., "speech about capital punishment" or "speech about smoking"). One might argue that, just as in the content-neutral subsidy context, the government does not aim to persuade audiences to adopt a particular position or viewpoint and thus should not be seen as recruiting others to communicate governmental views. Yet, unlike in that context, the focused subsidies encourage expression about particular issues, and ultimately seek to lead audiences to think about, or even accord importance to, those issues (e.g., attention to race discrimination rather than discrimination based on sexual orientation). As the ability to influence the agenda of public debate has powerful political significance, it seems appropriate to infer that speakers who highlight a particular issue are communicating at the government's behest. For content-based subsidies about subjects for which there is widespread social consensus, such as "speech about domestic violence," moreover, it may be that, though the subsidy is viewpoint-neutral on its face, the government may anticipate, and in fact desire, that the speakers express a particular, favored view.

While it is difficult to delineate with precision which subsidies involve government efforts to communicate its views, it seems clear that the burden imposed by a disclosure requirement would be relatively minimal. Accordingly, a general transparency requirement applicable to all content-based or viewpoint-based governmentally subsidized speech would be most consistent with the constitutional commitment to political accountability. Although such a requirement would be over-inclusive and would sweep in instances where the government provides subsidies simply to encourage private communications and not to further any particular message or idea, rules furthering constitutional purposes are often broadly prophylactic in nature, designed to over-protect the fundamental principle at stake. Also, the extent of the mandated disclosure would take into account the differences among types of subsidies. Having accepted a content- or viewpoint-based subsidy, a speaker would have to disclose both the fact of the government subsidy and the nature of the accompanying restriction.

Such disclosure should be made even if the speech accurately reflects the speaker's independently held views. Even if a speaker shares certain views with the government, he might not have expressed a particular opinion, or expressed it in the same manner or to the same extent as the government, and thus the disclosure requirement would not undermine the speaker's freedom of expression.

248. See Mutz, supra note 145, at 89–91; cf. Anderson v. Martin, 375 U.S. 399, 402 (1964) ("[B]y directing the citizen's attention to the single consideration of race or color [through a ballot label], the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines.").

extent, without the government's financial incentive. But even if he would have done so, disclosure is still necessary, for it informs listeners of the government's influence or impact not only on the speaker who discloses, but also on the broader universe of speakers, some of whom may have chosen to express a differing or contrary position but were denied governmental support to do so. That a speaker might prefer the audience to understand his position to be only his own, rather than the government's, does not alter that analysis. Notwithstanding the disclosure, a speaker can still make clear that he would have taken the same position even absent the government's support. It is true that disclosure of government support may affect the way in which audiences receive the speaker's ideas; for example, it may prompt closer scrutiny, or prevent the operation of one or more of the cues discussed above. But there is no obvious reason why a speaker who accepts government funds to speak ought to be able to avoid additional scrutiny. Indeed, such scrutiny may be the necessary cost, in the interests of democratic accountability, of accepting government support.

Some might question why the transparency principle should apply stringently to government contractors, but not to government employees. Indeed, the apparent inconsistency in treatment seems to contradict the Supreme Court's free speech jurisprudence, which accords government contractors and employees similar protections against official retaliation. Yet it should be noted that the principle does not completely disallow anonymity for government contractors. The transparency principle requires identification not of the private individual or institution delivering the message, but of the government and its role. In other words, government contractors can speak anonymously or pseudonymously; they must disclose only any government support for the message. Government employees may avoid disclosure only when it is reasonable to conclude that they speak on their own accord, independent of the government.

The differential treatment for government employees and contractors lies in the applicability of the assumption in favor of finding private speech even when it appears that both private and official speech are at issue. The assumption applies to employees alone because of the particular difficulties employees would face in attempting to speak about

250. By analogy, in the jury context, government witnesses, upon questioning from the adverse party, must often disclose any benefits that they received in exchange for testifying.

251. To the extent that a speaker claims he would have expressed the view in the same manner, to the same extent, even absent government support, any claim that such a cost would be unfair seems mitigated by the fact that the speaker did not actually need to accept the government subsidy to express his view.

an issue relating to their employment without the mandatory disclosure. Because disclosure of government ties can place speakers’ anonymity at risk, some government employees will likely forego speaking rather than either risk identification or sever their governmental ties (i.e., resign). By contrast, government contractors may at once receive government resources for some of its speech and use its own resources when it seeks to speak without disclosure. Though, of course, some contractors may lack the financial means to do so, the fact remains that it is generally simpler for government contractors to act in a manner that establishes the independence of their speech from the government—and therefore avoid the required disclosure—than for government employees to do so.

Turning to the nature of the disclosure, some might argue that transparency could be achieved without requiring specific disclosure of each individual subsidy. The government could instead simply publish or codify the general subsidy regimes in legislation, administrative regulations, or some central registry. But such general means of notification are insufficient to render communications transparent. Most members of the public have neither the resources nor the interest to follow the development of governmental policy closely. It is thus unrealistic to assume that recipients of governmental messages will become so well-versed in the extensive universe of governmental programs and funding as to know when a government bears responsibility for particular speech. Disclosure should thus accompany the actual communication.

Some might also object that such a requirement would conflict with society’s general presumption, exemplified by the maxim “ignorance of the law is no excuse,” that individuals are familiar with laws and regulations. While that presumption may be justified on a number of grounds, its ultimate justification likely lies in the enforcement

253. If there were such a registry, then the law would presume, as it does in the context of the filed-rate doctrine, that people know of the registry’s contents. See Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998).

254. Also, the social science research indicates that people take into account speaker identity at the start of evaluating a message, and that subsequent information about the speaker rarely leads individuals to rethink their evaluations. See O’Keeffe, supra note 61, at 142 (citing studies showing that “the impact of communicator credibility appears to be minimized when the identity of the source is withheld from the audience until after the message is presented”). This research suggests that disclosure should accompany the communication at the start of the communication rather than at the end.

255. The maxim may rest on the assumption that many laws reflect socially agreed upon morals and are thus already knowable. See Craig Haney, Making Law Modern: Toward a Contextual Model of Justice, 8 PSYCHOL., PUB. POL’Y, & L. 3, 11 (2002) (“[T]he legal maxim that ‘ignorance of the law is no excuse’ seems to reflect the dispositional assumption that ‘good’ persons will somehow know or intuit the law—and obey it—where ‘bad’ persons simply will not.”). For complex regulatory schemes that may not reflect such morals (e.g., the laws of heavily regulated industries), the maxim may be justified on the ground that society may legitimately place the cost of learning the law on those who wish to
problems that would result absent the presumption. If the government had to ensure that individuals knew, or had reason to know, of rules and regulations beyond the fact of their codification, the administrative and enforcement costs would be enormous. A government simply cannot inform each individual of its laws and regulations prior to each individual act.

Yet government communications do not raise the same types of practical difficulties. Whenever the government or someone acting on its behalf delivers a message, there is a distinct opportunity to disclose the origins of and support for that message. The government can require disclosure of its identity each time it, or another, communicates a government message. As accountability concerns generally counsel in favor of individuals actually knowing of the government's speech activities, the ready availability of an opportunity to disclose suggests that governments ought not to rely simply on the fact of codification to assume recipients' knowledge of the government's responsibility for a program of speech. In other words, because of the relative ease in effectuating disclosure with the message, the government ought not to be able to rely on less accessible or effective means of disclosure and thereby hamper accountability.

The "stand by your ad" provision of the Bipartisan Campaign Reform Act of 2002 provides a useful precedent for the disclosure requirement. Designed to combat negative campaigning by making candidates "more accountable," the provision requires candidates in federal elections to approve their television and radio commercials within the advertisement itself. A television commercial, for example, must include either "an unobscured, full-screen view of the candidate making the statement [of approval]" or a voice-over by the candidate, "accompanied by a clearly identifiable photographic or similar image of the candidate." The commercial must also display the candidate's statement of approval "in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds."

The provision's specificity aims to ensure that the disclosures are meaningful. Although some recipients may eventually overlook or ignore the disclosures because of their ubiquity, there, as in


\[257.\] Jessica Wehrman, Political Operatives Don't Approve of New TV Ad Rule, SCRIPPS HOWARD NEWS SERVICE, Oct. 8, 2004; see also Garry South, When the Mud Flies This Time, Bush Can't Duck; Campaign Rules Now Force a Candidate to Own Up to Attack Ads on Air and in His or Her Own Voice, L.A. TIMES, Apr. 2, 2004, at B15.

\[258.\] § 441d(d)(1)(B); see also 11 C.F.R. § 110.11 (2002).

\[259.\] § 441d(d)(1)(B).
the government speech context, the disclosures nonetheless provide important information for those who care, or would care if made aware, of the messages' origins. Also, in both the campaign and government speech contexts, though the disclosures may detract from the messages' effectiveness, that may be a necessary cost of enhancing accountability.

Finally, the transparency principle is not absolute. It is well-established that the public interest in maintaining mechanisms of political accountability must sometimes give way to a government's specific need for safeguarding confidentiality. That point applies equally when the government needs to communicate anonymously or pseudonymously. Therefore, when the government has a heightened interest in maintaining its anonymity or pseudonymity, and alternative means of open communication are insufficient, the transparency principle should not constrain the government. As suggested earlier, for example, the interest in protecting government whistleblowers would likely qualify for an exception to the transparency principle.

B. TRANSPARENCY AND THE ROLE OF THE COURTS

The foregoing discussion, calling for a form of heightened scrutiny analysis akin to that applied by courts in numerous constitutional contexts, inevitably raises the issue of judicial enforceability. One might confuse the question whether courts ought to enforce a constitutional principle with the question whether the principle gives rise to a freestanding cause of action, or, in other words, a judicially enforceable right. As the remainder of the Article makes clear, however, the two inquiries are analytically distinct. While the transparency principle does not give rise to a judicially enforceable right, the courts nevertheless have an important role to play in ensuring government compliance with the principle.

1. Transparency as a Judicially Enforceable Right?

In his important article Government of the Good, Abner Greene advances a powerful argument in favor of affording broad latitude to the government to participate in public debate and promote its conception of the good life. In doing so, he recognizes, however, that a limited number of concerns, in particular, monopolization, coercion, or ventriloquism, may require that such participation be restricted or invalidated. Monopolization arises if government communications

260. See Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) (suggesting that the government could prohibit, as a prior restraint, publication of "sailing dates of transports or the number and location of troops"); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974).
261. See supra text accompanying notes 222–24.
262. Greene, supra note 37.
263. Id. at 27–52.
actually dominate a relevant speech market. Coercion occurs if the government requires others to accept, or adopt, its views or else risk some form of penalty.\textsuperscript{264} The final concern, ventriloquism, corresponds in significant part with the concept of non-transparency: ventriloquism occurs when the government uses others to promote its views, without disclosing that it is the ultimate source of those views.\textsuperscript{265}

According to Greene, courts should invalidate specific government communications only on the basis of the first two concerns, monopolization or coercion.\textsuperscript{266} Greene considers ventriloquism relevant to the courts only to the extent it indicates monopolization or coercion.\textsuperscript{267} Ventriloquism, he maintains, is not a sufficient ground in itself to doubt the constitutionality of government speech "in part... because the government can easily remedy ventriloquism by disclosure; in part... because citizens will often know speech is dictated by the government even if no disclosure is made; and in part... because ventriloquism is more a concern of political theory than of constitutional law."\textsuperscript{268} Insofar as ventriloquism is relevant in constitutional law, he asserts, it is "a matter of ideal constitutional theory (to be followed by government officials and legislators) and not a ground for judicial invalidation of government speech."

Yet ventriloquism, or more broadly, the lack of transparency in government communications, undermines the legitimacy of those communications—and, indeed, the broader project of self-government—in manners distinct from the ways that monopolization and coercion do. Non-transparent communications do not simply pose the risk that the government will dominate a speech market or force others to adopt its ideas. Rather, as this Article argues, non-transparent communications undermine mechanisms of political accountability, both by precluding individuals from knowing when, and to what extent, the government is responsible for specific speech and by enabling the government to skew individuals' perceptions of the actual support for its ideas.\textsuperscript{270} The fact that the lack of transparency can easily be remedied by disclosure or may often not be a problem does not establish that, when it does occur, it is any less serious, or, in other words, not of constitutional significance.\textsuperscript{271}

\begin{footnotesize}
\begin{enumerate}
\item[264.] Id. at 27–49.
\item[265.] Id. at 49.
\item[266.] Id. at 51.
\item[267.] Id.
\item[268.] Id.
\item[269.] Id.
\item[270.] Greene acknowledges that transparency can "enhance[] accountability" and adds that it can "help[] to ward off monopolization" by enabling individuals to know when the government is the sole source of a viewpoint. Id. at 49–50.
\item[271.] Indeed, to the extent it is true that the problem may be easily remedied and may not occur too often, that militates in favor of recognizing it as capable of judicial review.
\end{enumerate}
\end{footnotesize}
Greene's final objection, that transparency is more a concern of political theory than of constitutional law, rests on a constrained vision of the Constitution. As discussed above, an indisputable foundational principle of the Constitution is its guarantee of democracy and political accountability; the lack of transparency in government communications substantially undermines those constitutional commitments.272

The question whether transparency in government communications ought to be viewed only as a hortatory constitutional ideal to be followed by those sworn to uphold the Constitution or rather as a judicially enforceable constitutional requirement is a more complicated one. Usually, a matter of constitutional significance is deemed to fall beyond the scope of judicial enforcement because of institutional concerns such as the separation of powers or judicial competence.273 While the issue of transparency in government communications is not the sort of matter that falls within the exclusive authority of the executive or legislative branches, it would generally be inappropriate for judicial resolution.

As an initial matter, the number of government communications is virtually unlimited, and recognizing a judicially enforceable right to transparent government communications, or, in other words, a right not to be subject to non-transparent communications, could overwhelm the work of the courts. Even assuming there were a limited number of cases, the task of enforcing judicial remedies through overseeing all subsequent related government communications could be all-consuming. Beyond manageability concerns, the particular difficulty sometimes in identifying who speaks for the government and when they do so, and the delicate inter-branch tensions that may arise when the courts become involved in making such determinations, generally counsel against judicial intervention. More important, should the courts begin to hear cases against government officials or employees who (reasonably) assumed they spoke as private citizens under conditions of anonymity, the chilling effect on the speech of those individuals and others could be substantial. In light of those myriad concerns, the transparency principle should generally serve as a constitutional ideal, rather than a judicially enforceable right.274

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272. See supra Part IV.A.
274. The press, of course, can play some role in ensuring transparency. Indeed, the impetus for this Article came from press reports about the White House's anti-drug message arrangements with the television networks. Yet several factors suggest that the press may not sufficiently deter and detect abuses of this sort. They include, among others, the difficulty in policing the extraordinary number of government communications; the unlikelihood of investigating the full range of government communications, many of which do not involve high-profile matters; and the seemingly growing tendency of the press to temper its political reporting in order to curry favor with, and thereby secure access to, government officials.
2. The "Government Speech" Defense

Though it does not give rise to an independent cause of action, the transparency principle should nonetheless in some cases be grounds for judicial invalidation of conduct or communications that the government defends on "government speech" grounds. In certain areas of constitutional adjudication, it makes sense, as a matter of theory and practice, for courts to take into account the issue of transparency, even when not subsumed within questions of monopolization and coercion. Such instances arise when a private party claims an infringement of First Amendment rights, and the government defends its action on the ground that the contested speech is properly understood as government speech, rather than private speech. As discussed in detail below, this "government speech" defense rests on the idea that the government generally "is entitled to say what it wishes," and arises most commonly in mandatory speech assessment and government subsidy cases. Although there has been doctrinal confusion as to when speech ought to be attributed to private parties or the government, courts have generally accepted and applied the government speech defense. Earlier this

The legislative or executive branches might also enact legislation or issue executive orders, respectively, in furtherance of the transparency principle. Such laws or orders would need to take into account the manageability, inter-branch relationship, and chilling effect concerns mentioned above.

275. Since the argument for transparency flows from the interests of the listener, it may seem anomalous to argue that courts should enforce this requirement only when the interests of speakers, rather than listeners, are at stake. But the generalized constitutional requirement that government communicate transparently may not be justiciable in the majority of cases. Thus, to enforce this principle, courts must be vigilant to ensure transparency in cases where there are allegations of direct infringement of a speaker's First Amendment right. The inquiry into transparency evaluates whether a court should recognize the government's interest in speaking as substantial enough to justify a potential restriction of private speakers' First Amendment rights. Furthermore, even in the context of the First Amendment, courts often accord protection to speech because of listeners' interests—indeed, protection for the "marketplace of ideas" is primarily based on such interests—yet courts do not generally allow listeners, rather than speakers, to raise First Amendment claims.


277. See, e.g., R.J. Reynolds Tobacco v. Shewry, 384 F.3d 1126, 1135 (9th Cir. 2004); Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324-25 (Fed. Cir. 2002); Wells v. City & County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1093, 1012-13 (9th Cir. 2000); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093-94 (8th Cir. 2000); Goetz v. Glickman, 149 F.3d 1131, 1138-39 (10th Cir. 1998); see also United States v. United Foods, Inc., 533 U.S. 405, 416-17 (2001) (acknowledging but declining to address defense); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001) (drawing distinction); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (same); Rosenberger, 515 U.S. at 833 (explaining that Rust was based on that defense).

Numerous courts also have acknowledged the "government speech" defense, but have found it inapplicable to the speech at issue. See Peltz & Skins, L.L.C. v. Landreneau, 365 F.3d 423, 429 (5th Cir. 2004); Cochran v. Veneman, 359 F.3d 263, 280 (3d Cir. 2004); Mich. Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157, 161 (6th Cir. 2003); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept' of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002); Latino Officers Ass'n, N.Y., Inc. v. City of New York, 196 F.3d 458, 468-69 (2d Cir. 1999); Cal-Almond, Inc. v. U.S. Dept' of Agric., 14 F.3d 429, 436 (9th Cir. 1993); United States v. Frame, 885 F.2d 1119, 1132-33 (3d Cir. 1989).
month, several days before this Article was to go to the presses, the Supreme Court handed down *Johanns v. Livestock Marketing Association*, and for the first time explicitly considered the issue of transparency in the government speech context. Over a vigorous dissent, the Court held, among other things, that in mandatory speech assessment cases the government may justify its actions as "government speech" without having identified itself as the speaker or established that reasonable listeners understand it to be speaking. Because the basic justification for affording the government broad latitude in communicating its views lies in the expectation that citizens will ultimately accept or reject those communications through mechanisms of political accountability, the Court was wrong to reject a transparency requirement.

At issue in *Johanns* was a federal program requiring beef producers to pay $1-per-head cattle assessments to fund beef-related projects, including promotional campaigns. The program required the producers to pay the assessments primarily to state beef councils, which then forwarded the proceeds to the Beef Promotion and Research Board ("Beef Board"), a group of beef producers and importers nominated by trade associations and appointed by the Secretary of Agriculture. An Operating Committee of the Board, composed of ten Beef Board members and ten representatives named by a federation of state beef councils, designed the promotional campaigns, which were subject to the Secretary’s approval. Several associations and individuals subject to the assessments challenged the program, arguing, *inter alia*, that the government could not, consistent with the First Amendment, compel them to subsidize the promotional messages. The plaintiffs argued that, by promoting beef as a generic commodity, the messages interfered with their efforts to promote their own specific beef products (e.g., "American beef, grain-fed beef, or certified Angus or Hereford beef"). In support of their claim, plaintiffs relied on *United States v. United Foods, Inc.*, which had invalidated on free speech grounds a similar mandatory

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279. *See id.* at 2063–66 & n. 7; *see also id.* at 2068–73 (Souter, J., dissenting). Before *Johanns*, a few courts had suggested, at least implicitly, that the “government speech” inquiry ought to take the audience’s perspective into account. *See, e.g., Griffin,* 288 F.3d at 1325; *Wells,* 257 F.3d at 1155 (Briscoe, J., dissenting); *Knights of the Ku Klux Klan,* 203 F.3d at 1094 n.9. No court had concluded, however, that a particular message may be classified as “government speech” only if, at a minimum, audiences understand the government to be speaking.
281. *See id.* at 2058.
282. *See id.*
283. *See id.*
284. *See id.* at 2059.
285. *Id.* at 2059–60.
assessment program that promoted mushrooms instead of beef. In response, the federal government raised, among other things, the “government speech” defense: the messages were properly understood as government speech, not private beef producers’ speech, and hence were immune from First Amendment scrutiny. (Although the program in United Foods was substantially identical to the beef program, the government had raised the government speech defense belatedly in that prior case, and the Court had declined to consider it.)

In Johanns, the district court and the Eighth Circuit rejected the government speech defense and held the program unconstitutional. The district court reasoned that the Beef Board, which received the assessments for advertising, was more “akin to a labor union or state bar association whose members are representative of one segment of the population,” rather than “a governmental agency, representative of the people.” Accordingly, the court concluded that the Board’s advertising was properly treated as private rather than government speech. The Eighth Circuit adopted a different approach, stating that the government speech doctrine was inapplicable in the context of compelled subsidies for speech. According to the Eighth Circuit, the doctrine applied to insulate the government only from First Amendment challenges concerning the content of the government’s speech, not from challenges to mandatory contributions for the speech.

The Supreme Court reversed, accepting the government speech defense. In an opinion written by Justice Scalia, the Court made clear that the defense applies to mandatory assessment challenges. “Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest,” the Court stated, “[a]nd some government programs involve, or entirely consist of, advocating a position.” In other words, the Court explained, “[c]ompelled support of a private association is fundamentally different from compelled

287. See Johanns, 125 S. Ct. at 2059.
288. See id. at 2060.
290. See Johanns, 125 S. Ct. at 2060.
292. See id.
293. See Livestock Mktg. Ass’n v. U.S. Dep’t of Agric., 335 F.3d 711, 721-21 (8th Cir. 2003).
294. See id.
295. See Johanns, 125 S. Ct. at 2062-64. The Supreme Court granted certiorari in a companion case, Neb. Cattlemen, Inc. v. Livestock Mktg. Ass’n, 541 U.S. 1062 (2005), and issued a consolidated opinion for the two cases.
296. See Johanns, 125 S. Ct. at 2061-62.
297. Id. at 2062.
support of government." While the government generally may not force individuals to fund the speech of other private actors, it may require individuals to pay for its own speech, even speech that they find offensive and disagreeable. The resolution in *Johanns* thus depended on the proper classification of the promotional messages as either governmental or private. And that analysis, according to the Court, turned on the degree of the government’s control over the messages. Although the Operating Committee designed the messages, the Court noted, Congress and the Secretary prescribed by law the messages’ general outline, and federal officials supervised the messages’ development and exercised final approval authority over them. "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from non-governmental sources in developing specific messages."

The program’s use of targeted assessments, rather than general revenues, to fund the messages made no difference, the Court continued. Although Congress did not allocate funding for the messages as part of the budgetary process, a politically accountable official, the Secretary of Agriculture, was responsible for the messages. Moreover, the fact that a specific group paid for the messages did not on its own mean that the reasonable viewer would falsely attribute the messages to that group. Indeed, if there were a reasonable likelihood of such erroneous attribution, the Court clarified, “the analysis would be different.” But in *Johanns*, the Court pointed out, because the federal program did not “require[] attribution,” the lower court improperly invalidated the statute on its face. In the Court’s view, so long as a reasonable viewer would not attribute the messages to the challenging parties, it mattered not whether the government made clear its responsibility for the messages or falsely attributed the messages to others.

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300. *See id.* at 2062-66.
301. *See id.* at 2062-63.
302. *See id.*
303. *Id.*
304. *See id.* at 2063-66.
305. *See id.* at 2064.
306. *See id.* at 2064-65 & n.7-8.
307. *See id.* at 2064 n.7.
308. *Id.* at 2065 & n.7 (emphasis in original)
309. *See id.*
Four Justices dissented from the Court’s conclusion that the beef messages were government speech.\textsuperscript{310} Concurring in the judgment on the theory that the assessments were permissible economic regulation, Justice Ginsburg noted that she would not categorize the messages funded under the federal beef legislation, “but not attributed to the Government as government speech,” given the apparently inconsistent “message the Government conveys in its own name.”\textsuperscript{311} Joined by Justices Kennedy and Stevens, Justice Souter wrote the principal dissent.\textsuperscript{312} Adopting a position similar to the one set forth in this Article, Justice Souter maintained that transparency must be part of the government speech defense analysis:

The [Court’s] error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.\ldots I take the view that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message\ldots .\textsuperscript{313}

Rejecting the Court’s reasoning that congressional authorization and final government approval of the messages ensured democratic accountability, Justice Souter argued that “[i]t means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.”\textsuperscript{314}

Justice Souter clarified that not all taxpayers could raise a First Amendment compelled subsidy challenge to government messages with which they disagreed. “[W]hen government funds its speech with general tax revenue, as it usually does, no individual taxpayer or group of taxpayers can lay claim to a special, or even a particularly strong, connection to the money spent (and hence to the speech funded),” and thus there is no cognizable First Amendment harm.\textsuperscript{315} But when the government pays for its speech with targeted taxes, Justice Souter continued, “the particular interests of those singled out to pay the tax are closely linked with the expression, and taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say.”\textsuperscript{316} Accordingly, only those individuals compelled to fund speech through

\begin{itemize}
\item \textsuperscript{310} See Johanns, 125 S. Ct. at 2067 (Ginsburg, J., concurring in the judgment); \textit{id.} at 2068 (Souter, J., dissenting).
\item \textsuperscript{311} See \textit{id.} at 2067 (Ginsburg, J., concurring in the judgment).
\item \textsuperscript{312} See \textit{id.} at 2068 (Souter, J., dissenting).
\item \textsuperscript{313} \textit{Id.}
\item \textsuperscript{314} \textit{Id.} at 2073.
\item \textsuperscript{315} \textit{Id.} at 2071 & n.4.
\item \textsuperscript{316} \textit{Id.}
\end{itemize}
targeted assessments may raise a First Amendment challenge.  

This Article generally agrees with the analysis set forth in Justice Souter's dissent. The Court ought to recognize a unique First Amendment harm to individuals who may trace the use of their particular tax payments to messages with which they disagree. But even if one disagreed that the targeted nature of assessments gives rise to constitutionally significant harms, another, perhaps more compelling factor justified finding a cognizable compelled speech subsidy claim here. The First Amendment objection stems not simply from the targeted nature of the tax, but also from the type of organization to which the assessments were due. The beef producers' claim was colorable because the program orders one group of private individuals to pay assessments for speech purposes to another group of private individuals. The federal program requires producers and importers to pay not the United States Treasury or any other federal governmental body, but, through state beef councils (which may be either private or quasi-governmental in character), a collection of representatives of private industry. Though the Court did not explicitly address the status of the Beef Board or the Operating Committee, it did note that the government “solicit[ed]
assistance from *nongovernmental sources*" to develop the promotional beef messages.\textsuperscript{320} That observation strongly supports the view that those entities are private.\textsuperscript{321}

Relatedly, the government's prior defense of fundamentally indistinguishable mandatory assessment programs in litigation leading to two Supreme Court cases, *Glickman v. Wileman Brothers & Elliott, Inc.*\textsuperscript{322} and *United Foods*, makes clear that messages generated by representatives of private industry and funded by private parties cannot naturally or comfortably be characterized as government speech. Indeed, the government in *Glickman* expressly disavowed the government speech defense in its brief before the Court.\textsuperscript{323} Four years later, in *United Foods*, the government litigated the mushroom case all the way to the Supreme Court before raising the government speech defense for the first time.\textsuperscript{324} Had there been any doubt that the messages disseminated were properly characterized as private, one would have expected the government to have raised that defense in *Glickman*, or at least from the start in *United Foods*. Put another way, it seems highly likely that, had the beef producers challenged an assessment paid to the United States Treasury or the Department of Agriculture, rather than one conveyed to the Beef Board, the government would have asserted the government speech defense immediately. The discussion here does not mean to suggest that the Court should have considered in its analysis the fact that the government had failed to raise the government defense in earlier cases. Rather, it points to the omission only as evidence that there is a strong basis to classify the subsidized messages as private.

What this case involved then was a claim by the government that assessments for speech paid to private parties did not constitute compelled subsidies for private speech, but government speech instead. According to the Court, to cast the government speech defense over what otherwise appears to be private speech, the government generally need only prescribe by law an outline of the desired message and provide

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\textsuperscript{320.} *Johanns*, 125 S. Ct. at 2063.

\textsuperscript{321.} Notably the Beef Board presents itself to the public as a nongovernmental organization. See Brief for Respondents at 28, *Veneman*, 2004 WL 2362873 (pointing out that the Board's website, which is "a dot-com, not a dot-gov," states that "NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED" in the checkoff program.).

\textsuperscript{322.} 521 U.S. 457 (1997).

\textsuperscript{323.} See Brief for Petitioner at 25, *Glickman v. Wileman Bros. & Elliott, Inc.*, 1996 WL 494305 n.16 ("In the court of appeals, the United States did not advance the argument that the generic advertising supported by the system of assessments on handlers constitutes 'government speech' that does not implicate respondents' First Amendment rights.... We similarly do not rely on that argument in this Court as an independent ground of decision.").

for "final review" by a politically accountable official. Such a rule hardly seems protective of individual First Amendment rights. As the plaintiffs suggested in their brief to the Court, that view "take[s] the First Amendment doctrine through the looking glass." Under the rule announced in *Johanns*, the government may compel private individuals to pay another group of private individuals to disseminate messages if the government defines and must approve the latter group's messages. In other words, "the more severe the government's censorship, the less scrutiny courts [] afford."

Of course the government regularly depends (and should be able to depend) on private parties to help develop and convey its messages, and it must be able to control the private parties to do so. Yet, as this Article argues, the government should, consistent with constitutional principles, ensure that the messages are identified as its own. And before courts accept any government assertion that a challenged program is immune from First Amendment scrutiny because it involves "government speech," they should at least require the government to ensure that its identity as speaker is transparent. In other words, underlying constitutional principles should play a role in establishing the appropriate default positions. The Court would require First Amendment plaintiffs to show that reasonable viewers would mistakenly attribute messages to the plaintiffs. But given the heightened interest in protecting individual First Amendment rights, the government, rather than private individuals, should at a minimum bear the burden of demonstrating no mistaken attribution. Considering in addition the larger structural interests set forth here of enhancing the government's accountability for its messages, and the relatively limited costs of an identification requirement, this Article maintains that the appropriate standard should be even more speech-protective: require the government to show that viewers or listeners understand that the message comes from the government.

Another way of conceiving the identification requirement in the mandatory assessment, and not the general revenue, context is as an accommodation of competing interests. As discussed above, despite the strong constitutional interest in transparency in government

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329. One might argue that, unlike in some other veiled government speech contexts, in the mandatory assessment context, specific, aggrieved individuals will have sufficient incentives to publicize and challenge the government program. Yet, as this Article argues, there are strong reasons to require government disclosure in the speech context, even if one assumes that resort to political process is an available option. *See supra text accompanying notes 228-59.*
communications, there are many reasons not to recognize a judicially enforceable right to non-transparent communications. Yet if one could raise a compelled speech subsidy challenge any time the government funds speech through general revenues, then an identification requirement would in effect create such an enforceable right. It may be that, although there ought not to be a generally available cause of action, there should be one at least when individuals can raise colorable claims that the government is compelling them to subsidize another's speech. In other words, contrary to the approach adopted by Johanns, the governing standard ought to provide an aggressive prophylactic rule protective of both individual speech interests and the broader structural interests in transparency.

It bears emphasis that the concerns counseling against recognizing a judicially enforceable right to transparent government communications provide no reason not to consider transparency when evaluating the government speech defense. Because the First Amendment, not a freestanding transparency right, provides the basis for adjudication, judicial recognition of the principle would not necessarily increase the courts' workload appreciably. Insofar as the courts already entertain First Amendment claims that require consideration of whether the government can properly classify speech as its own, incorporating transparency will become part of that analysis. Also, since the government in those cases characterizes the contested speech as its own, the judiciary would not be put in the difficult position of deciding, against the government's contentions, that some individual or institution speaks for the government. The courts would determine only if the government had taken sufficient steps to assume responsibility for the speech and thereby establish the inapplicability of individual First Amendment rights. Finally, because such cases would not involve government officials or employees speaking anonymously in their private capacities, there would be no concerns about possible chilling effects.

Courts have also accepted the government speech defense in the context of litigation challenging viewpoint-based government subsidies. Consider, for instance, Rust v. Sullivan, mentioned at the start of this Article. There, a group of federal funding grantees and doctors who supervised the use of the funds challenged a federal regulation that prohibited family planning projects from using federal funds to provide counseling that would encourage the use of abortion as a method of family planning. That prohibition violated the First Amendment, they argued, because it constituted impermissible viewpoint discrimination.

331. See supra text accompanying notes 228–74.
333. Id. at 178, 181.
and "ai[med] at the suppression of dangerous ideas." Emphasizing, *inter alia*, the government’s prerogative to fund programs selectively, the Court rejected the claim and upheld the prohibition. In a later case, the Court clarified that the *Rust* holding was predicated on the finding that the expression at issue was government speech, not the speech of the service providers in the federal program. The Court explained, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

As others have pointed out, a fundamental problem with the *Rust* decision is that the patients themselves did not necessarily understand the doctors or other family planning counselors to be delivering a governmental message; instead, it was highly likely that the patients understood the doctors and counselors to be speaking independently, in accord with their professional training and expertise. While the *Rust* majority noted that, "[n]othing in [the regulations] requires a doctor to represent as his own any opinion that he does not hold," and that "[t]he doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program," it was also true that nothing in the regulations required the doctors to disclose the government’s role in restricting the scope of their counseling. As in the mandatory assessment context, here, the key factor is what the proper default condition is when the government uses private parties to deliver its messages. According to the transparency principle, courts should require disclosure of the governmental role as a precondition to accepting the categorization of any speech as government speech.

As the type of subsidized speech challenged in *Legal Services Corp. v. Velazquez* makes clear, however, disclosure alone may not always

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334. *Id.* at 192 (internal quotations omitted).
335. *Id.* at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way.").
337. *Id.* (discussing *Rust*, 500 U.S. at 194, 196–200).
suffice to establish the government as speaker. At issue there was a restriction that prohibited recipients of Legal Service Corporation ("LSC") grants from providing legal representation for indigent clients if that representation involved an effort to amend or otherwise challenge existing law.\textsuperscript{341} In striking down the restriction, the Court explained, \textit{inter alia}, that the subsidy program facilitated private speech, not government speech.\textsuperscript{342} "The LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker."\textsuperscript{343} One might initially respond that, so long as the lawyer disclosed to the client the restrictions on the types of arguments that he could raise, the lawyer's speech ought to be characterized as government speech. But that mistakes the nature of the speech at issue. The government provided funding to support lawyers' or clients' claims to courts. The recipient of the purported governmental speech is the judge or jury, not the client. In the institutional context of the courts, no degree of disclosure would have led a judge or jury to accept the lawyer's speech to be that of the government. To the contrary, a court necessarily would expect, and require, the lawyer to speak on behalf of his client.

By examining the contested speech from the perspective of whom listeners understand to be speaking—as the transparency inquiry would have us do—we can thus reconcile what others have suggested to be irreconcilable in \textit{Rust} and \textit{Velazquez}: the Court's reasoning about the nature of the subsidized speech of the family planning counselor and doctors, on the one hand, and of the legal services lawyers, on the other. As Justice Scalia wrote in dissent:

\begin{quote}
If the private doctors' confidential advice to their patients at issue in \textit{Rust} constituted "government speech," it is hard to imagine what subsidized speech would not be government speech. Moreover, the majority's contention that subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in \textit{Rust} had a professional obligation to serve the interests of their patients . . . . Even respondents agree that "the true speaker in \textit{Rust} was not the government, but the doctor."\textsuperscript{344}
\end{quote}

While Justice Scalia is correct that the Court should have recognized that the speaker in \textit{Rust} was the doctor, that does not mean that the parallel fiduciary responsibilities of the doctors and lawyers established that the nature of their speech, as private or governmental, was necessarily the same. In \textit{Rust}, the doctors could have disclosed to the patients that they were providing counseling not as doctors, or at least

\textsuperscript{341} \textit{Id.} at 537-38.
\textsuperscript{342} \textit{Id.} at 542.
\textsuperscript{343} \textit{Id.}
\textsuperscript{344} \textit{Id.} at 554 (Scalia, J., dissenting).
not in accordance with the full freedom normally accorded those in their profession, but instead as governmental messengers. Had they done so, then the recipients would have understood the speech to be the government's, and the Court could have reasonably concluded that the subsidized speech was government speech. In Velazquez, by contrast, disclosure would not have led the recipients—the courts—to understand the subsidized speech to be the government's, and the Court thus could not have reasonably found the contested speech to be government speech. In other words, because the clients in Velazquez were not the intended listeners of the subsidized speech, the parallel fiduciary obligations of doctors and lawyers to their clients were not determinative.

3. The Reasonable Recipient Standard

The question what a court's transparency inquiry should look like naturally arises. This inquiry should focus on the perspective of the reasonable recipient of the purported government speech. Only if a reasonable recipient understands that the government bears responsibility for a communication should a court conclude that the contested speech is "government speech." This emphasis on the receipt, or effect, of government communications flows naturally from concerns about political accountability. As this Article has made clear, the basic reason we afford governments broad latitude in communicating is the expectation that the citizenry will hold the government accountable for its exercise of its communicative powers. Because the citizenry may do so only when it knows what the government is saying, citizens must be able to identify speech for which the government is responsible.

Courts should adopt a standard of reasonableness appropriate for those likely to receive a message. Such a standard comports with the political accountability rationale for the transparency requirement. Thus, if the likely recipients of a government message include those who understand only Spanish or are illiterate, the government must undertake sufficient efforts to ensure that those recipients will understand the government's responsibility for the speech. Furthermore, even if the likely recipients are those who cannot vote in

345. See Greene, supra note 37, at 50; Post, supra note 41, at 174 n.128.

346. Some might question whether people would in fact understand such a disclosure. Even if doctors were to disclose government restrictions clearly, as long as they continue to wear their white coats and stethoscopes and treat patients in hospitals or clinics, it is possible that some patients would nevertheless assume that the doctors would speak freely and fully in the patients' best interests. If the reasonable recipient of the message would not understand the disclosure, then the disclosure alone may not suffice to establish the government as speaker.

347. Cf. Rust v. Sullivan, 500 U.S. 173, 192-201 (1991) (ignoring the likelihood that most women receiving family planning counseling at the public clinics would have limited medical sophistication and resources).
the political process, such as children or non-citizens, the standard of reasonableness should nevertheless focus on their perspective. Although they themselves cannot vote, they can inform other individuals, who can vote, of the government’s speech efforts, and those individuals may be just as concerned about the government’s efforts to persuade others as its efforts to persuade themselves.

The religion context provides an instructive analogy for the reasonable recipient standard. One of the principal ways in which courts assess alleged violations of the Establishment Clause is to focus on the perspective of the “reasonable observer.” A court asks “whether the practice in question creates the appearance of endorsement to the reasonable observer.” With respect to displays of religious symbols by private parties on public property, for instance, four Justices of the Court have embraced a test quite similar to the one set forth here. There, because of the “crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,” a court must determine whether a reasonable observer would interpret the display’s symbolic endorsement of religion to constitute private speech or government speech. Regardless of the government’s intent, if a reasonable observer would “mistake private, unattended religious displays in a public forum for government speech endorsing religion,” then a court would find the displays to be “government speech” for Establishment Clause purposes and thus hold them unconstitutional.

Numerous commentators have criticized the reasonable observer standard as too difficult to apply. The inquiry into what a reasonable
observer, or reasonable recipient, would perceive can indeed be elusive. Yet, unlike in the religion context, in the government speech context, the adoption of a rebuttable presumption may help alleviate some of the standard's seeming indeterminacy.\textsuperscript{356} Courts should presume that a reasonable recipient would attribute speech to the individual delivering the message, or an institution that she represents. In other words, courts should presume that a reasonable recipient would understand non-governmental speakers to convey messages on their own, rather than the government's, behalf.\textsuperscript{357} To rebut that presumption, the government would bear the burden of demonstrating that a reasonable recipient of a message would understand the message to be the government's. That it is far easier for a speaker to disclose the identity of the individual or institution for whom she speaks, than for a listener to discern that identity, makes this presumption and allocation of proof sensible.

As a final matter, it should be noted that the transparency analysis, and its implications for the government speech/private speech distinction, does not by itself resolve all questions regarding government communications. In other words, following the transparency principle does not obviate the need for compliance with other First Amendment requirements. For example, a government may not control the speech of government employees or government contractors simply by asserting that they are government speakers and having them disclose that fact to listeners. The Supreme Court has already developed an employee speech doctrine\textsuperscript{358} and a related government contractor speech doctrine\textsuperscript{359} that seek to balance the government's interest as an employer or contractor with a private party's First Amendment rights to speak on matters of public concern, and the transparency analysis is not meant to displace that inquiry. Similarly, the Constitution restricts some governmental expression involving religion\textsuperscript{360} and elections,\textsuperscript{361} yet the concerns go well

\textsuperscript{356} Adopting a presumption in the religion context raises more difficulties because of the competing concerns of the Establishment Clause and the Free Exercise Clause: whereas the former counsels against a presumption that the contested speech is private and hence permissible, the latter cautions against a presumption that the disputed speech is the government's and hence impermissible.

\textsuperscript{357} Cf. Capitol Square, 515 U.S. at 786 (Souter, J., concurring) ("When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker . . . .").


\textsuperscript{359} See Bd. of County Comm'rs v. Umbricht, 518 U.S. 668 (1996) (adopting Pickering analysis).

\textsuperscript{360} See supra notes 351–54 and accompanying text.

beyond the issue of transparency. Thus, even if the government transparently advocated the tenets of Protestantism over those of Judaism, or the election of Republicans versus Democrats, the fact of transparency would not insulate those communications from constitutional challenge.

In any event, transparency remains an important factor for understanding the proper bounds of government communications. The transparency requirement has roots in the Constitution's fundamental commitment to political accountability and indeed undergirds the legitimacy of government communications, and thus should be respected by all governmental actors. Also, even though the transparency distinction will not apply in all First Amendment claims, it will be relevant in many cases, and should be outcome-determinative in some. Accordingly, the principle of transparency in government communications should inform the work of all parts of the government.

CONCLUSION

This Article has shown that the White House's position on its responsibility for informing viewers of its role in producing the news videos and encouraging the anti-drug entertainment programs was wrong. It was the "government's place" to notify the viewers. In fact, the task of doing so was a matter of constitutional dimension. As this Article has made clear, when the government participates in public debate, it should let the people know that it is participating. By identifying what it says and how it does so, the government gives the people the means to process official messages free from false assumptions and the means to hold the government accountable for those messages. Transparency is indispensable to the legitimacy not only of government communications but of government itself.

This Article has also made clear that, notwithstanding its constitutional basis, the transparency principle does not give rise to a judicially enforceable right. So, the courts should not entertain claims by individuals such as the viewers of the news videos and anti-drug programs who assert that the government has violated their constitutional rights. But the transparency principle does warrant judicial concern. In mandatory assessment cases or government subsidy cases like Rust v. Sullivan, in which a party alleges that the government is violating its First Amendment speech rights, and the government defends on the grounds that the contested speech is not private speech but "government speech"—that the government, in other words, is merely exercising its broad discretion to speak—the courts ought to incorporate the element of transparency into their analysis. The Supreme Court should thus rethink its analysis in Johanns and clarify that, in order to avail itself of that defense, the government must establish, at a minimum,
that the reasonable recipient of the speech understands the communication to come from the government.

This Article has further clarified that the transparency principle ought not apply to government employees, such as Chief Justice John Marshall, whom one might reasonably conclude speak primarily in their private capacities. The transparency principle makes the government accountable to the public for its speech activities, but should not stifle anonymous or pseudonymous speech in general. Because of the need to protect individual speech rights, including the rights of those who serve in the government's employ, the transparency principle should apply only in those employee speech cases in which it appears clear that the individual speaks in his official capacity. Applying it more broadly would have a substantial chilling effect on government officials and employees who wish to communicate their personal views, and would thereby impose too great a burden on individual First Amendment rights.

Finally, turning from the Article's content to its methodology, the argument for transparency here has drawn on social science findings concerning how people actually process and receive information. This effort illustrates that normative analyses of government communications could benefit considerably from an enhanced understanding of that process. There are many other issues, both in the area of government communications and in other areas of the law, that might benefit from similar approaches.362 In other words, in a variety of contexts, the law incorporates, or ought to incorporate, assumptions about people's

362. For example, as discussed above, the Supreme Court's Establishment Clause jurisprudence calls in certain circumstances for an analysis of the reasonable observer's perceptions about whether particular conduct amounts to a state endorsement of religion. See supra Part.V.B.3. In discussing that standard in Good News Club v. Milford Central School, 533 U.S. 98 (2001), Justice Breyer, for example, recently emphasized the importance of developing a factual record to determine whether children who attended a public school perceived private religious activities on their school premises as an official endorsement of religion. Id. at 127, 128 (Breyer, J., concurring in part). Although additional factual findings might have been useful there, a more fully developed understanding of the cognitive processes by which people (and children in particular) perceive government action would have provided the essential framework to analyze those facts.

Similarly, an approach based upon understanding how people actually process and receive information could inform questions in the state action context. The Court's analysis in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), for example, suggests a significant role for this kind of approach. There, the Court held that race discrimination by a privately-owned restaurant that leased space in a building owned by a municipal parking authority was impermissible state action. Id. at 717. In reaching that decision, the Court pointed to, among other things, the "official signs indicating the public character of the building," "the state and national flags" that "flew from mastsheads on the roof," and "the obvious fact that the restaurant is operated as an integral part of a public building." Id. at 720, 724. The parking authority, the Court stressed, "place[d] its power, property and prestige behind the admitted discrimination." Id. at 725. Burton suggests that the state action question turns, at least in part, on how people understand the action in question. The case further implies that the resolution of that question turns upon not only verbal cues, but visual cues as well.
perceptions. The law may ask, for example, do people perceive a speaker to be a government speaker, or an actor to be a governmental actor? Or, do people interpret the action in question to bear the government's imprimatur? Although not every legal question should turn on perceptions, sometimes perceptions do matter. In those circumstances, legal analysis will necessarily benefit from a better understanding of what and how people actually perceive.