The Government Brand

Northwestern University Law Review, v 110 forthcoming 2016

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INTRODUCTION

Until recently, the Roberts Court had a pretty good track record on offensive speech. This Court has struck down laws restricting "crush" animal videos,[1] the sale of violent video games to children,[2] and dissemination of intentional lies about military honors,[3] and it has defended the right of the hateful Westboro Baptist Church to protest outside a funeral.[4] But in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Court held that Texas could deny specialty license plate application of the Sons of Confederate Veterans because the public found the group's Confederate-flag logo "offensive."[5] Justice Breyer, writing for the Court, held that Texas was entitled to do this because the specialty license plates constitute government speech immune to the usual restrictions of the First Amendment.

· Professor, University of North Carolina School of Law. Many thanks to David Ardia, Bill Marshall, Richard Meyers, Ted Shaw, and all those who participated in UNC's Summer Supreme Court Series for their thoughtful comments and insights on the topic of this paper. I am also very grateful to Alexander Tsesis for inviting me to participate in this symposium.

[1] U.S. v. Stevens, 559 U.S. 460 (2010).
[2] Brown v. Entertainment Merchants Ass'n, 131 S Ct. 2729 (2011).
[3] U.S. v. Alvarez, 131 S. Ct. 2729 (2011).
[4] Snyder v. Phelps, 562 U.S. 443 (2011).
[5] 135 S. Ct. 2239, 2245 (2015).

In his dissent, Justice Alito declared that the majority's "capacious understanding of the government speech doctrine takes a large and painful bite out of the First Amendment."[6] This bold statement is noteworthy given that Justice Alito does not have a track record as a particularly speech-protective Justice.[7] He is also the author of the majority opinion in *Pleasant Grove City v. Summum*,[8] the case upon which the *Walker* majority purportedly relies.

This Article dissects *Walker* and its larger significance for the government speech doctrine. *Walker* is a potentially explosive decision with even more significant ramifications than Justice Alito contemplated. *Walker*'s expansive view of the government speech doctrine grants state actors broad authority to restrict private speech. This case takes the Court's growing deference to government institutional actors and puts it on steroids, allowing the government to disfavor private speech in the name of protecting its image—its brand—in a wide variety of contexts, from schools to public employment, and to advertisements on municipal transportation to any number of new fora.

Part I discusses the brief and troubled history of the government speech doctrine. Part II takes a closer look at the test for government speech the Court embraced in *Walker* and why this test dramatically expands the government speech doctrine. Part III argues that *Walker*'s dramatic expansion of the doctrine is disturbing because it potentially permits the government to silence private speakers whenever a reasonable person might believe the government is endorsing that speech. This is because *Walker* suggests that it is will frequently be "reasonable" for people to believe that the government has endorsed private speech appearing on public property or spoken by a public employee or student. But the government is not private entity entitled to protect its brand from dilution. Under well-established First Amendment principles, the government is required to support the speech of private speakers. The Court's focus on reasonable observers who believe this tolerance operates as endorsement threaten the future of free speech rights in this country.

I. A BRIEF AND TROUBLED HISTORY

The First Amendment does not restrict the government's ability to speak.[9] After all, "it is not easy to imagine how government could function if it lacked th[e] freedom to select the messages it wishes to convey."[10] For example, a government program encouraging vaccinations or recycling should not be required to discourage people from those things.[11] The First Amendment does not serve as a "check" on the government's

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[6] 135 S. Ct. at 2255 (Alito, J., dissenting).
[7] *See* Clay Calvert, *Justice Samuel A. Alito's Lonely Battle Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115 (2011).
[8] 555 U.S. 460 (2009).
[9] 135 S. Ct. at 2245-46.
[10] *Id.* (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009)).
[11] *See also* Agency for Intentional Development v. Alliance for Open Society, 133 S. Ct. 2321, 2332 (Scalia, J., dissenting) ("The First Amendment does not mandate a viewpoint-neutral government.

expression; ballot-box accountability does.[12]

It is hardly controversial that the government must speak to be effective and that need not have to embrace opposing viewpoints whenever it does. The real crux of the problem, however, is figuring when in fact the government is speaking.[13] This Part sketches the brief and troubled history of the Court's government speech doctrine. This Part then turns to outline the pre-*Walker* dispute in the lower courts about how to deal with license plates and other cases where public and private speech is arguably intertwined.

A. From *Rust* to *Open Alliance*

The Court has struggled to determine what constitutes government speech in a variety of contexts, and the result is a hodge-podge of cases lacking coherence.

The Court has invoked the government speech doctrine in five general contexts: (1) the government using third parties to express a specific, substantive government policy[14]; (2) government programs that condition the receipt of federal funds on the forfeiture of speech rights[15]; (3) the administration of a government program that inherently requires selective discretion, such as those involving the arts,[16] libraries,[17] or television broadcasts[18]; (4) the apparent government endorsement of private speech[19]; and (5) restrictions on government employee speech.[20] Restrictions on expressive speech in public schools that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" also rests on the government speech doctrine, although the Court has not been explicit about this.[21] This taxonomy is not rigid;

Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas.").

[12] 135 S. Ct. at 2246.

[13] *Summum*, 555 U.S. 470 (noting "there may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.")

[14] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) (rejecting challenge to government advertisement promoting beef consumption).

[15] Alliance for Open Society, 133 S. Ct. at 2330; Rust v. Sullivan, 500 U.S. 173 (1991).

[16] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (rejecting challenge to "decency" restriction on government arts funding).

[17] U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003) (noting public libraries "must have broad discretion to consider content in making collection decisions").

[18] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)(holding public television broadcaster necessarily must exercise editorial discretion).

[19] Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

[20] Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that the First Amendment does not protect a government employee speaking within the scope of his job responsibilities).

[21] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1987). The articulated basis for this decision was not the government speech doctrine, which had not recognized at that point, but rather the importance of deferring to the importance of controlling speech as part of the educational process. *Id.* at 570-71.

"the typologies do not arise in isolation, but instead often interact with one another."[22] For example, the line between using third parties to express the government's message and the conditioning of subsidies on the forfeiture of other constitutional rights is hardly a bright one.[23] Similarly, the explicit or implicit endorsement of private speech can arguably involve some sort of government subsidy; in some cases, the endorsement is arguably classifiable as the government itself speaking through third parties. Restrictions on government employee speech might be regarded as equivalent to the government's right to control subsidized speech.

From the moment this doctrine was born in *Rust v Sullivan*, the Court recognized that it exists in tension with other well-established First Amendment doctrines. The government speech doctrine permits the government to do what it otherwise would not be able to do. Most commonly, the doctrine operates to permit the government to engage in viewpoint-based discrimination with impunity by favoring some speakers over others, by requiring those who accept funding to forego their right to say certain things, or by compelling private actors to speak.[24]

Another common conflict is with the public forum doctrine.[25] Traditionally, the government was believed to have absolute power to control the use of its property for expressive activities. While serving on Massachusetts's highest court, Oliver Wendell Holmes famously declared that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of public than for the owner of a private house to forbid it in his house."[26] The Court ultimately rejected the argument that the government had the same right as private individuals to exclude speech from its property.[27] Under the public forum doctrine, private speech is not attributable to the government. In one of the leading cases where the Court rejected a government speech defense and instead determined that a public forum existed is *Rosenberger v. Rector and Visitors of the University of Virginia*. There the Court held that a fund providing financial support for student organizations at a public university was a limited public forum that could not engage in viewpoint discrimination.[28] In that case, the Court emphasized the university's asserted purpose for

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[22] Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001).
[23] *See*, *e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991).
[24] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (rejecting compelled speech challenge). *Compare* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down law requiring the mandatory recitation of the Pledge of Allegiance).
[25] The Court recognized this tension as early as *Rust v. Sullivan*. *See* 500 U.S. at 199-200 ("the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity' [or] have been expressly dedicated to speech activity").
[26] Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).
[27] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939).
[28] Rosenberger v. Rector & Visitors of U. of Va., 515 U.S. 819 (1995); *see also* Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (holding public university is entitled to charge students activity feeds to fund a program designed to facilitate extracurricular speech as long as the allocation of funding is viewpoint neutral).

the student activity fund as well as its lack of control over the speech subsidized.[29]

The Court faced the same choice between the government speech doctrine and the public forum doctrine in *Pleasant Grove City v. Summum*.[30] In this case, the Court had to determine whether a city was entitled to make content-based determinations about which monuments to accept for permanent display in its park. In determining that permanent monuments represent government speech, the Court seemed to return to an argument it had long rejected: namely, that the government has a right to control its property the same way that private property owners do.[31] In addition, the Court rejected arguments that the government speech doctrine should require the city to formally adopt the monument as its own and to articulate what message it is trying to communicate.[32] The Court reasoned that any formal adoption requirement "would be a pointless exercise" because playing the monument in the park is sufficient to put people on notice that it is endorsing it.[33] Requiring a specific message, the Court contended, "fundamentally misunderstands the way monuments convey meaning."[34]

Scholars have criticized *Summum* for the Court's failure to require more from the government before permitting it to receive the benefit of the government speech doctrine. As Helen Norton and others have argued, failing to require the government to be transparent about when it is speaking undermines the possibility of political accountability.[35] Others have noted that the failure to force the government to articulate the message it is adopting also arguably undermines political accountability because the public cannot judge what the government is trying to say.[36]

Summum set a very low bar for the application of the government speech doctrine. If the principles of that case are generally applicable to all cases where the government asserts a government speech doctrine defense, the government does not have to develop the message; the government does not have to formally adopt the message; the government does not even have to be clearly saying anything. All that *Summum* seems to require is that the government exercise final approval authority over expression on its property. Although the Court emphasized how different permanent monuments are from

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[29] 515 U.S. at 835.
[30] 555 U.S. 460 (2009).
[31] *Id.* at 471 (equating the government with private property owners).
[32] *Id.* at 473-74.
[33] *Id.*
[34] *Id.* at 474.
[35] Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 599 (2008) (arguing that the "government can establish its entitlement to the government speech defense only when it establishes itself as the source of that expression both as a formal and as a functional matter"); *see also*, *e.g.*, Bezanson & Buss, *supra* note __; Corbin, *supra* note __; Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002).
[36] Steven G. Gey, *Why Should the First Amendment Protect the Government When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1301-03 (2010) (arguing that *Summum* "encourage[s] official misconduct using the government speech doctrine as a cloak"); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1510 (2001) (arguing the "government should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message").

more temporary displays, the threat to the public forum doctrine – and to the rest of the robust protections for free speech that the First Amendment otherwise usually provides – is obvious.

Of course, if one is not a fan of the public forum doctrine, this threat might not be much of a concern. It is possible to see this distain for the public forum doctrine in Justice Breyer's *Summum* dissent. Justice Breyer – who went on to author the majority opinion in *Walker* – declared in his separate concurring opinion that he regards the government speech doctrine "as a rule of thumb, not a rigid category."[37] Although he joined Justice Alito's majority, he wrote separately to make clear he had distain for the "jurisprudence of labels" that the First Amendment had become.[38] He argued that excluding Summum's proffered monument "does not disproportionately restrict Summum's freedom of expression" given the group's ability to express itself in other ways, and the "impracticality of alternatives" and the City's "legitimate needs" to "use park space to further a variety of recreational, historical, educational, esthetic, and other civic interests."[39]

As Justice Breyer's *Summum* concurrence suggests, one reason the requirements of the government speech doctrine are so low is that is the Court has embraced it to resolve tricky problems. Once the Court determines the case before it involves government speech, First Amendment claims dissolve like magic. In various cases, the Court has rejected the application of the public forum doctrine because it would lead to what the Court believes would be "unworkable" results.[40] Indeed the popular perception of *Summum* as an "easy case" may come not from the clarity of the Court's reasoning but rather from an awareness of the implications of a contrary ruling.[41] This kind of pragmatism has frequently guided the Court's government speech decisions.[42]

Until recently, the government had won almost every single time it asserted a government speech defense.[43] The government has suffered two notable defeats. In *Agency for Intentional Development v. Alliance for Open Society*, the Court held that the

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[37] 129 S. Ct. 1125, 1140 (Breyer, J. concurring).
[38] *Id.* (quoting *U.S. v. Kokinda*, 497 U.S. 720, 740-43 (Brennan, J., dissenting)).
[39] *Id.* at 1141. Breyer has recognized the usefulness of the government speech doctrine before. See *Johanns*, 544 U.S. at 569 (Breyer, J., concurring) ("Now that we have had an opportunity to consider the government speech theory, I accept it as a solution to the problem presented by these cases."). This is not inconsistent with Justice Breyer's general willingness to jettison the First Amendment jurisprudence in favor of a case-by-case proportionality inquiry.
[40] *Summum*, 555 U.S. 460 (2009); U.S. v. American Library Ass'n, 539 U.S. 194 (2003) (holding forum analysis and heightened judicial scrutiny "are incompatible with the discretion that public libraries must have to fulfill their traditional missions").
[41] Helen Norton & Danielle Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 913 (2010) (declaring that *Summum* was "an easy government speech case" but also recognizing that "[p]erhaps *Summum* was unanimous because the objectionable consequences of a contrary ruling were so clear as a pragmatic matter"). Of course not everyone thinks *Summum* was decided correctly. *See*, *e.g.*, Steven G. Gey, *Why Should the First Amendment Protect the Government When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1302 (2010) (criticizing *Summum* as "[s]loppy, and ultimately incoherent").
[42] Norton & Citron, *supra* note __, at 915-16.
[43] One notable exception is *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) (invalidating restriction on types of legal arguments lawyers receiving federal funds could make).

government may not condition the receipt of subsidies unless those subsidies serve the purposes of the program.[44] In that particular case, the Court held that conditioning the receipt of funds to fight HIV/AIDS on having an organizational policy against prostitution and sex trafficking was unconstitutional.[45] The Court rejected Justice Scalia's more expansive approach that would invalidate only those conditions that are coercive or not *relevant* to the contours of the federal program.[46] The Court concluded it was "confident" that the policy requirement at issue "fell on the unconstitutional side of the line"[47] because it was not necessary to prevent recipients from using federal funds to promote prostitution or sex trafficking.[48] The Court also rejected the government's argument that groups that did not honor the requirement would "undermine the government's program and confuse its message opposing prostitution and sex trafficking."[49] The Court admitted that "[t]he distinction between conditions that define a federal program and those that reach outside it is not always self-evident."[50]

In *Lane v. Franks*, the Court limited the scope of the government's power to restrict the speech of its employees.[51] In this case, a former government employee alleged he suffered retaliation for testifying at a corruption trial. The Court held that the First Amendment protected the employee's right to testify on a matter of public concern, at least when that testimony was outside of the scope of his job duties. Although the concurring Justices argued that the case involved nothing more than a straight-forward application of *Garcetti*[52] – the testimony was not within the scope of the plaintiff's job duties – the majority went out of its way to emphasize the value of public employee speech.[53]

Neither *Open Alliance* nor *Lane* specifically addresses how a court should determine when the government is speaking. After all, one concerns the constitutionality of government limits on subsidy programs, and the other concerns the constitutional rights of government employees. Nevertheless, because they both are rooted in the government speech doctrine, they potentially suggest that the government speech doctrine should not apply when the speech restriction (or compulsion) does not serve a programmatic purpose, or at least when the government does not have a good reason for censoring or compelling private speech.

B. License Plates

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[44] 133 S. Ct. 2321, 2330 (2013).
[45] *Agency for Intentional Development v. Alliance for Open Society*, 133 S. Ct. 2321, 2330 (2013).
[46] *Id.* at 2328.
[47] *Id.* at 2330.
[48] *Id.* at 2332.
[49] *Id.* at 2332.
[50] *Id.* at 2323. Reconciling this decision with *Rust*, which forbade doctors from mentioning abortion at all to their patients, is not easy.
[51] 134 S. Ct. 2369 (2014). The Court explicitly did not address whether the First Amendment would protect an employee who testified as part of his job duties. *Id.* at 2378 n.4.
[52] *Id.* at 2383 (Scalia, J., dissenting).
[53] *Id.* at 2379-80 ("It bears emphasis that our precedents dating back to *Picking* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.").

The power of States to control the messages that appear on license plates has been a hotly debated issue for decades.

The debate began almost 40 years ago in *Wooley v. Maynard*, where the Court held that individuals could not be compelled to affix to their car a license plate proclaiming the State's motto "Live Free or Die."[54] Significantly, the Court rejected New Hampshire's argument that no one would believe car operators affirmed the motto simply by affixing the plate to their vehicle because everyone knows that the State prescribed the format and content of the required license plates.[55] The Court did not address whether the motto or anything else on a license plate constituted government speech because the Court had not yet recognized the government speech doctrine, and New Hampshire did not make any such argument.

Customized license plates were not on the Court's mind 40 years ago. States did not begin earning revenue from specialty license plates until the late 1980s, when the public sympathies for the Challenger explosion prompted the creation of a special Challenger license plate. Since that time, specialty license plates have turned into big business. Texas's program brings in millions of dollars every year.[56] The precise contours of each state's license plate program can vary, but the three programs Texas has are representative. In one Texas program, the state legislature itself has selected a limited number of mottos.[57] A second Texas program permits private individuals or organizations to request specialty plates through a private vendor, typically for promotional or commercial purposes.[58] These first two programs were not at issue in *Walker*. Instead, the Court was asked to consider the constitutionality of a program permitting the Board of the Texas Department of Motor Vehicles to "create new specialty license plates on its own initiative or on receipt of an application from a nonprofit entity seeking to sponsor a specialty plate."[59] Nonprofits must include a "draft design of the specialty license plate" in its application.[60] The Board has been delegated authority to approve applications and is permitted to refuse to create a plate "if the design might be offensive to any member of the public . . . or for any other reason established by rule."[61] In *Walker*, the Board rejected a proposed plate design submitted by the Sons of Confederate Veterans. This design contained a Confederate flag in its logo. The Board rejected the plate as "offensive" because, it concluded, the public associates the flag "with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or

[54] 430 U.S. 705, 707 (1977).
[55] *Id.* at 720-21 (Rehnquist, J., dissenting) ("The issue, unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views."),
[56] *See Walker*, 135 S. Ct. at 2261-62 (Alito, J.) (remarking that Texas's program was "adopted because [it] brings in money").
[57] *Id.* at 2244 (describing Texas's program and offering "Keep Texas Beautiful," "Mothers Against Drunk Driving," and "Fight Terrorism" as example plates).
[58] *Id.* (offering "Keller Indians" and "Get it Sold with RE/MAX" as examples).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2244-45.

groups."[62]

Courts and commentators have disagreed whether specialty license plate programs in various states constitute a "limited public forum," "non public forum," government speech, or some form of "hybrid" public and private speech.[63] Other moneymaking schemes, such as adopt-a-highway programs[64] and sponsorship of public radio,[65] have faced similar challenges and scrutiny. As this debate has swirled, the Court continued its struggle to define in fits and starts the government speech doctrine.

Because many license plate cases were decided before *Summum*, lower courts frequently embraced a four-factor test from *Johannes* as relevant for determining what constituted government speech: (1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech. Over the course of time, some lower courts expressed the view that these factors were a proxy for considering the views of a reasonable observer.[66] A marked minority of courts and commentators asserted that the reasonable observer was not the appropriate focus of the inquiry; instead, they claimed, ultimate government control over the speech was the central concern of the doctrine.[67]

Many lower courts held that state specialty license plate programs (or related vanity license plate programs) are most appropriately analyzed as limited public or

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[62] *Id.* at 2245.

[63] *See*, *e.g.*, ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006) (rejecting First Amendment challenge to specialty license plate program); Sons of Confederate Veterans v. Glendening, 954 F. Supp. 1099 (D. Md. 1997) (holding Maryland violated the SVC's First Amendment rights by refusing to produce and distribute a license plate with the organization's logo containing a confederate flag); Pruitt v. Wilder, 840 F. Supp. 414 (E.D. Va. 1994) (holding ban on reference to deities on specialty license plates violates the First Amendment). For examples of scholarship addressing specialty license plates, *see*, *e.g.*, Scott W. Gaylord, "*Kill the Seat Turtles" and Other Things You Can't Make the Government Say,"* 71 WASH. & LEE L. REV. 93 (2014) (arguing that license plates are government speech because states exercise ultimate control over their content); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (arguing for intermediate scrutiny); Leslie Gieslow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419 (2001).

[64] *See*, *e.g.*, Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004).

[65] Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000).

[66] *See*, *e.g.*, Children's First Foundation, Inc. v. Fiala, 790 F.3d 328, 338 (2d Cir. 2015) ("'Considering the emphasis on context and the public's perception of the speaker's identity in *Summum,* we think the proper inquiry here is 'whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.'") (quoting Tex. Div., Sons of Confederate Veterans v. Vandergriff, 759 F.3d 388, 393 (5th Cir. 2014), *rev'd sub nom*. Walker v. Tex. Div., 135 S. Ct. 2239 (2015)); *see also* Helen Norton & Danielle Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 917 (2010) (noting that over time circuit courts came to "more helpfully explain [the four] factors as proxies for determining a reasonable onlooker's attribution of the speech to the government or private parties").

[67] *See*, *e.g.,* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006) (holding government control is central inquiry); *see also* Scott W. Gaylord, "*Kill the Seat Turtles" and Other Things You Can't Make the Government Say,"* 71 WASH. & LEE L. REV. 93 (2014) (arguing for government control standard).

nonpublic forum in which viewpoint-based distinctions are impermissible. Those concluding that a specialty license plate program creates a nonpublic forum have sometimes held that the government nevertheless has the power to make speech restrictions that are "reasonable" given the purpose of the forum. Specifically, courts have held that states do not have to issue license plates that are offensive, provided that the determination of offensiveness is viewpoint neutral.[68] For example, the Second Circuit has held that New York is not required to accept applications for vanity plates containing offensive scatological terms. More controversially, that same circuit held just one month before *Walker* that the State did not have to issue a "Choose Life" plate because such an issue "is so incredibly divisive."[69]

In *Walker*, the Court held that the specialty license plates were government speech and that the public forum doctrine was inapplicable. This decision rested on an examination of three factors: (1) the history of license plates; (2) the reasonable observer test; and (3) the government's control over the content of license plates. As discussed in greater detail in Part II, the dissent disagreed with the Court's analysis of all three of these factors and took issue with its failure to consider other relevant factors.

Because the majority concluded that the Texas plates are government speech, it did not have to address Texas's argument that its decision to reflect a plate with a Confederate flag did not constitute viewpoint-based discrimination. The dissenters did, however, and it rejected it out of hand. The dissenters first took issue with Texas's claim that it had not issued a license plate representing the opposing viewpoint, pointing to the DMV Board's approval of Buffalo Soldiers plate.[70] The dissenters went on to reject Texas's argument that its decision was constitutional because the SCV plate was rejected not because of its message but because the Board was worried about driver distraction or road rage that could undermine safety.[71] The dissent pointed out that Texas had failed to present any evidence to support the this claim, which was further undermined by Texas's failure to ban Confederate flag bumper stickers.[72]

II. A Close Look at *Walker*

In *Walker*, Justice Breyer, writing for the majority, candidly uses the government

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[68] *See, e.g.,* Perry v. McDonald, 280 F.3d 159 (2d Cir. 2001) (upholding Vermont's restriction on offensive scatological terms on vanity plates as viewpoint neutral and reasonable).

[69] Children's First Foundation, Inc. v. Fiala, 790 F.3d 328 (2015) (holding specialty license plate program created a nonpublic forum but that the decision to reject the "Choose Life" plate was content-neutral).

[70] 135 S. Ct. at 2262 (Alito, J., dissenting).

[71] *Id.* at 2263.

[72] *Id.* Arguments about the need to censor controversial political speech have been made in public transit advertising cases. *See*, *e.g.*, Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489, 500 (9th Cir. 2015) (holding that although public transit advertising constituted limited public forum, the rejection of a controversial political advertisement was content-neutral because the government made a reasonable forecast of substantial disruption). In *American Freedom Defense Initiative v. Metropolitan Transportation Auth.*, 70 F. Supp.3d 572 (2015), *vacated*. 2015 WL 3797651 (S.D.N.Y. Jun. 19, 2015), Judge Koeltl rejected claims that accepting a controversial political advertisement would lead to violence, stating, "the defendants underestimate the tolerant quality of New Yorkers and overestimate the potential impact of these fleeting advertisements." *Id.* at 583.

speech doctrine as a convenient solution for what he regards as an otherwise tricky problem. Although it appears that Breyer's approach is not far different from the proportionality or balancing approach he has advocated in a number of cases,[73] his majority opinion in *Walker* announces what appears to be a new three-part test for government speech. Determining whether private speech is actually government speech requires an inquiry into three factors: (1) the history of the program at issue; (2) the understanding of a reasonable person; and (3) whether the government has ultimate control over the content of the speech. This test contains various elements the Court has mentioned before in its First Amendment cases but never all together as a way of defining government speech. Each prong of the test is deeply problematic, particularly in the way in which the Court applied them in *Walker*.

A. History

In *Summum*, the Court relied on the long-standing historical tradition of governments using monuments to communicate, whether the government has commissioned and financed the construction of those monuments or accepted monuments donated by private groups.[74] In *Walker*, the majority contends that history similarly indicates that States are speaking through license plates because they have long used license plates not just to identify vehicles but also to communicate messages.[75]

Before criticizing the majority's warped view of the history of messaging on license plates, it is worth noting how interesting it is that the four progressive Justices on the Court rely on history for the interpretation of the scope of First Amendment rights. Although history has lately played a more central role in the Court's jurisprudence in cases like *U.S. v. Stevens* and *Brown v. Entertainment Merchants Association*, the Court's reliance on history in those cases is hardly free from controversy.[76] If the Court consistently relied on history, it would be forced to roll back protections it has extended for all sorts of speech that was traditionally unprotected (or at least not clearly protected), and perhaps extend protections to speech that the Court has excluded, like obscenity.

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[73] *See*, *e.g.*,. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) ("The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories"); (D.C. v. Heller, 554 U.S. 570, 690 (2008) (Breyer, J., dissenting) ("I would simply adopt such an interest-balancing inquiry explicitly," rather than embrace a particular tier of scrutiny); Van Orden v. Perry, 545 U.S. 677, 701 (Breyer, J., concurring) ("I see no test-related substitute for the exercise of legal judgment"); Thompson v. Western States Medical Ctr., 535 U.S. 357, 388-89 (2002) (Breyer, J., dissenting) (criticizing the majority's "strict" application of the commercial speech doctrine and arguing that "the Constitution demands a more lenient application, an application that reflects the need for distinctions among contexts, forms of regulation, and forms of speech"); Nixon v. Shrink Missouri Govt. PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("where a law significantly implicates competing constitutionally protected interests in complex ways," the Court should consider whether the burden of the law is proportional to the government interest).

[74] *Summum*, 555 U.S. at 470-71.

[75] 135 S. Ct. at 2248 ("States have used license plates to urge action, to promote tourism, and to tout local industries.").

[76] *See*, *e.g.*, Toni Massaro, *Tread on Me!*, 17 U. PA. J. CONSTL. L. 365, 397-401(2014) (criticizing focus on history).

Indeed, Justice Breyer was part of the Court's liberal wing that joined Justice Kennedy's dissenting opinion in *Int'l Society for Krishna Consciousness v. Lee* protesting that history and tradition should not be used to define what is a public forum.[77]

Certainly the explicit consideration of history could be useful in defining government speech, but such an inquiry is troublesome in many ways. Locating the relevant historical tradition is tricky business.[78] In addition, a historical requirement of openness would give the government a free pass to control new communication platforms with no history whatsoever.[79] History might be most useful to prevent the government from taking over a forum that has been traditionally open for expression – like streets, parks, and sidewalks – but it seems odd to require a history of openness to defeat a government speech argument. [80]

Breyer's historical analysis demonstrates how easily history can be manipulated to support a finding of government speech. Breyer concludes that "the history of license plates shows that . . . they have long communicated messages from the States."[81] Breyer fails to recognize the rise of specialty license plates as distinct from the issuance of the first license plate in the early 1900s and the inclusion of state symbols and mottos several years later. Of course license plates are used for identification, and of course States have used license plates to express state pride, but the first specialty license plate in the United States was not issued until the 1980s, when Florida issued a special Challenger plate. It was not until the 1990s that Texas realized the moneymaking value of license plates and began to issue specialty plates with a small variety of slogans with messages selected by the State.[82] It is disingenuous to equate the history of license plates generally to the much more recent history of specialty plates.

Breyer's historical approach, which looks at the history of license plates as a whole, potentially gives the government free reign to make available portions of government property not traditionally open to the public for the expression of a multitude of messages. Relatedly, this approach furthers the controversial suggestion in *Summum* that the First Amendment cannot interfere with the government's attempts to promote its

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[77] *See*, *e.g.*, Int'l Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (Kennedy, J., dissenting) (focusing on whether the public property is one that has had as its 'principal purpose . . . the free exchange of ideas' . . . leaves the government with almost unlimited authority to restrict speech on its property").

[78] The Justices frequently debate history in constitutional law cases, and increasingly history is playing an important role in First Amendment/speech cases as well. *See*, *e.g.*, U.S. v. Alvarez, 132 S. Ct. 2537, 2544-47 (2012) (plurality opinion) (finding no historical basis for excluding false speech from First Amendment protection; dissent embraces contrary view); Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2735-36 n.3 (2011) (holding historical traditions did not support an exception for violent speech directed at minors; dissent embraces contrary view).

[79] Charles W. "rocky" Rhodes, *First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 427-28 (2014) (recognizing the drawbacks to a historical inquiry). Justice Breyer has not frequently embroiled himself in historical debates before, with the notable exception of *D.C. v. Heller*, 554 U.S. 570, 690 (2008) (Breyer, J., dissenting).

[80] Rhodes, *supra* note __, at 424-25 (arguing that the "historical prerequisite would preclude the government from attempting to assert control over existing mediums of communication to immunize itself from compliance with First Amendment limitations").

[81] *Walker*, 135 U.S. at 2248.

[82] *See Walker*, 135 S. Ct. at 2257 (Alito, J.) (summarizing history of specialty plates in Texas).

identity in public places. As Tim Zick has argued, "if public places are all potential canvases for governmental speech, then it is possible that anything that is done in those places will either have to conform to the government's identity and image or be subject to exclusion."[83]

Because *Walker*'s historical analysis is so suspect, it is difficult to know how lower courts are supposed to apply it in the future. This is especially true given that the legal framework for speech rights in managerial settings (like public employment and schools) is very much in flux, particularly (but not limited to) in cases involving new media. In these instances, public school students and government employees enjoyed no historical protection for their speech; instead, in the late 1960s, the Court held the First Amendment applied to these groups after all, at least in some instances.

The majority's reliance on history to determine what constitutes government speech is strikingly familiar to the approach it has embraced when determining whether to recognize a new category of unprotected speech. In *Stevens*, for example, the Court rejected the argument that new exceptions to the First Amendment could be created based on a balancing of the benefits and harms of a particular kind of speech; instead, Chief Justice Roberts declared, categorical exceptions must be "historic and traditional."[84] This assertion helped the Court resolve the animal cruelty case, but it fails to explain all of the various existing categories of speech that now receive full or at least partial constitutional protection without even a hint of historic support.[85]

B. The Reasonable Observer

In *Walker*, the Court makes clear for the first time that the "reasonable observer" test plays an important role in determining what constitutes government speech.[86] In the face of jeers from the dissent,[87] the majority proclaims that a reasonable observer would associate any speech on a specialty license plate with the State. The Court explains that the reasonable observer would know that license plates are government property even when they are affixed to private vehicles, that the government maintains tight control over what can appear on these plates, and that people pay extra money for specialty plates specifically because they want the government's endorsement. All of these assumptions are questionable.

The Court's decision to embrace a reasonable observer test explicitly is

[83] *See* Timothy Zick, Summum*, the Vocality of Public Places, and the Public Forum*, 2010 B.Y.U. L. REV. 2203, 2222.

[84] [cite to Stevens]

[85] *See* Toni Massaro, *Tread on Me!*, 17 J. CONST'L L. 365, 400 (2015) ("*Stevens* foolishly introduced an ostensibly history-and-tradition hard brake on the categorical exceptions within free speech doctrine without adequately considering the wider, logical, and normative implications of doing this.")

[86] Sante Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).

[87] *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting) ("If a car with a plate that says 'Rather Be Golfing' passed by at 8:30 am on a Monday morning, would you think: 'This is the official policy of the State—better to golf than work?'").

noteworthy. The perception of a reasonable observer played a relatively small and uncertain role in Justice Alito's majority opinion in *Summum*. In that case, the Court primarily relied on the common understanding that property owners do not open up their land for the erection of monuments conveying messages with which they disagree. Accordingly, Alito wrote, "persons who observe donated monuments routinely—and reasonably interpret them as conveying some message on the property owner's behalf," regardless of whether a monument is located on "public private or on private property."[88] Alito's opinion left open whether he would embrace a reasonable observer test in all government speech cases or simply in contexts that involve the traditional rights of property owners.[89]

It was Justice Souter who argued in his solo concurrence in *Summum* that the "reasonable observer" inquiry should play a primary role in determining what constitutes government speech.[90] Souter argued the reasonable observer test is appropriate because it is the same test used in Establishment Clause cases.[91] The reasonable observer approach also appeared in *Hazelwood School District v. Kuhlmeier*,[92] where the Court permitted public school to censor speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." As mentioned earlier, however, the Court has not (yet) explicitly recognized that case as a government speech case.

Under the Establishment Clause's reasonable observer test, the Court inquires whether reasonable observers would perceive the government to be endorsing religious expression or otherwise "appearing to take a position on questions of religious belief."[93] The Court has explained that the perception that the government endorses religious speech arguably causes the very harm the Establishment Clause was intended to avoid because "it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full, members of the political community, and an

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[88] *Summum*, 555 U.S. at 467.

[89] Alito also mentioned the reasonable observer to response to the argument that the government must have an articulable message whenever it speaks. He asserted that it was not uncommon for reasonable observers to disagree about the message the government wishes to express through permanent monuments. 555 U.S. at 475-76 (noting that monuments "may be intended, and may in fact be interpreted by different observers, in a variety of ways"); *id.* (certain monuments like the John-Lennon "Imagine" monument in Central Park "are almost certain to evoke different thoughts and sentiments in the minds of different observers").

[90] Summum, 555 U.S. at 487 (Souter, J., concurring) ("the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinction from private speech the government chooses to oblige by allowing the monument to be placed on public land"). *See also* Gaylord, *supra* note __, at 125 ("a majority of the Court has never adopted Justice Souter's proposed [reasonable observer] test").

[91] *Id.* (citing County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment)). Justice Stevens agreed with Alito's assertion that the reasonable observer would associate a permanent monument on government property with the government. *Id.* at 481-82 (Stevens, J., concurring). Justice Stevens took this same approach in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 801-02 (Stevens, J., dissenting). Stevens suggested, however, that it might be more accurate to characterize the government's acceptance of the monument as "an implicit endorsement of the donor's message." *Summum*, 555 U.S. at 481 (Stevens, J., concurring).

[92] 484 U.S. 260 (1987).

[93] County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989).

accompanying message to adherents that they are insiders, favored members of the political community."[94] In the government speech context, the reasonable observer test ideally ensures that the voting public knows that the government is speaking so that political accountability can occur.

Determining exactly who this reasonable observer is and what this person knows, however, is famously controversial.[95] In *Capitol Square Review and Advisory Board v. Pinette*, the Court considered whether it was unconstitutional for a city to prevent the Ku Klux Klan from erecting a large cross in a public square in front of the statehouse.[96] Justice O'Connor said that the reasonable observer is "a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share."[97] This person "must be deemed aware of the history and context of the community and forum in which the religious display appears [and] the general history of the place in which the cross is displayed. [An] informed member of the community will know how the public space in question has been used in the past."[98] In dissent, Justice Stevens criticized O'Connor's approach for imagining "a well-schooled jurist, a being finer than the tort-law model."[99] Stevens, joined by Justice Ginsburg, would consider the perspective of a reasonable person passing by the monument instead.[100] In *McCreary County v. ACLU*, the Court stated that the reasonable observer is aware of the history and context of a religious display; he is not "an absentminded objective observer."[101]

Because it is not clear who the reasonable observer is, this test leads to uncertainty and unpredictability.[102] Indeed, prior to *Walker*, no fewer than six circuit courts held that the reasonable observer viewing specialty license plates would *not* consider the plates to be government speech.[103] These courts explained that a reasonable

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[94] Sante Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).

[95] *See*, *e.g.*, William P. Marshall, *"We Know It When We See It," the Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

[96] 515 U.S. 753, 780 (1995)

[97] *Id.* at 780 (O'Connor, J., concurring in the judgment).

[98] *Id.*

[99] *Id.* at 800 n.5 (Stevens, J., dissenting).

[100] *Id.* at 799-800 (Stevens, J., dissenting).

[101] 545 U.S. 844, 866 (2005).

[102] Justice Breyer is well known for reaching different results in two cases that both involved the Ten Commandments on government property. *Compare* Van Orden, 545 U.S. 677, 701-03 (2005) (Breyer, J., concurring) (Ten Commandments on Texas State Capitol grounds does not violate the Establishment Clause), *with* McCreary County v. ACLU, 545 U.S. 844 (2005) (holding Ten Commandments posted in courtroom violated Establishment Clause in opinion joined by Breyer).

[103] *See* Children's First Foundation, Inc. v. Fiala, 790 F.3d 328, 338 (2d Cir. 2015) ("we have little difficulty concluding that such an observer would know that motorists affirmatively request specialty plates and choose to display those plates on their vehicles, which constitute private property"); Tex. Div., Sons of Confederate Veterans v. Vandergriff, 759 F.3d 388, 393 (5th Cir. 2014), *rev'd sub nom*. Walker v. Tex. Div., 135 S. Ct. 2239 (2015); Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) ("[W]e now join the Fourth, Seventh and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."); *but see* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 377 (6th Cir. 2006) ("the medium in this case, a government-issued license plate that every reasonable person knows to be government-issued, a fortiori conveys a government message").

observer would know that the purpose of the specialty program is to raise money; that individuals and groups are permitted to propose a wide-variety of plates; individuals can choose whether to have a specialty license plate on their vehicles; and it would seem "unlikely" that the State is attempting to communicate all the hundreds of messages offered on these plates.[104]

Notably, the only circuit court decision to hold that specialty license plates are government speech specifically rejected the applicability of an observer test; instead, that court focused primarily on the government's control of the speech.[105] Indeed, even the State of Texas did not advance a reasonable observer argument before the Court, relying instead on the government's exercise of final editorial control. It is quite possible that Texas did not advance a reasonable observer argument because it did not think it could win it.

One reason the Court gives for its conclusion that a reasonable observer would believe the license plates contain government speech is that each license plate is "a government article" (i.e., government property) which the government owns and controls. As an empirical matter, it is far from clear that this is correct. Although everyone knows the government issues license plates, many people do not realize that license plates remain government property even when they are affixed to a private vehicle. It is hard to say that this is an unreasonable misunderstanding.

Even if the reasonable observer would know that license plates are government property, it does not follow that they would assume that everything on license plates is the government's expression. The Court declares that Texas uses the plates for identification purposes, and because Texas owns the plates and controls everything that appears on those plates, "persons who observe designs on IDs routinely – and reasonably – interpret them as conveying some message on the [issuer's] behalf."[106] The Court appears to embrace what was only a suggestion in *Summum*—that the government's mere ownership of property has expressive value that would be obvious to the reasonable observer. The Court's willingness to accept this argument potentially turns the public forum doctrine on its head. As mentioned in Part I, the public forum doctrine rejected the traditional assumption that the government had the same property rights as private property owners to control the speech appearing on their property.

Another element of the reasonable observer test in Establishment Clause cases is whether the government has a secular purpose for the challenged speech. In *Sante Fe Independent School District v. Doe*, for example, the Court rejected the school district's argument that it had a secular purpose for permitting students to lead pregame invocations.[107] In *Walke*r, the Court gives no weight to the purpose of the specialty license plate program, ignoring the plain fact that the Board of the Texas DMV had itself

[104] Gaylord, *supra* note __, at 118.
[105] *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) (emphasizing government control over specialty license plates).
[106] 135 S. Ct. at 2248.
[107] *Id.* at 309.

declared that the program was intended "'to encourage private plates in order to 'generate additional revenue for the state.'"[108] Of course courts have a "duty . . . to distinguish a sham secular purpose from a sincere one,"[109] and at times this inquiry can be difficult, but it cannot be disputed that the government's purpose for specialty license plates in this case was to make money from the creation of a new expressive forum.

Another leap of logic Breyer makes without evidentiary support is that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message."[110] Although other courts and commentators have made this same assertion,[111] it is not clear this is true.[112] Most specialty license plate schemes give the organization requesting the creation of a specialty place a portion of the proceeds of the plate. Those who purchase the plate can express their support in an aesthetically pleasing manner. Bumper stickers are nowhere near as prevalent on cars anymore, perhaps because state specialty license plate programs have made it unnecessary to clutter up one's car with bumper stickers and to endure the risk of damage to the car's paint. It is hardly clear that people who are willing to pay extra for such plates do so because they enjoy the state endorsement of their message. It is even less clear what assumptions the reasonable observer would make about why a car owner choose a specialty license plate rather than a bumper sticker.

Alito brilliantly attacks the majority's assumptions about the reasonable observer in his uncharacteristically clever dissent, where he asks rhetorically whether a "reasonable observer" who sees a specialty plate for another state's university believes that his state is endorsing a rival. In addition, a reasonable person might not think twice when seeing any number of messages that seem like government speech – like "Save the Sea Turtles" – or nonoffensive messages that do not resemble government messages – like the seal of a Greek fraternity or sorority – but appear to be the government simply authorizing private speech on license plates.

Perhaps what is really going on in this case, then, is that some people who see a controversial message on a license plate might wonder, "Wow! I cannot believe Texas allows Confederate flags on its license plates." The more controversial the message, the more likely people will wonder why a State was permitting that message to appear. As Andrew Koppelman has argued in the Establishment Clause context, "one's perception of

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[108] *Walker*, 135 S. Ct. 2239, 2260 (2015) (Alito, J., dissenting).
[109] Sante Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).
[110] Id. at 2249.
[111] See, e.g., Higgins v. Driver & Motor Vehicle Servs. Branch, 13 P.3d 531, 541 n.4 (Or. Ct. App. 2000) (en banc). (Wollheim, J., concurring) ("[T]he license plate bears the imprimatur of the state. Petitioner wants the state's endorsement of his message.... [A] bumper sticker would not satisfy petitioner's desire to have the state endorse the words he chooses to display."), aff'd, 72 P.3d 628 (Or. 2003); *see also* See Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 620 (2008) (arguing that those who seek specialty license plates instead using bumper stickers or license plate frames might "intend, and may be likely to achieve, the public's perception that the government endorses their views").
[112] See Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424 (2001) ("Groups that seek specialty plates are generally motivated by both their money-making potential and the recognition they bring to the advertised cause.").

endorsement or nonendorsement merely reflects one's culturally subjective position."[113]

In the Establishment Clause context, it is unclear whether the mythical reasonable observer "will have the perspective of one in the religious majority or religious minority, and whether the observer will have the perspective of an adherent or a nonadherent of the religion on display."[114] The same could be said of the reasonable observer asked to evaluate whether a particular message is government or private speech. Just as members of a religious majority are less likely to regard the presence of common religious symbols in public places as an endorsement of religion, individuals who embrace majoritarian views are less likely to regard noncontroversial expression on public property as containing a government endorsement and are more likely to regard controversial or offensive speech as carrying the government's imprimatur.[115]

No doubt that a lot of reasonable people think the government should and does exercise a lot more control over offensive speech in public places that it really does or can consistent with the First Amendment. Indeed, contributing to the confusion is that sometimes the government does in fact use its own property to express certain messages – very clear, articulable messages – and sometimes the lines between public and private property are not always clear.[116]

Furthermore, it is arguably not unreasonable for an observer to believe that the government supports an offensive message when it appears on government property, whether this property is a traditional public forum like a park, street, or sidewalk, or whether it is a new kind of public property, like a license plate (or government website). The support the government is providing, however, is not support of the substance of the message but rather support of the right to communicate that message.

Putting aside all the foregoing criticisms regarding the Court's application of the reasonable observer test in *Walker*, a fundamental question remains: Is it either appropriate or necessary to use the same test to determine what constitutes government speech and what constitutes a violation of the Establishment Clause? In the context of the government speech analysis, a reasonable observer's perception that the government endorses speech harms only the government's image. It does not undermine anyone's civil liberties. Instead, the expansive of the government speech doctrine threatens to pervert the marketplace of ideas by allowing the government to prefer some speech over others.

Thomas's decision to join Justice Breyer's opinion to form a majority is noteworthy, and not just because this particular lineup is extraordinarily rare. Some commentators have suggested that Justice Thomas's vote is based solely on the fact that

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[113] Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 106 (2002).
[114] Benjamin Sachs, *Whose Reasonableness Counts?*, 107 YALE L. J. 1523, 1526 (1998).
[115] See William P. Marshall, *"We Know It When We See It" – The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533 (1986) ("[T]he meaning of a symbol depends on the nature of its audience.").
[116] See Zick, 2010 B.Y.U. L. REV. at 2215 (arguing that the privatization of public spaces makes it difficult to know whether observers attribute speech on public land to the government).

he shares the liberal's distaste for the Confederate flag.[117] Because Thomas did not write separately, it is hard to know what was behind his vote in this case.[118] Given that Thomas has vehemently rejected the "reasonable observer" test in Establishment Clause cases,[119] it is a bit of a mystery why he would embrace such an inquiry in government speech cases.

C. Control

The third factor on which Justice Breyer's rests his majority opinion is Texas's exercise of "final approval authority."[120] A control element has appeared elsewhere in the Court's government speech cases, but the control required here is very minimal.

Standing alone, it is hard to imagine the Court ever holding that the State's exercise of ultimate control over the content of speech is sufficient for a finding of government speech. The government cannot claim immunity from First Amendment scrutiny for speech in a traditional public forum, for example, by demonstrating pre-speech review. Indeed, any such scheme would be a prior restraint, and prior restraints are presumptively unconstitutional.

Control has played a central role in the Court's decisions in *Johannes* and *Summum*. In *Johannes*, the Court held that promotional beef ads constituted government speech. There, the challengers argued that the U.S. could not claim the protections of the government speech doctrine because third-party non-governmental actors were involved in creating the content. The Court rejected this argument because the federal government "effectively control[s]" the message because it "sets the overall message to be communicated and approves every word that is disseminated."[121]

Notably, the majority dismisses concerns that the license plates cannot be government speech because private parties have contributed the content.[122] In *Summum*, the Court rejected this same argument, noting that many of the Nation's great monuments have been donated or privately funded.[123] But in *Summum*, unlike in *Walker*, it was clear

[117] Eugene Volokh and Erwin Chemerinsky disagree on this point. Compare Erwin Chemerinsky, The Troubling Government Speech Doctrine, *available at* http://www.acslaw.org/acsblog/the-troubling-government-speech-doctrine (Jun. 19, 2015) (suggesting Justice Thomas joined the majority because confederate flags communicate an inherently hurtful message), *with* Eugene Volokh, WASH. POST. (Jun. 24, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/justice-thomass-vote-in-walker-v-sons-of-confederate-veterans/.

[118] In *Virginia v. Black*, for example, Justice Thomas wrote a separate opinion explaining at great length the history and inherently threatening nature of cross-burning).

[119] *See*, *e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1838 (Thomas, J., concurring) (arguing "whatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the reasonable observer"). *See also* Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283 (Mem) (Scalia, J., dissenting) (arguing *Town of Greece* "abandoned the antiquated 'endorsement test'"; Thomas joined).

[120] 135 S. Ct. at 2249.

[121] *Johannes*, 544 U.S. at 560-62.

[122] *Id.* at 2247.

[123] 555 U.S. at 471.

that the government exercised "selectively,"[124] an element that is almost entirely missing from Texas's challenged specialty license plate program. Although Texas mentioned in its reply brief that it had rejected a handful of other specialty license plate applications, the precise details of these rejections remains unclear. The Court holds that Texas's exercise of control informs the reasonable observer's understanding that license plates are government speech, but given that Texas itself seemed unclear about when and under what circumstances it exercised this control, it impossible to believe third parties knew about this control. The lack of selectivity should impact not only whether a reasonable observer believes the government is speaking but also the likelihood of meaningful government accountability. Because the actual operation of the Texas license plate program demonstrates that Texas will create specialty license plates for almost anyone who asks, the likelihood of the public understanding that some plates are rejected—much less the criteria for the Board's decisions—is slim.

D. Factors Not Considered or Discounted

In *Walker*, Breyer conducts a proportionality inquiry in the guise of a three-part test.[125] He asserts that his opinion is just an application of the approach to the government speech doctrine in *Summum*, but it is clear he is picking and choosing what factors from that case are relevant to him here.[126]

In his *Walker* dissent, Justice Alito points out some of the factors the majority largely ignores or discounts. For example, Alito argues that the majority fails to address the differences between the rejection of the Summum monument and the rejection of the SVC specialty license plate application. Alito protests that public parks have never "been thrown open for private groups or individuals to put up whatever monuments they desired."[127] In addition, in *Summum* the spatial limitations of public parks rendered the application of the public forum doctrine unworkable; there are no such practical spatial problems present in the context of specialty license plates because the government can issue an unlimited number of plates.[128]

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[124] *Id.* ("But while government entities regularly accept privately funded or donated monuments, they have exercised selectively.")

[125] Justice Breyer is not always transparent about his desire to abandon the Court's traditional doctrinal approaches. In *Brown*, for example, he asserts that it is appropriate to apply strict scrutiny, but he would not apply such scrutiny "mechanically." 131 S. Ct. at 2765 (Breyer, J., dissenting). In *Alvarez*, he asserts he would apply intermediate scrutiny but then states that he thinks a proportionality approach is best, one that "examines speech-related harms, justifications, and potential alternatives. . . . [I]t take[s] account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so." 132 S. Ct. at 2552 (Breyer, J.).

[126] Indeed, Breyer indirectly recognizes as much at the beginning of *Walker*, where he summarizes the result in *Summum* as resting on three factors: the history of public monuments, the understanding of reasonable observers, and the city's control over the monuments. He states that "[i]n light of these and *a few other relevant considerations*, the Court concluded that the expression at issue was government speech." 135 S. Ct. at 2247 (emphasis added).

[127] Walker, 135 S. Ct. at 2259 (Alito, J., dissenting).

[128] *Id.*

The *Walker* majority suggests the public forum doctrine is unworkable in the context of specialty license plates because Texas would have to accept license plates not just with Confederate flags but other unappealing messages, like one supporting al Qaeda, and Texas would stop the program rather than do that.[129] To be fair, *Summum* gave mixed messages on the unworkability inquiry. Near the end of his majority opinion, Justice Alito essentially makes a confession that "[t]he obvious truth of the matter" is that if the Court decided that the government had to accept permanent monuments on a viewpoint-neutral basis, "most parks would have little choice but to refuse all such donations."[130] It is not unreasonable to read this portion of the opinion as suggesting that a forum analysis does not apply whenever the government would rather close a forum than be forced to endorse offensive messages. This is the reading Justice Breyer appears to embrace in *Walker*.

Another possibility, however, is that in *Summum* the Court was simply recognizing that as a practical matter, parks cannot accommodate very many permanent monuments, and as a result, the government must be able to make some choices. By rejecting this approach to the "unworkability" inquiry, the Court suggests a wide variety of government platforms for expression will constitute government speech because in many instances the government would prefer to close them than embrace a diversity of viewpoints. Notably, the majority also fails to consider the possibility of content-neutral alternatives that might solve this alleged unworkability problem.[131] This is particularly striking given the lengthy discussion of alternatives in *Reed v. Town of Gilbert*, which the Court decided on the very same day.[132]

Alito also criticizes the majority for largely discounting the for-profit nature of the specialty license plate program. Unlike any other government speech case before *Walker*, the Texas specialty plate program requires people to pay the State for the privilege of displaying one of these plates on their cars. Alito notes that the fees Texas collects for specialty license plates far exceed the cost of their issuance. Breyer responds that "the existence of government profit alone is insufficient to trigger forum analysis" because if the city in *Summum* had required those who donated monuments to pay maintenance fees, that would not have converted the monuments to private speech.[133] This might well be correct, but it ignores the host of other factors that were crucial to the outcome in *Summum* (namely, the long tradition of permanent government monuments and the unworkability of the public forum doctrine in that context). Furthermore, this argument ignores the real possibility that the spending of government funds and resources to support third-party expressive activities is more likely to attract political attention and promote the sort of accountability that is at the heart of the government speech

[129] *Walker*, 135 S. Ct. at 2249.
[130] *Id.* at 480.
[131] In ACLU v. Tata, the Fourth Circuit called North Carolina's similar unworkability argument "melodramatic" and suggested that the requiring at least 300 people to support a proposed plate should weed out frivolous plates, or, if that did not work, stay out of controversial issues entirely. ACLU v. Tata, 742 F.3d at 575.
[132] 135 S. Ct. 2218, 2232 (2015) ("The Town has ample content-neutral options available to resolve problems with safety and aesthetics.").
[133] *Walker*, 135 S. Ct. at 2252.

determination.

Another problem with the government speech doctrine after *Summum* and *Walker* is that the government is not required to articulate any particular message. The Court first expressly rejected any such requirement in *Summum*, where Justice Alito waxed eloquently for the Court about how the meaning of public monuments is potentially different for each observer and changes over time. Although it may not be possible to declare definitively what the message a permanent government monument is intended to express, the wide variety of the over 400 Texas specialty license plates indicates that the government has no message at all.[134]

When the public does not even know what the government is saying, accountability through the political process is highly unlikely.[135] What the government means to say when it rejects an application to include private speech on government property potentially makes it even more unclear what the government's message is. In *Walker*, it was clear that SCV's plate was rejected because its logo was "offensive" to the public, but nothing in the Court's opinion requires state actors to be clear about the reasons for rejection in the future in order to take advantage of the protections of the government speech doctrine.[136]

Because Texas does not exercise any meaningful selectivity over the specialty license plates it chooses, the program appears to be some sort of forum like *Rosenberger*, where the University did not "speak or subsidize a message it favors but instead expends funds to encourage a diversity of views from private speakers."[137] By rejecting the SVC plate, Texas appears to be doing nothing but blatantly "manipulating private expression in a viewpoint-based manner."[138]

In *Walker*, the Court concludes that just as the private individuals cannot be compelled to support the speech of the government, the government should not be compelled to support the speech of private individuals.[139] This sounds like the Court is

[134] Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 643 (2008) ("the sheer number of specialty license plates offered makes it difficult to convincingly posit that any specific message is being promoted").
[135] *See* Zick, *supra* note __, at 2217 ("If the municipality is not required to identify a particularized message, how are the people to know whether to be offended and object, to agree with the government's sentiment, or simply to ask for clarification?").
[136] See Zick, *supra* note __, at 2218 (arguing that governments can speak through exclusion, but that it is not always clear "what message rejection conveys absent some explanation from officials"). In *Walker*, the government message was particularly muddled because the State has given mixed messages about the Confederate flag. The Confederate Flag can be found on the state capitol grounds, including on items for sale in the official state capital gift shop. See *Johannes*, 544 U.S. at 569-70 (Ginsburg, J.,) (noting her reluctance to label the beef advertisements at issue as government speech given the conflicting messages about healthy eating that "the Government conveys in its own name").
[137] Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).
[138] Redish & Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 577 (1996).
[139] 135 S. Ct. at 2253.

holding that the government has First Amendment rights just like individuals.[140] This is strange. Unlike private parties, the government is in fact "compelled" to support the speech of private individuals all the time under the public forum doctrine. Whether it is in the form of land or money, the government cannot discriminate among speakers, even though some people might reasonably but mistakenly believe that the government is supporting private expression.

III. RAMIFICATIONS

The ramifications of *Walker* are potentially staggering. Using this decision as a guide, the government will likely assert the government speech doctrine in a wide variety of contexts in order to justify content-based and even viewpoint-based censorship of private speech.

Even before *Walker*, the lower courts tended to give the government a wide berth to restrict speech. As Helen Norton put it in a provocatively titled article, some of the cases involve "imaginary threats to the government's expressive interests."[141] These restrictions extend from the exclusion of individuals from government events, restrictions on the speech of public school teachers and students, the censorship of government employees generally, and advertisements in public transportation. *Walker* will make it even easier for the government to claim that private speech is actually its own speech.

The dissent warns of some of the ramifications of the majority's expansive government speech doctrine. Justice Alito asks about whether the government could now make viewpoint-based decisions about the content to appear on a government-controlled electronic billboard, simply because it controls it and owns it.[142] Even worse, he warns, "[w]hat if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?"[143] These concerns are well taken. *Walker* solidifies the suggestion in *Board of Regents v. Southworth* that it will consider a university to be the speaker in cases where "the challenged speech [is] financed by tuition dollars and the University and its officials were responsible for its content."[144] After *Walker*, "responsibility" for

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[140] Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1262 (2010) (questioning the Court's decision to grant the government the "right" to silence or coerce the rights of its critics).

[141] Helen Norton, *Imaginary Threats to the Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265 (2011).

[142] 135 S. Ct. at 2256.

[143] *Id.* Others sounded this same alarm bell after *Summum*. See, e.g., Zick, *supra* note __, at 2229 ("Under *Summum*'s identity conception, governmental entities could claim that parks, streets, classrooms, museums, subway platforms, university campuses, municipal buildings, public meetings, municipal websites, and other places are not public forums but tangible expressions of a governmental identity or image. Any private speech that is not consistent with that preferred image or identity would be subject to exclusion under the government speech principle."). Indeed, some warmed of this potential expansion long before that. See, e.g., Bezanson & Buss, *supra* note __, at 1443 (noting the possibility that the government could recharacterize the awarding of parade permits as an exercise of editorial discretion).

[144] 529 U.S. at 229.

content can be simply the exercise of final censorship authority; *Walker* does not require the government to be involved in any way with the development of the speech.

Alito's comments reflect very legitimate concerns about the scope of *Walker*'s expansive conception of the government speech doctrine limited only by a weak historical inquiry, an easily met ultimate control requirement, and a highly uncertain and malleable reasonable observer test that rests in large part upon the first two factors. As Part II.A argues, Breyer's history requirement will be no obstacle to claims that speech on public property is government speech. This prong does not require courts to inquire whether the government had the purpose to create a forum for private speech; as long as the government has exercised at least some control over the forum, it does not matter if it has not, in reality, exercised control over all of it. The control requirement will be even more easily met. After *Walker*, government actors will be wise to the need to assert control not over the development of the expression content but merely final approval authority. Governments will be thrilled to censor speech if doing so perversely insulates them from constitutional challenges. Finally, after *Walker*, courts will be reluctant to use a reasonable observer test to reject a government speech defense when the history and control factors indicate otherwise.

Walker is dangerous because it will give the government much greater ability to restrict private speech whenever that speech threatens to undermine the government's image. As long as the government exercises control and a reasonable might think that the government is endorsing that private speech, the government speech doctrine potential applies. For example, just two weeks after the Court released *Walker*, a federal district court judge relied on that decision to reject a First Amendment challenge to the government's decision to cancel the registration of the "Redskins" trademark under the Lanham Act's "may disparage" provision.[145] The court explained that trademark registration "communicates the message that the federal government has approved the trademark"; the public closely associates trademark registration with the government's recognition of the mark; and the federal government exercises final authority to determine which marks to recognize.[146] Arguably this case is not equivalent to *Walker* because it does not obviously implicate the public forum doctrine. Instead, it feels more like an unconstitutional conditions case. After *Open Alliance*, it might appear that the government would have to demonstrate some connection between its viewpoint-based discrimination and the trademark benefit. It would be difficult for the government to meet this burden. However, if *Walker* governs a broader range of government speech cases – and at least one federal district court judge thinks it does – then the much more easily met three-part *Walker* test applies.

Walker will have perhaps the most dramatic impact on the free speech rights of government employees and public school students. In both of these contexts, the scope of the government's power to restrict speech is somewhat unclear. In the context of public school student speech rights, for example, the Court decided in *Hazelwood* that public

[145] Pro-Football, Inc. v. Blackhorse, 2015 WL 4096277, __ F. Supp.3d __ (2015), *appeal filed* (Aug. 6, 2015).
[146] *Id.* at *12.

schools could restrict speech for legitimate pedagogical reasons when such speech bore the "imprimatur" of the school. Lower courts have relied extensively on *Hazelwood* to restrict speech at both the secondary and higher education levels. Although *Hazelwood* pre-dated the Court's recognition of the government speech doctrine, it is based on the same theory. Like the government speech doctrine, the determination of whether speech bears the "imprimatur" of the school depends on the perspective of the reasonable person looking at the relevant history and government control of the type of expressive activity at issue. Given that schools have historically at least tried to exercise control and final approval authority over student speech, *Walker* makes it easier to conclude that a reasonable person would think that the student speaks for the school. Again, the more offensive the speech, the more likely the reasonable person will think that the school is tolerating and thereby endorsing the speech, rather than simply recognizing that students enjoy constitutional rights, too. Federal laws like Title IX holding schools liable for hostile environment discrimination buttress the "reasonableness" of a belief that the school is endorsing student speech.

Walker will have the most significant impact on student athletes who might otherwise challenge restrictions on their ability to use social media or communicate with the press. These bans have come into place after student athletes have posted disparaging remarks about their teammates, coaches, or opposing teams, pictures of underage drinking or other inappropriate behavior, or apparent violations of NCAA's rules. For example, UNC's policy towards social networking changed after an investigation into whether defensive lineman Marvin Austin had improper contact with an agent. Austin posted receipt of expensive gifts for himself and his family on Twitter before his page was deleted. When a teammate posted offensive comments, the coach immediately instituted a broad in-season Twitter ban. UNC has also recently imposed a ban on student communications with the press without advance permission. These new policies certainly satisfy *Walker*'s control element. The only question is whether a reasonable person thinks these students are speaking for the school. Many reasonable people believe that student-athletes on high-profile teams like basketball and football are public figures who represent the school, and that therefore schools should not be required to tolerate communications that embarrass the team and the school. After *Walker*, the exercise of control, which in turn informs the fictional reasonable observer, suggests this belief is reasonable.

Like public school students, government employees are also likely to find themselves with even less protection for their speech activities after *Walker*. As discussed in Part I, the Court has indicated that the government speech doctrine applies to any speech in which an employee engages in the scope of his job duties. As with students, courts might read *Walker* as providing governments with the power to restrict the speech of its employees even when they are not speaking within the scope of their job duties as long as a reasonable observer might believe that the employer's willingness to tolerate the offensive speech is equivalent to endorsing the speech. Public school

teachers, for example, are frequently punished for their offensive "off duty" speech.[147]

Open Alliance's focus on the connection between the speech restriction and the government condition on speech offers a promising suggestion for the government speech doctrine as a whole. Rather than focusing on simply whether the government is controlling speech and whether the reasonable person would think the government has endorsed private speech, the *Open Alliance* approach would cabin in an otherwise overly expansive government speech doctrine so that it applies only when appropriate to serve the government's legitimate interests.

The government is not private entity entitled to protect its brand from dilution. Under well-established First Amendment principles, the government is required to support the speech of private speakers. A focus on reasonable observers who believe this tolerance operates as endorsement threaten the future of free speech rights in this country.

CONCLUSION

Walker is likely to have much more far-reaching effects that the seemingly trivial issue of specialty license plates. By permitting the government to defeat First Amendment claims based on the easily satisfied three-part test the Court embraced in *Walker*, the Court raises the potential for an expansive government speech doctrine that defeats First Amendment rights in a wide variety of settings. Requiring a connection between the speech restriction and the government program is one promising approach to limiting this dangerous doctrine.

[147] For more information on this topic, *see* Mary-Rose Papandrea, *Social Media, Teachers, and the First Amendment*, 90 N.C. L. REV. 1597 (2012).