William & Mary Bill of Rights Journal

Volume *25 (2016-2017)*
Issue 4

Article 3

May 2017

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Clay Calvert

THE GOVERNMENT SPEECH DOCTRINE IN *WALKER*'S WAKE: EARLY RIFTS AND REVERBERATIONS ON FREE SPEECH, VIEWPOINT DISCRIMINATION, AND OFFENSIVE EXPRESSION

Clay Calvert*

ABSTRACT

This Article examines the immediate effects on free expression of the U.S. Supreme Court's 2015 ruling in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* involving the government speech doctrine. In *Walker*, a sharply—and largely partisanly—divided Court upheld, in the face of a First Amendment challenge, Texas's decision denying a private organization's application for a specialty license plate featuring Confederate battle flag imagery. This Article initially reviews the government speech doctrine and *Walker*. It then analyzes *Walker*'s impact on cases that, like it, involve specialty license plate programs. Next, this Article explores lower court efforts stretching *Walker*'s test for government speech to four very different settings: 1) a public school program that allows banners promoting private businesses to hang on school fences in exchange for monetary donations to the school; 2) highway welcome centers and rest areas offering tourist-oriented literature and advertisements published by private entities; 3) an outdoor lunch program held on public property featuring private food-truck vendors; and 4) the process of federal trademark registration for allegedly disparaging names. Finally, this Article synthesizes the lower courts' analyses in these diverse scenarios, identifying both themes and problems with the doctrine in a post-*Walker* world.

INTRODUCTION

> 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[.][1]

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Florida. BA, Communication, Stanford University, 1987; JD (Order of the Coif), McGeorge School of Law, University of the Pacific, 1991; PhD, Communication, Stanford University, 1996. Member, State Bar of California. The author thanks graduate students Minch Minchin and Austin Vining, as well as undergraduates Jessie Goodman and Olivia Vega, of the University of Florida, for their research and editing assistance with several drafts of this Article.

[1] Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

In 2015, a sharply divided United States Supreme Court provided stark proof of the epigraph above when it held in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[2] that Texas's specialty license plates constitute government speech rather than private expression.[3] That conclusion, in turn, led the majority to find that the Lone Star State did not violate the First Amendment[4] speech rights of the Sons of Confederate Veterans (SCV) when it denied that organization's request for a specialty plate featuring the image of a Confederate battle flag.[5]

Application of the government speech doctrine is critical in rendering nugatory First Amendment claims like those of the SCV. That is because, as Dean Erwin Chemerinsky points out, "when the government is the speaker, the First Amendment does not apply at all or provide a basis for challenging the government's action."[6]

Indeed, Justice Stephen Breyer explained for the five-Justice *Walker* majority[7] that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[8] The distinction between government speech and private expression, the latter of which is subject to the full panoply of First Amendment safeguards, thus "is often of substantial importance from the perspective of free speech law."[9]

Walker's outcome banning Confederate battle flags on license plates surely was emotionally satisfying for many people.[10] As Chemerinsky explains, "[i]t is easy to like the result in this case because [C]onfederate battle flags convey a message of

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[2] 135 S. Ct. 2239 (2015).

[3] *Id.* at 2253.

[4] The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[5] *Walker*, 135 S. Ct. at 2253; *see also id.* at 2245 (noting that part of the design included the SCV's "logo, a square Confederate battle flag framed by the words 'Sons of Confederate Veterans 1896.' A faint Confederate battle flag appeared in the background on the lower portion of the plate.").

[6] Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 730 (2011) (footnote omitted).

[7] Breyer was joined by Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. *Walker*, 135 S. Ct. at 2243. Justice Samuel Alito penned a dissent that was joined by Chief Justice John Roberts, and Justices Antonin Scalia and Anthony Kennedy. *Id* at 2254 (Alito, J., dissenting).

[8] *Id.* at 2245 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009)).

[9] R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347, 347 (2016).

[10] *See, e.g.*, Editorial, *Government Speech: A Sensible Court Ruling on Confederate Flag Plates*, PITT. POST-GAZETTE, June 22, 2015, at A-6 (calling the ruling in *Walker* a "welcome decision," asserting that "the high court ruled sensibly," and opining that "the Confederate flag for too many Americans has been a symbol of terrorism and racial oppression").

racism that is inherently hurtful and divisive."[11] Although everyone may not agree with Chemerinsky's contention, "polls have indicated that most African Americans view the Confederate battle flag as racist and emblematic of 19th century efforts to preserve slavery as well as 20th century efforts to maintain a segregated South."[12] In *Walker*, although the SCV claimed its proposed plate was "merely honoring those who fought for the South during the Civil War,"[13] Texas denied the application precisely because it found the flag "offensive."[14]

Yet Chemerinsky, from a macro-level perspective stretching beyond the specific facts of *Walker*, is displeased with the majority's approach to government speech—so much so he confesses "I don't get to say this often, but . . . I think that the conservative Justices—Roberts, Scalia, Kennedy and Alito—got it right" in their *Walker* dissent.[15] Specifically, the liberal-leaning Chemerinsky[16] asserts:

> [T]here is much that is troubling about the [C]ourt's approach. If license plates are government speech, and the government can say whatever it wants, does this mean the government can put any message it wants on license plates and require that people have that on their cars? What if the government wants to put a message that abortion is murder or a message to vote Republican? The [C]ourt's approach says that when the government is the speaker, it cannot be challenged for violating the speech clause of the First Amendment.[17]

He adds that "the [C]ourt's approach gives the government the ability to avoid free speech challenges by declaring that something is government speech. Could a city

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[11] Erwin Chemerinsky, *Free Speech, Confederate Flags and License Plates*, ORANGE COUNTY REG. (June 25, 2015, 3:57 PM), http://www.ocregister.com/articles/government-668320-texas-license.html [https://perma.cc/VQ78-DVGW].

[12] Gerald R. Webster & Jonathan I. Leib, *Whose South Is It Anyway? Race and the Confederate Battle Flag in South Carolina*, 20 POL. GEOGRAPHY 271, 275 (2001).

[13] Richard Wolf & Brad Heath, *Justices Split Rulings on Free Speech*: *Supreme Court OK with Restricting License Plates but Frowns on Treating Roadside Signs Differently Based on Content*, USA TODAY, June 19, 2015, at 3A.

[14] Adam Liptak, *Supreme Court Upholds Texas Ban of License Plates with Confederate Flag*, N.Y. TIMES, June 19, 2015, at A12.

[15] Chemerinsky, *supra* note 11.

[16] *See* Sonya Geis, *Scholars Decry Law School's About-Face on New Dean*, WASH. POST, Sept. 14, 2007, at A02 (describing Chemerinsky as a "highly visible liberal law professor" and noting that "[h]e is a frequent guest on talk shows to represent a liberal point of view"); Adam Liptak, *Furor Ends in Deanship for Liberal Scholar*, N.Y. TIMES, Sept. 18, 2007, at A18 (labeling Chemerinsky "a liberal law professor" and observing that "Chemerinsky has for decades been a prominent liberal public intellectual and litigator, and he has written scores of opinion articles taking liberal positions").

[17] Chemerinsky, *supra* note 11.

library choose to have only books by Republican authors by saying that it is the government speaking?"[18]

This Article examines the immediate ramifications of *Walker*, particularly in light of Chemerinsky's fears regarding possible fallout in pro-conservative-view fashion.[19] Part I initially reviews the government speech doctrine and the Court's decision in *Walker*, including the logic and reasoning applied by both the majority and dissent.[20] Part II then explores *Walker*'s immediate impact on cases[21] involving specialty license plate policies in states other than Texas.[22] Next, Part III analyzes a quartet of lower-court decisions post-*Walker*[23] involving efforts by government entities to apply the government speech doctrine to scenarios and venues other than specialty license plate programs.[24] The Conclusion identifies some lessons and problems illustrated by the post-*Walker* rulings regarding the application and scope of the government speech doctrine.[25]

Ultimately, the Article asserts that while *Walker*'s result holds visceral appeal for those who abhor Confederate battle flag symbolism, the Court's logic and reasoning in reaching that outcome leave much to be desired—a fact demonstrated by the half-dozen post-*Walker* rulings (two specialty license plate cases, four involving other situations) examined here. The three-factor approach to government speech proffered by the *Walker* majority,[26] along with a different three-prong test proposed by

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[18] *Id.*

[19] Chemerinsky's worries about pro–Republican speech decisions being supported by *Walker*'s reasoning, of course, likely stem from his liberal leanings. *See* Robert Barnes, *Will Conservatives Save Obamacare?*, WASH. POST, Mar. 18, 2012, at B1 (describing Chemerinsky as "the *liberal* dean of the University of California at Irvine Law School" (emphasis added)). The opposite, however, could also prove true: *Walker*'s reasoning might be used by the government in heavily Democratic-leaning states, such as California, to espouse liberal points of view and to suppress conservative ones. This Article thus uses Chemerinsky's frets simply to demonstrate potential problems of viewpoint-based discrimination after *Walker* as recognized by a leading constitutional scholar; it abstains from adopting a political position.

[20] *See infra* Part I.

[21] The cases examined in Part II are *American Civil Liberties Union of North Carolina v. Tennyson*, 815 F.3d 183 (4th Cir. 2016) and *Sons of Confederate Veterans, Inc. v. Holcomb*, No. 7:99-cv-00530, 2015 U.S. Dist. LEXIS 103603 (W.D. Va. Aug. 6, 2015).

[22] *See infra* Part II.

[23] The four cases examined in Part III are *Mech v. School Board of Palm Beach County*, 806 F.3d 1070 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016); *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted sub nom*. *Lee v. Tam*, 13 S. Ct. 30 (2016); *Wandering Dago, Inc. v. Destito*, No. 1:13-cv-01053, 2016 U.S. Dist. LEXIS 26046 (N.D.N.Y. Mar. 1, 2016), *appeal filed sub nom. Wandering Dago Inc. v. New York State Office of General Services*, No. 16-622 (2d Cir. Mar. 3, 2016); *Vista-Graphics, Inc. v. Virginia Department of Transportation*, 171 F. Supp. 3d 457 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016).

[24] *See infra* Part III.

[25] *Infra* notes 382–469 and accompanying text.

[26] *See infra* Section I.B.1 (describing Justice Breyer's articulation of the three-part test for the majority in *Walker*).

the dissent,[27] both foster large degrees of malleability and plasticity that permit the government to censor speech it finds offensive or detrimental to its interests. In brief, and when viewed most critically, *Walker* and its progeny illustrate a key difference in First Amendment law between a results-oriented jurisprudence (one that feels good about shutting down images of the Confederate battle flag in a particular case) and a doctrinally coherent jurisprudence (one that balances First Amendment speech interests against government needs in a logical, predictable, and consistent manner).

I. GOVERNMENT SPEECH AND THE *WALKER* RULING: A MUDDLED DOCTRINE GROWS MURKIER

This Part has two sections. The first provides an overview of the government speech doctrine and its important, yet unsettled and contested, nature. The second section then analyzes the *Walker* ruling.

A. Overview and Importance of the Government Speech Doctrine

The government speech doctrine is a powerful weapon in a state's arsenal for expression—one deployable both for promoting the government's own viewpoint and, conversely, for squelching the views of others with which it disagrees.[28] As Professor Joseph Blocher explains, the "doctrine gives the government a nearly unlimited power not only to flood the market with its own viewpoints, but to limit private speakers on the basis of theirs."[29]

In *Walker*, for instance, the private speaker limited was the Texas Division of the SCV.[30] Specifically, Texas denied the SCV the ability to express its viewpoint on specialty license plates.[31]

This pro-censorial outcome comports with Professor David Ardia's prescient, pre-*Walker* observation that "[t]he government speech doctrine . . . grants the government nearly carte blanche ability to exclude speakers and speech on the basis of viewpoint so long as the government can show that it 'effectively controlled' the message being conveyed."[32] Indeed, as Professor John Inazu notes, characterizing

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[27] *See infra* Section I.B.2 (describing Justice Alito's articulation of the three-part test for the minority in *Walker*).

[28] Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 767 (2011).

[29] *Id.*

[30] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243–44 (2015).

[31] *Id.* at 2245.

[32] David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1983–84 (footnote omitted).

speech as that of the government allows lawmakers to "impose content or even viewpoint-based expressive restrictions."[33]

Typically, such viewpoint-based discrimination by the government is "disfavorable."[34] Professor Martin Redish explains that "[i]f there is one unbending principle of First Amendment theory and doctrine, it is that government may not shut off one side of a political debate because of disagreement with the position sought to be expressed."[35]

The rule against viewpoint-based censorship, however, does not apply when courts consider the government—rather than a private individual or entity—to be the speaker.[36] As Professor Blocher asserts, "when the government speaks, it can say what it wants, even if that means discriminating on the basis of viewpoint."[37]

Thus, because the *Walker* majority identified Texas as the speaker on specialty license plates, the Lone Star State could freely stifle imagery of the Confederate battle flag simply because it objected to the viewpoint or message the flag allegedly conveys.[38] In brief, when the government speaks, its decisions about what to say and what to censor are "not subject to First Amendment review."[39] The government, in other words, gets a free pass from First Amendment strictures.

A critical problem, however, with the government speech doctrine is, as Professor Mark Strasser wrote several years prior to the Court's *Walker* ruling, that "there are no clear criteria by which to determine when the government is speaking or what, if anything, the govern-ment [sic] must say to trigger the doctrine's protections."[40] Strasser added that "this lack of clarity has caused great confusion in the lower courts—judges seem not to know how or when to apply the doctrine."[41]

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[33] John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1182 (2015).

[34] *See* Wood v. Moss, 134 S. Ct. 2056, 2061 (2014) ("The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination." (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995))).

[35] Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 579–80 (1997) (footnote omitted).

[36] *See* Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a "Jurisprudence of Labels,"* 2010 BYU L. REV. 2071, 2071 (noting that, under the government speech doctrine, the Supreme Court permits "the imposition of normally prohibited viewpoint restrictions on private speakers").

[37] Joseph Blocher, *New Problems for Subsidized Speech*, 56 WM. & MARY L. REV. 1083, 1096 (2015) (footnotes omitted).

[38] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2253 (2015).

[39] Inazu, *supra* note 33, at 1166 (footnote omitted).

[40] Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 85 (2011).

[41] *Id.*

Professors Helen Norton and Danielle Keats Citron identified the same problem in 2010, writing that "the Supreme Court has yet to articulate a clear rule for parsing government from private speech[.]"[42] Indeed, Professor Lyrissa Lidsky averred in 2012 that the government speech doctrine is "lacking in coherence—to put it mildly."[43] In a nutshell, the government speech doctrine prior to 2015 was in a tumultuous state of judicial fermentation.

B. Wading into Walker

It was against this unstable, if not volatile, background that the U.S. Supreme Court waded into *Walker* and put Texas's specialty license plate program directly in the Court's crosshairs. Under that program, all specialty plates featured "the word 'Texas,' a license plate number, and one of a selection of designs prepared by the State."[44] Non-profit entities, including the SCV, can apply for a specialty plate featuring their own design.[45] The Texas Department of Motor Vehicles Board, however, wields statutory power to reject a proposed plate "if the design might be offensive to any member of the public[.]"[46]

In addition to incorporating "Texas" and a license plate number, the SCV's proposed plate included "the organization's logo, a square Confederate battle flag framed by the words 'Sons of Confederate Veterans 1896,'" as well as "[a] faint Confederate battle flag [that] appeared in the background on the lower portion of the plate."[47] After seeking public comment on this design, the Board rejected it because "'many members of the general public find the design offensive, and because such comments are reasonable.'"[48] Indeed, according to the *Austin American-Statesman*, "[o]pponents of a proposed Confederate flag license plate in Texas presented petitions containing 22,000 signatures" to Texas's Department of Motor Vehicles in October 2011.[49] The SCV sued in response, seeking a court order, premised on First Amendment grounds, requiring the Board to issue its proposed plate.[50]

As framed by Justice Stephen Breyer for the majority, the issue was whether the Board's decision rejecting the SCV's specialty plate "violated the Constitution's free

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[42] Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 917 (2010).

[43] Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1976 (2011) (footnote omitted).

[44] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2244 (2015) (citations omitted).

[45] *Id.*

[46] TEX. TRANSP. CODE ANN. § 504.801(c) (West 2015).

[47] *Walker*, 135 S. Ct. at 2245.

[48] *Id.* (citation omitted).

[49] Mike Ward, *Confederate Flag Plates Draped in Strife*, AUSTIN AM.-STATESMAN, Oct. 13, 2011, at B01.

[50] *Walker*, 135 S. Ct. at 2245.

speech guarantees."[51] The resolution of that issue, in turn, hinged directly on whether specialty plates in Texas are government speech or private expression.

That "distinction is critical,"[52] Samuel Alito explained for the four-Justice dissent, because the First Amendment does not apply to government speech and the government thus can choose and favor whatever views it wants.[53] In stark contrast, the government "cannot forbid private speech based on its viewpoint."[54]

Ultimately, the *Walker* majority—a block of four liberal-leaning Justices joined by stalwart conservative Clarence Thomas[55]—concluded "that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design."[56] Conversely, the dissent, comprised of four conservative-tilting Justices,[57] held that "[m]essages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech"[58] and that Texas therefore violated the First Amendment speech rights of the SCV by discriminating against the organization's viewpoint.[59] The dissent found that Texas's specialty plate program amounted to "a limited public forum" in which the government "cannot discriminate on the basis of viewpoint."[60]

How did the Justices reach these conflicting conclusions? As described later, both the majority and dissent applied three-part tests they claimed were drawn from

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[51] *Id.* at 2244.

[52] *Id.* at 2254 (Alito, J., dissenting).

[53] *Id.* at 2255.

[54] *Id.* at 2263.

[55] Authored by Stephen Breyer, the majority opinion was joined by Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. *Id.* at 2243 (majority opinion); *see also* Robert Barnes, *Texas Free to Say No to Confederate Flag Plates*, WASH. POST, June 19, 2015, at A1 (noting that "Justice Clarence Thomas, the court's only African American justice, split with fellow conservatives and joined the court's liberals in the 5-to-4 decision"); Adam Liptak, *Right Divided, Disciplined Left Steered Justices*, N.Y. TIMES, July 1, 2015, at A1 (observing that "[t]he liberals, as usual, voted as a group—but they were joined by Justice Thomas in a rare alliance"); David G. Savage, *Court Upholds License Plate Limits*, L.A. TIMES, June 19, 2015, at A8 (reporting that Thomas "cast a rare fifth vote on the side of the court's four liberals to reject the Confederate license plate").

Some speculated that Thomas, an African American and arguably "the Court's staunchest conservative," might have joined the four liberals because of his personal "experience with symbols of hate and violence[.]" Dahlia Lithwick, *Good Day to Fold Up the Confederate Flag*, PITT. POST-GAZETTE, June 22, 2015, at A-7.

[56] *Walker*, 135 S. Ct. at 2253.

[57] Samuel Alito authored the dissent and was joined by Chief Justice John Roberts, and Justices Antonin Scalia and Anthony Kennedy. *Id.* at 2254 (Alito, J., dissenting).

[58] *Id.* at 2263.

[59] *Id.*

[60] *Id.* at 2262 (citations omitted).

the Court's 2009 ruling in *Pleasant Grove City v. Summum*.[61] In *Summum*, the Court held that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[62] *Summum* involved a religious group's efforts to force a Utah municipality "to place a permanent monument in a city park in which other donated monuments were previously erected."[63] Specifically, a church named Summum sought to donate a stone monument featuring its "Seven Aphorisms" and to have it placed in Pioneer Park in Pleasant Grove City, Utah.[64]

Writing the Court's opinion in *Summum* and holding that permanent monuments in the park constitute government speech, Justice Alito reasoned, among other things, that "[g]overnments have long used monuments to speak to the public."[65] He added that "throughout our Nation's history," governments have exercised "selective receptivity" when choosing to accept or reject privately donated monuments.[66] Such governmental selectivity is necessary, in part, due to physical space restrictions. As Alito wrote, "public parks can accommodate only a limited number of permanent monuments."[67] Emphasizing what might be considered a spatial-scarcity factor, Alito added that "it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression."[68]

In addition to considering factors of history, selectivity, and spatial-scarcity when evaluating whether permanent monuments in public parks constitute government speech, Justice Alito focused on public perception. Specifically, he noted that "[p]ublic parks are often closely identified *in the public mind* with the government unit that owns the land."[69]

Under this multi-factor approach, the bottom line from *Summum* is that while public parks generally constitute traditional public fora[70] where content-based suppression of speech undergoes strict scrutiny review[71] and where viewpoint-based

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[61] 555 U.S. 460 (2009); *infra* Sections I.B.1–2; *see also* Todd E. Pettys, *Weddings, Whiter Teeth, Judicial-Campaign Speech, and More: Civil Cases in the Supreme Court's 2014–2015 Term*, 51 CT. REV. 94, 102 (2015) (asserting that the Court in *Walker* "relied heavily upon its 2009 ruling in *Pleasant Grove City v. Summum*" (footnote omitted)).

[62] *Summum*, 555 U.S. at 464.

[63] *Id.* at 464–65.

[64] *Id.* at 464–66.

[65] *Id.* at 470.

[66] *Id.* at 471.

[67] *Id.* at 478.

[68] *Id.* at 479.

[69] *Id.* at 472 (emphasis added).

[70] *See* RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 116 (2d ed. 2006) ("Traditional public forums are those that historically have been dedicated to assembly and debate. Primary examples are streets, sidewalks, and parks.").

[71] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (noting that "content-based restrictions on speech" are permissible "only if they survive strict scrutiny" and adding that

discrimination is verboten,[72] the public "forum analysis simply does not apply" when it comes to regulating the placement of permanent monuments in those parks.[73]

Justice Breyer issued a separate concurrence in *Summum* that stressed he joined Alito's opinion for the Court only "on the understanding that the 'government speech' doctrine is a rule of thumb, not a rigid category."[74] Breyer cautioned that the Court should not be bound by "a jurisprudence of labels" in First Amendment speech cases but, instead, should engage in a more flexible, proportionality approach in which it considers "whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[75] Applying this methodology, Breyer concluded that Pleasant Grove City engaged in "a proportionate restriction on Summum's expression[.]"[76] Breyer, it should be noted, has embraced such a proportionality approach in other speech cases.[77]

Although Breyer ultimately agreed with the outcome reached by Alito in *Summum*,[78] the two Justices reached radically different conclusions just six years later in *Walker*, with Breyer writing for the majority and Alito authoring the dissent.[79] Despite contradictory pronouncements in *Walker*, both Breyer and Alito claimed their respective opinions were premised on the Court's logic and reasoning in *Summum*.[80] In brief, the *Walker* majority and dissent both deployed their own

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strict scrutiny requires the government to prove that the regulation in question "furthers a compelling governmental interest and is narrowly tailored to that end" (citations omitted)); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) (asserting that a content-based speech regulation can only withstand judicial review "if it satisfies strict scrutiny," noting that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest," and adding that "[i]f a less restrictive alternative would serve the Gov-ernment's [sic] purpose, the legislature must use that alternative" (citations omitted)); WEAVER & LIVELY, *supra* note 70, at 118 (observing that content-based regulation of speech in "quintessential public forums . . . is permissible only when the state demonstrates a compelling interest and the law is narrowly framed to achieve this end" (footnote omitted)).

[72] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1190 (5th ed. 2015) (noting "the impermissibility of viewpoint restrictions in government regulation of speech in public forums" (citing Boos v. Berry, 485 U.S. 312 (1988))).

[73] *Summum*, 555 U.S. at 480 (concluding that "as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property").

[74] *Id.* at 484 (Breyer, J., concurring).

[75] *Id.* (citations omitted).

[76] *Id.* at 485.

[77] Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 493–94 (2016).

[78] *Summum*, 555 U.S. at 484.

[79] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243, 2254 (2015).

[80] Justice Breyer wrote in *Walker* that "[o]ur analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue." 135 S. Ct. at 2248. Breyer added that "[o]ur reasoning rests primarily on our analysis in *Summum*[.]" *Id.* at 2246.

Summum-derived tests for government speech and yet, in doing so, arrived at opposite results. The next two subsections describe how the majority and dissent reached their decisions.

1. The Majority Opinion

Looking to *Summum* for guidance in *Walker*, Justice Breyer explained that the test for government speech involves consideration of: 1) the history of the program, medium, or venue in or on which messages occur; 2) who a reasonable observer of the speech would consider is speaking; and 3) who effectively controls the selection of the messages.[81] Applying this test to *Walker*'s facts, Breyer initially found that history militated in Texas's favor because, in part, license plates "long have communicated messages from the States."[82] Breyer stressed that Texas lawmakers had approved designs and messages for specialty "plates for decades."[83]

Turning to the second factor—the perspective of a reasonable observer—Breyer opined that "Texas license plates are, essentially, government IDs" and that government issuers of IDs "typically do not" feature content with which they do not seek association.[84] People would thus reasonably perceive the plates as conveying a message on the issuer's—in other words, on Texas's—behalf.[85]

Breyer added that "the governmental nature of the plates is clear from their faces: The State places the name 'TEXAS' in large letters at the top of every plate."[86] Furthermore, he speculated—not citing any evidence to support his assumption—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. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate."[87] The phrase "likely intends" is emphasized because, without referencing any evidence or research to indicate as such, it is a mere guess by the majority about why people display specialty plates.

Finally, on the third factor—the individual or entity that effectively controls selection of the messages in question—Breyer reasoned that "Texas maintains direct

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Justice Alito opined that the Breyer-authored majority opinion "badly misunderstands *Summum*." *Id.* at 2258 (Alito, J., dissenting). Alito wrote that *Summum* "identified several important factors" in the government speech determination. *Id.* In turn, he reasoned that the characteristics under these factors, "which rendered public monuments government speech in *Summum*, are not present in Texas's specialty plate program." *Id.* at 2259.

[81] *See id.* at 2247 (majority opinion).

[82] *Id.* at 2248.

[83] *Id.*

[84] *Id.* at 2249 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 471 (2009)).

[85] *Id.*

[86] *Id.* at 2248.

[87] *Id.* at 2249 (emphasis added).

control over the messages conveyed on its specialty plates."[88] He emphasized that the Texas Department of Motor Vehicles Board must, pursuant to statutory fiat, "approve every specialty plate design proposal before the design can appear on a Texas plate."[89] Such final authority as the decider, as it were, "allows Texas to choose how to present itself and its constituency."[90] Breyer pointed out, in concluding that Texas's specialty plates "are similar enough to the monuments in *Summum*"[91] to constitute government speech, that:

> Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs.[92]

Four Justices, however, disagreed with Breyer. Their dissent is addressed immediately below.

2. The Dissenting Opinion

Justice Alito framed his version of the *Summum* test for the *Walker* minority in a slightly different fashion,[93] although he too—like Breyer—initially focused on who, historically, has used the program, medium, or venue in question to speak.[94] Alito's three-part test differed from Breyer's version, however, on the remaining two factors. Specifically, the second factor for the minority was the amount or level of "selective receptivity" and "evidence of selectivity" exercised by the government in controlling the speech in question.[95] Finally, the third factor for the dissent was physical space and, in particular, whether there is a shortage of space for message display that might justify government control of speech, free from First Amendment attacks.[96]

In addition to this three-prong test derived from *Summum*, Alito proposed a more holistic, gestalt-like test. It simply asks what a person, sitting by a Texas highway and watching cars whiz by, might believe in terms of whether "the sentiments

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[88] *Id.*

[89] *Id.* (citing 43 TEX. ADMIN. CODE §§ 217.45(i)(7)–(8), 217.52(b) (2015)).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 2250.

[93] This different framing of the test is anything but surprising, given that Alito wrote that the majority "badly misunderstands *Summum*." *Id.* at 2258 (Alito, J., dissenting).

[94] *Id.* at 2258–59.

[95] *Id.* at 2260–61.

[96] *Id.* at 2261–62.

reflected in these specialty plates are the views of the State of Texas and not those of the owners[.]"[97] In other words, what constitutes government speech is left to the eyes of a mythical beholder.[98]

Applying his three-part test to the facts in *Walker*, Alito initially found that history weighed against calling Texas's specialty license plates government speech because those plates are "quite new" in the Lone Star State.[99] In contrast to how "governments have used monuments since time immemorial to express important government messages,"[100] it was only "within the last 20 years or so" that Texas allowed private entities to "secure plates conveying their own messages."[101] The minority's analysis of the history factor thus conflicts with that of the majority.[102]

Turning to the degree of selectivity exercised by Texas under its specialty plate program, Alito concluded the program was "*not* selective by design" because it was intended to generate revenue.[103] He reasoned here that "Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some who viewed them."[104] Alito also cited the following question-and-answer content for consumers set forth in a Texas Department of Motor Vehicles Board brochure: "Q. Who provides the plate design? A. You do,

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[97] *Id.* at 2255.

[98] Justice Alito's analysis under this holistic, impression-based standard took the form of a series of somewhat snarky rhetorical questions designed to suggest that no one sitting by a Texas highway could possibly believe the government was expressing its views—rather than those of drivers—on specialty plates:

> 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 to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR—24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

Id. (footnote omitted).

[99] *Id.* at 2260 (asserting that "history here does not suggest that the messages at issue are government speech").

[100] *Id.* at 2259.

[101] *Id.* at 2260.

[102] *See supra* notes 82–83 (describing the majority's analysis of the history factor).

[103] *Walker*, 135 S. Ct. at 2260. As Alito wrote, specialty plate "programs were adopted because they bring in money" and that in Texas "the program brings in many millions of dollars every year." *Id.* at 2261–62 (citation omitted).

[104] *Id.* at 2261.

though your design is subject to reflectivity, legibility, and design standards."[105] The program has produced, Alito observed, more than 350 different specialty plates, including those with messages for universities (both in and out of state), commercial businesses, and non-profit organizations.[106]

The contrast here with Justice Breyer's approach for the majority regarding the notion of control is important. While Breyer focused on the fact that Texas ultimately "maintains direct control over the messages conveyed on its specialty plates[,]"[107] Alito and the dissent found the exercise of that control to be exceedingly lax—so much so that the only reason for excluding requested plates is if the Texas Department of Motor Vehicles Board determines they "would offend some who viewed them."[108] Put differently, the dissent zeroed in on the level or degree of selectivity actually exercised by the government, not simply whether the government holds final power to reject plates. For the dissent, then, the more closely the government exercises its authority over speech: the more selective it is in the application process somewhat akin, perhaps, to an elite university weeding out the vast majority of applicants—the more likely the medium (permanent monuments in *Summum*) is to be classified as government speech.[109]

Furthermore, Alito focused on the space-scarcity factor that, as he put it, "was important in *Summum*."[110] Unlike in *Summum*, however, where the space shortage problem was very real because "[a] park can accommodate only so many permanent monuments," Alito asserted that "[t]he only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too. Today Texas offers more than 350 varieties. In 10 years, might it be 3,500?"[111] In brief, there was no shortage of physical space that would justify government control over otherwise private speech as it did in *Summum*.[112]

Counterposed to Alito's dissent, however, the Breyer majority suggested that physical scarcity simply was irrelevant in *Walker* because specialty license plates, unlike public parks, never have been considered traditional public fora.[113] The question

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[105] *Id.* at 2260 (quoting a Department brochure).

[106] *Id.* at 2257.

[107] *Id.* at 2249 (majority opinion).

[108] *Id.* at 2261 (Alito, J., dissenting).

[109] *See id.*

[110] *Id.*

[111] *Id.* Justice Alito's assertion that the absolute number of possible specialty plates in Texas is limited only by the number of registered vehicles is somewhat of an exaggeration. That is because organizations proposing a specialty plate design must demonstrate at least 200 commitments to prove public demand. *See* TEX. DEP'T OF MOTOR VEHICLES, PROPOSING A SPECIALTY LICENSE PLATE 2 (2014), http://www.txdmv.gov/motorists/license-plates/sponsoring-a-specialty-license-plate [https://perma.cc/7FT4-9GFZ] (Click on "How to Propose a Specialty Plate").

[112] *See supra* note 67 and accompanying text.

[113] *Walker*, 135 S. Ct. at 2249–50 (majority opinion). Breyer explained that while the

of physical scarcity, in other words, was only relevant in *Summum* because it helped to explain the necessity of excluding one medium of expression—permanent monuments—in a traditional public forum where other forms of communication— speeches, marches, and demonstrations—do not pose such problems and thus receive full First Amendment protection.[114] In brief, the majority intimated that physical scarcity questions are relevant on the government speech determination only when it comes to expression situated in traditional public fora like parks and sidewalks.[115]

Finally, Alito suggested that when it comes to issuing specialty plates, Texas is not so much concerned with controlling speech as it is with generating money and selling license-plate space that amounts to "little mobile billboards."[116] As Alito wrote, "Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech."[117] Alito's analysis here thus might be considered a fourth factor—one that questions whether, under the program in question, the government is more interested in controlling speech or generating revenue. The Breyer majority discounted and denigrated this fiscal analysis, however, writing that "the existence of government profit alone is insufficient to trigger forum analysis."[118]

The bottom line from *Walker* is that Justice Alito's determination that specialty plates in Texas constitute private expression triggered, for the dissent, a public forum analysis under which Texas's banning of the SCV's proposed plate amounted to unconstitutional viewpoint-based discrimination.[119] In contrast, Justice Breyer's conclusion for the majority that specialty plates in the Lone Star State are government speech rendered a public forum analysis moot and allowed, in turn, Texas to squelch the SCV's plate without needing to clear any First Amendment hurdles.[120]

The *Walker* majority thus was able to prevent the distribution of a license plate carrying a symbol—the Confederate battle flag—no doubt odious to many people.[121] And yet, as Justice Alito cautioned, *Walker*'s impact goes beyond that symbol and

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majority found "that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result," this conclusion "is *not* to say that every element of our discussion in *Summum* is relevant here." *Id.* at 2249 (emphasis added).

[114] *See id.* at 2249–50.

[115] *See id.*

[116] *Id.* at 2262 (Alito, J., dissenting).

[117] *Id.*

[118] *Id.* at 2252 (majority opinion).

[119] *Id.* at 2262 (Alito, J., dissenting).

[120] *See id.* at 2250 (majority opinion) (opining that a "forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply").

[121] Justice Alito acknowledged that the imagery on the SCV's proposed plate "evoked painful memories" for its opponents. *Id.* at 2262 (Alito, J., dissenting).

threatens the suppression of "many other specialty plates [that] have the potential to irritate and perhaps even infuriate those who see them."[122]

Ultimately, *Walker*'s five-to-four split on government speech, with majority and dissent focusing on different factors from *Summum* and analyzing one seemingly agreed-upon factor—history—in very different ways, fails to add rigor, clarity or predictability for deciphering when, in future cases, expression amounts to government or private speech. As Professor David Anderson asserts, "[t]he principal lesson to be gleaned from these opinions is that the government-private dichotomy offers no predictable way to decide cases; it only produces *ipse dixit* results."[123] The next two Parts of this Article thus focus on how some lower courts, through September 2016, attempted to make sense of *Walker*, with Part II immediately below illustrating *Walker*'s impact on specialty license plate programs in other states.

II. SPECIALTY LICENSE PLATE RULINGS AFTER *WALKER*: LOSSES FOR PRO-CHOICE AND CONFEDERATE FLAG PLATES

As of September 2016, there had been two post-*Walker* opinions affecting specialty license programs in other states. Those cases are described below.

A. North Carolina: The Government Speech Doctrine Allows Discrimination Against Pro-Choice License Plates

In March 2016, the United States Court of Appeals for the Fourth Circuit in *American Civil Liberties Union of North Carolina v. Tennyson*[124] considered whether North Carolina's specialty license plate program, which offers a "Choose Life" plate but not a pro-choice option, violated the First Amendment.[125] North Carolina, in fact, had "repeatedly rejected efforts to include a pro-choice license plate."[126] For example, state lawmakers had forbidden plates with the slogans "Trust Women. Respect Choice" and "Respect Choice."[127]

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[122] *Id.*

[123] David A. Anderson, *Of Horses, Donkeys, and Mules*, 94 TEX. L. REV. SEE ALSO 1, 4 (2015), http://www.texaslrev.com/wp-content/uploads/2016/03/Anderson-94-SeeAlso.pdf. [https://perma.cc/GJA7-XDCD].

[124] 815 F.3d 183 (4th Cir. 2016).

[125] *Id.* at 184.

[126] Deborah Elkins, *Specialty License Plate Upheld After Walker*, VA. LAW. WKLY. (Mar. 21, 2016), http://www.valawyersweekly.com/2016/03/21/specialty-license-plate-upheld-after-walker/ [https://perma.cc/P8V3-N352].

[127] Colin Campbell, *'Choose Life' License Plate Upheld as Federal Court Reverses Ruling*, CHARLOTTE OBSERVER (Mar. 10, 2016, 1:47 PM), http://www.charlotteobserver.com/news/politics-government/article65205912.html [https://perma.cc/J8DQ-V34Y].

More than one year prior to *Walker*, the Fourth Circuit issued a permanent injunction against this abortion-related facet of the Tar Heel State's specialty plate program.[128] It concluded then that "issuing a 'Choose Life' specialty license plate while refusing to issue a pro-choice specialty plate constitutes blatant viewpoint discrimination squarely at odds with the First Amendment."[129]

The U.S. Supreme Court, however, vacated that ruling just eleven days after its *Walker* decision.[130] In doing so, the Court remanded the case to "the Fourth Circuit for further consideration in light of *Walker*[.]"[131]

Walker proved to be a radical game-changer on remand for the Fourth Circuit. Importantly, it did so precisely in the conservative-leaning manner feared by Erwin Chemerinsky.[132]

Specifically, the Fourth Circuit held, in a two-to-one ruling in *Tennyson*, that "the *Walker* Court's analysis is dispositive of the issues in this case. Accordingly, we now conclude that specialty license plates issued under North Carolina's program amount to government speech and that North Carolina is therefore free to reject license plate designs that convey messages with which it disagrees."[133] The two-Justice majority opinion is cursory—it spans a mere five paragraphs—and somewhat summarily finds that the Tar Heel State's specialty license plate program is "substantively indistinguishable from that in *Walker*."[134] The Fourth Circuit thus reversed its earlier decision and, in doing so, ruled in favor of North Carolina's discriminatory specialty plate system that privileges pro-life plates and shuns pro-choice possibilities.[135]

The outcome in North Carolina should not be a surprise, given the result in *Walker*. As Professor Scott Lemieux wrote in *The Guardian* shortly after *Walker* was decided, "[t]he Court's decision, of course, will not only cut in one ideological direction. Based on the ruling, lower courts will almost certainly . . . rule that North Carolina is permitted to offer a 'Choose Life' license plate without offering a pro-choice alternative."[136] Yet, Sarah Preston—executive director of the American Civil

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[128] Am. Civil Liberties Union of N.C. v. Tata, 742 F.3d 563, 566 (4th Cir. 2014), *vacated sub nom.* Berger v. Am. Civil Liberties Union of N.C., 135 S. Ct. 2886 (2015).

[129] *Id.*

[130] *Berger*, 135 S. Ct. at 2886.

[131] *Id.*

[132] *See supra* notes 17–18 and accompanying text.

[133] Am. Civil Liberties Union of N.C. v. Tennyson, 815 F.3d 183, 185 (4th Cir. 2016) (citation omitted).

[134] *Id.*

[135] *Id.*

[136] Scott Lemieux, *The Supreme Court Is Right: Confederate Flag License Plates Aren't Free Speech*, GUARDIAN (June 18, 2015, 1:47 PM), https://www.theguardian.com/commentisfree/2015/jun/18/us-supreme-court-confederate-license-plates-arent-free-speech [https://perma.cc/RD8C-MTDS].

Liberties Union of North Carolina, which litigated the case—called it "very disappointing that North Carolina can now deny drivers on one side of this contentious issue an equal ability to express their views[.]"[137]

Conservative court-watchers who objected to *Walker*'s outcome, however, probably considered the result in *Tennyson* fitting payback. Viewed from the perspective of, admittedly, the most sweeping of stereotypes: If the political left won *Walker* by using the government speech doctrine to permit Texas's banning of license plates featuring Confederate battle flag imagery, then the political and religious right triumphed in *Tennyson* via the government speech doctrine by stifling pro-choice license plates and allowing pro-life ones.

Columnist Noah Feldman opined in the *Dallas Morning News* that the Fourth Circuit's ruling in *Tennyson* "shows a serious flaw in the Supreme Court's free-speech jurisprudence."[138] Although acknowledging the decision was "technically correct under" *Walker*, Feldman lambasted the result:

> The North Carolina case makes the viewpoint discrimination especially clear because the abortion issue has two easily recognized sides. If you want an abortion-rights plate to speak against the anti-abortion plate, you simply can't get one. The message is by definition unavailable to you.
> It isn't just that the government disagrees with you. It's actively giving the other side a forum while denying the same forum to you.[139]

Indeed, *Tennyson* simply confirms that *Walker* gives the government the ability to discriminate, in blatant viewpoint-based fashion, against political opinions (abortion being a political issue) to which it objects, so long as the venue or medium for the expression—permanent monuments in parks in *Summum*, specialty plates on vehicles in *Walker*—is classified as one for government speech rather than a public forum for private speech.

Dissenting in *Tennyson*, however, Judge James Wynn argued that North Carolina's specialty plates are not "pure government speech" controlled by *Walker* but, instead, constitute "mixed speech—with private speech components that prohibit viewpoint discrimination."[140] In other words, Wynn sought a middle ground, rejecting a binary approach where speech is either purely government or purely private and,

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[137] Press Release, Am. Civil Liberties Union, Appeals Court Reverses Ruling on North Carolina 'Choose Life' License Plate Case (Mar. 10, 2016), https://www.aclu.org/news/appeals-court-reverses-ruling-north-carolina-choose-life-license-plate-case [https://perma.cc/4CDA-Z79D].

[138] Noah Feldman, *The Problem with the Anti-Abortion Specialty License Plate*, DALL. NEWS (Mar. 15, 2016), http://www.dallasnews.com/opinion/commentary/2016/03/15/noah-feldman-the-problem-with-the-anti-abortion-specialty-license-plate [https://perma.cc/9H52-AZY2].

[139] *Id.*

[140] *Tennyson*, 815 F.3d at 185–86 (Wynn, J., dissenting).

instead, recognizing there may be hybrid scenarios that blend elements of government and private speech.[141] He pointed out that the Fourth Circuit has "recognized 'mixed speech'—that is, speech that is 'neither purely government speech nor purely private speech, but a mixture of the two.'"[142]

Wynn illustrated his mixed-speech conclusion about the specialty plates in *Tennyson* by citing and then applying the *Walker* majority's three-factor approach to government speech.[143] He encapsulated the test as considering: "(1) 'the history of license plates;' (2) observers' 'routine' and 'reasonable' associations between the speech at issue and the state; and (3) the extent of state control over the message conveyed."[144] On the history prong, Wynn found that North Carolina repeatedly invited vehicle owners with common interests to make statements promoting themselves or their causes.[145] "This history[,]" Wynn wrote, "supports the conclusion that the challenged speech was *not* the government's."[146]

He then considered the mental associations that observers of specialty plates make in terms of whether the government or a private person is speaking.[147] Wynn found here that North Carolina's repeated invitation to vehicle owners to create statements on specialty plates to promote themselves or their causes "has surely sunken in and must impact the way the North Carolina public views its specialty plates—as a forum allowing them to make a statement and promote themselves and their causes, just as their government described."[148]

The first two factors, both of which, at least for Wynn, involved considering the state's invitation to vehicle owners to express themselves, thus suggested to him that the messages on specialty plates are private speech.[149] Yet, on the third factor—government control—he found that in North Carolina, "as in *Walker*, the state government controls the final wording and appearance of specialty plates."[150] This factor, Wynn opined, "tilts in the government's favor."[151]

Wynn ultimately concluded that:

> the speech at issue is a mixed picture tilting in favor of private speech. I do not deny that some elements of North Carolina's

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[141] *See id.*

[142] *Id.* (quoting Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 789 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005)).

[143] *Id.* at 186–88.

[144] *Id.* at 186–87 (quoting Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248–49 (2015)).

[145] *Id.* at 187.

[146] *Id.*

[147] *Id.* at 187–88.

[148] *Id.* at 188.

[149] *Id.* at 187–88.

[150] *Id.* at 188 (citations omitted).

[151] *Id.*

> specialty plates, like the state name and the vehicle's tag number, are unquestionably government speech. But the "designated segment of the plate [that] shall be set aside for unique design representing various groups and interests" can, and here does, contain private speech.[152]

Because specialty plates in North Carolina are "not pure government speech,"[153] Wynn held that the usual First Amendment safeguards against viewpoint-based discrimination apply[154] and, in turn, that North Carolina's "allowing a 'Choose Life' plate while rejecting a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment."[155]

Wynn's approach suggests three possible outcomes in cases where the government claims it is speaking:

1. Pure government speech: The government is free to discriminate against viewpoints with which it disagrees.
2. Mixed speech: The government may not discriminate against viewpoints with which it disagrees.[156]
3. Pure private speech: The government may not discriminate against viewpoints with which it disagrees.

Several things are unclear, however, from Wynn's analysis. As noted above, he found that two of the three *Walker* factors weighed in favor of private speech, while only "the control factor tilts in the government's favor."[157] Thus, as he put it, the case presents "a mixed picture *tilting in favor of* private speech."[158]

The question, of course, is: What if two out of the three factors had weighed in favor of calling specialty plates government speech? Would this "tilting," to use Wynn's term, toward government speech have flipped the case out of the mixed-speech category and back into the pure government speech category? In other words, how many factors—or, perhaps, which factors, if some count for more than others—must militate in favor of private speech before a case with some government speech elements is considered mixed?

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[152] *Id.* (alteration in original) (quoting N.C. GEN. STAT. § 20-79.4 (2016)).

[153] *Id.* at 189.

[154] *See id.* at 188 ("Because the speech at issue is not purely the government's, the First Amendment's constraints on viewpoint discrimination apply.").

[155] *Id.* at 189.

[156] *See id.* at 188. As Judge Wynn wrote, "[b]ecause the speech at issue is not purely the government's, the First Amendment's constraints on viewpoint discrimination apply." *Id.*

[157] *Id.*

[158] *Id.* (emphasis added).

This leads, in turn, to the question of whether Wynn's "mixed speech"[159] category is a legal term of art—one under which a certain minimum percentage or proportion of the evidence (not merely the existence of *any* shred of private-speech evidence) must weigh in favor of private speech before it fits into Wynn's mixed-speech category. In other words, perhaps not just any mixture nudges expression across the goal line and into the end zone of First Amendment–protected mixed speech. Precisely how imbued with private speech elements must expression be to constitute "mixed speech" and therefore be subject to First Amendment safeguards? That is a key question left unanswered.

Wynn thus might be lauded for recognizing the possibility of mixed-speech scenarios and, in doing so, suggesting that this third, hybrid category provides a mechanism for rejecting viewpoint-based discrimination in cases like *Tennyson*. Wynn cited twice the work of Professor David Anderson for pointing him in this mixed-speech direction.[160] Other scholars—notably, Professors Corey Brettschneider and Nelson Tebbe—have argued that specialty plates constitute mixed speech.[161] Yet, Wynn leaves muddled the mixed-speech category by failing to provide a clear formula for determining when expression falls into it. A mixed-speech classification thus appeals in theory, but in practice—as is so much of the government speech doctrine—is problematic.

B. Virginia: Another Defeat for the Sons of Confederate Veterans

Just as *Walker* caused the Fourth Circuit to reverse itself in *Tennyson*, it prompted Senior United States District Judge Jackson L. Kiser in *Sons of Confederate Veterans, Inc. v. Holcomb*[162] to overturn his earlier decision—one dating back more than a dozen years[163]—declaring unconstitutional, as an instance of viewpoint-based censorship,[164] a Virginia statute preventing the SCV from obtaining a specialty plate

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[159] *Id.* at 186.

[160] *Id.* at 185, 189 (citing Anderson, *supra* note 123, at 4).

[161] *See, e.g.*, Corey Brettschneider & Nelson Tebbe, *A License to Say Anything?*, N.Y. TIMES, Jan. 10, 2015, at A19 ("License plates are an important form of 'mixed speech,' blending both government and private messages. The court must balance the private right to free speech with the government's interest in conveying its own messages.").

[162] No. 7:99-cv-00530, 2015 U.S. Dist. LEXIS 103603 (W.D. Va. Aug. 6, 2015).

[163] Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941 (W.D. Va. 2001), *aff'd*, 288 F.3d 610 (4th Cir. 2002), *vacated*, No. 7:99-cv-00530, 2015 U.S. Dist. LEXIS 103603 (W.D. Va. Aug. 6, 2015).

[164] Kiser wrote in 2001:

> I find that the Commonwealth's exclusion of the Sons' logo is viewpoint-based. Plaintiffs' logo can be designed to meet the objective parameters that all specialty plates require, such as placement and size. It is clear to me, however, that the motivation behind the Commonwealth's ban of logos or emblems was to avoid controversy by preventing Plaintiffs

bearing a "logo or emblem of any description."[165] This law was passed because "Virginia lawmakers had deemed the logo's Confederate battle flag too divisive."[166] First Amendment scholar Vincent Blasi predicted in 1999, shortly after the SCV filed suit against Virginia, that the state had "probably gone too far in allowing this sort of thing to say it can restrict it for one group now."[167]

Blasi's prognostication proved particularly prescient. In his initial and now-reversed ruling in 2001, Judge Kiser remarked that the Virginia law "was clearly aimed at excluding the organization's official logo, which incorporates the Confederate battle flag."[168] This seemed especially clear because no other organization seeking specialty plates in Virginia was prohibited by statute from including a logo or emblem on its designs.[169]

Kiser, in 2001, also rejected Virginia's argument that specialty plates constitute government speech and, in turn, its contention "that it may veto the content because it cannot be compelled to speak unwillingly."[170] The judge found, instead, that expression on specialty "plates honoring private entities is speech of those entities."[171] Among the pieces of evidence leading him to this private-speech conclusion were the facts that "[t]he design of specialty plates is left entirely to the organization" and that "the DMV repeatedly uses the possessive pronoun 'your,' as in 'your design' and 'your plate,' when corresponding with groups regarding design of specialty plates."[172]

This last observation—the "your"[173] language, as it were, used by Virginia when communicating to the public about specialty plates—might have laid the foundation for Judge Wynn's similar logic in his 2016 *Tennyson* dissent arguing that North Carolina's specialty plates are private speech.[174] Wynn, as explained earlier, noted

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> from designing a plate that displays the Confederate battle flag. Out of hundreds of specialty plates in existence, only that bearing the Sons' logo is targeted.

Id. at 946.

[165] VA. CODE ANN. § 46.2-746.22 (2016).

[166] Michael Leahy, *EYE L SUE U 4 PLATES*: *Virginia's Special Tags Become Litigation Headache*, WASH. POST, Aug. 8, 1999, at C1.

[167] *Id.* (quoting Vincent Blasi, law professor at Columbia University and the University of Virginia).

[168] *Holcomb*, 129 F. Supp. 2d at 943.

[169] As Judge Kiser wrote, the statute targeting the Sons of Confederate Veterans "is identical to numerous other specialty license plate provisions with the sole exception of the ban on displaying any logos or emblems." *Id.*

[170] *Id.* (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

[171] *Id.* at 945.

[172] *Id.* at 944.

[173] *Id.*

[174] *See* Am. Civil Liberties Union of N.C. v. Tennyson, 815 F.3d 183, 187 (4th Cir. 2016) (Wynn, J., dissenting).

that "North Carolina expressly and repeatedly 'invite[d] its vehicle owners to "[m]ake a statement with a specialized or personalized license plate" and to "find the plate that fits you."'"[175] Judicial focus on the government's own language and messages to the public might prove profitable in other contexts—ones beyond specialty license plates—where the government runs programs that invite private entities to participate with the added incentive of giving them naming rights, such as Adopt-A-Highway trash removal programs.[176]

Ultimately, in tossing out his own 2001 ruling, Judge Kiser explained—perhaps somewhat apologetically—that he had no alternative but to reverse it.[177] He wrote in his August 2015 opinion that:

> [w]hen the Supreme Court speaks, district courts must listen. In light of the ruling in *Walker*, the primary rationale for the 2001 judgment and injunction in this case is no longer good law. Specialty license plates represent the government's speech, and the Commonwealth may choose, consonant with the First Amendment, the message it wishes to convey on those plates. The Commonwealth's rationale for singling out SCV for different treatment is no longer relevant. According to the Supreme Court, the Commonwealth is free to treat SCV differently from all other specialty groups. Because the underlying injunction violates that right, I have no choice but to dissolve it.[178]

Judge Kiser's 2001 ruling, buttressed by an affirming 2002 decision by the Fourth Circuit,[179] had forced Virginia to offer SCV plates bearing Confederate battle flag logos and, by 2015, there were "about 1,600 on the road[.]"[180] Virginia was not alone in offering such a plate. In fact, by early 2015, at least ten states had specialty plates featuring the Confederate battle flag.[181]

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[175] *Id.* (quoting Am. Civil Liberties Union of N.C. v. Tata, 742 F.3d 563, 572 (4th Cir. 2014), *vacated sub nom.* Berger v. Am. Civil Liberties Union of N.C., 135 S. Ct. 2886 (2015)).

[176] *See* Robb v. Hungerbeeler, 370 F.3d 735, 738, 744–45 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005) (involving a First Amendment–based challenge by the Knights of the Ku Klux Klan to Missouri's Adopt-A-Highway program and rejecting Missouri's argument that the program "involves only government speech").

[177] Sons of Confederate Veterans, Inc. v. Holcomb, No. 7:99-cv-00530, 2015 U.S. Dist. LEXIS 103603, at *10–11 (W.D. Va. Aug. 6, 2015).

[178] *Id.*

[179] Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002).

[180] Laura Vozzella & Jenna Portnoy, *Virginia Will Phase Out Confederate-Flag License Plates*, WASH. POST, June 24, 2015, at B1.

[181] *See* Rosalind Bentley, *Confederate Specialty Plates: Battle Flag Licenses Case May Affect Ga.*, ATLANTA J.-CONST., Mar. 24, 2015, at A1 (reporting that more than 3,500 drivers

Walker, however, flipped the script, giving states authority to ban such plates and remove existing ones. As Rhodes Ritenour, Virginia's deputy attorney general, stated in an August 2015 hearing, the state's "DMV has begun an internal process to work with the Sons of Confederate Veterans to come up with an alternative license plate design."[182] Other states now might follow suit.

C. Summary

The post-*Walker* specialty license plate rulings in Virginia and North Carolina resulted, respectively, in another (and quite predictable) *Walker*-like ban of Confederate battle flag imagery and the rejection of a pro-choice plate in the face of a government-sanctioned pro-life option. The government speech doctrine thus leads both to censorship of expression the government finds offensive (the Confederate battle flag) and viewpoint-based discrimination on political issues (denial of a pro-choice plate).

In both situations, the government took a clear side on an issue of social and cultural importance. Regarding the Confederate battle flag, Virginia adopted the position of those who consider the flag to be a symbol of racism and hatred.[183] In doing so, it rejected the view that the flag more benignly symbolizes southern heritage and pride. In North Carolina, the State took the side of the pro-life movement on the topic of abortion and rebuffed the pro-choice position.[184]

The dissent in *Tennyson* rejected the binary government-speech-versus-private-speech framework and proposed a third category of mixed speech.[185] This classification would provide First Amendment protection to specialty plates and, in turn, would thwart viewpoint-based discrimination targeting the pro-choice plates.[186]

Although a mixed-speech category provides jurists reticent to embrace viewpoint-based discrimination with an escape hatch from application of the government speech doctrine, this Article pointed out that the contours of the category are murky at best. Both the amount and proportion of private speech elements that must be present in a hybrid scenario to rise to the level of First Amendment–protected mixed speech is unsettled. Additionally, it is unclear whether the presence of any single private speech element or variable might constitute either a necessary or sufficient condition for such a determination. In other words, the presence of some facets of private speech might be weighted differently than others.

The next Part of this Article moves beyond *Walker*'s application to the narrow confines of specialty license plates. Specifically, it explores how lower courts

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in Georgia "have paid for . . . specialty plates bearing [the Confederate battle flag] image" and that "[a]t least nine other states offer similar plates").

[182] Antonio Olivo, *Va. Ban on Rebel Flag Tags Upheld*, WASH. POST, Aug. 1, 2015, at B1.

[183] *See* Leahy, *supra* note 166, at C1.

[184] Am. Civil Liberties Union of N.C. v. Tennyson, 815 F.3d 183, 184 (4th Cir. 2016).

[185] *Id.* at 185–87 (Wynn, J., dissenting).

[186] *Id.* at 185–89.

grappled with *Walker* in four different scenarios in which governmental entities claimed their discrimination against speech was immune from First Amendment attack because the forum or program in question was not public but, instead, was designed for government speech.

III. EXTENDING *WALKER*'S LOGIC AND REASONING BEYOND SPECIALTY LICENSE PLATES: FROM HIGHWAY WELCOME CENTERS TO THE FEDERAL TRADEMARK REGISTRATION PROCESS

This Part features four sections, each of which separately addresses a recent, post-*Walker* court battle over the alleged application of the government speech doctrine to a context other than specialty license plates.

A. Public Schools, Partnership Banners, and Porn Stars: Stopping Offense in Its Sordid Tracks Via Government Speech

The best way to encapsulate the November 2015 ruling by the United States Court of Appeals for the Eleventh Circuit in *Mech v. School Board of Palm Beach County*[187] is in the form of a legal riddle. *Question*: When is an advertisement for a private business not, in fact, an advertisement? *Answer*: When it hangs from a public school fence and constitutes, instead, a mere expression of the school's gratitude toward the business as a "Partner in Excellence" for making a monetary donation. And, as described below, the key for resolving the riddle and reaching that answer is the pliability of the government speech doctrine.

Specifically, the Eleventh Circuit held in *Mech* that a public school program allowing private businesses to hang promotional, school-partnership banners from school fences in exchange for monetary donations[188] constitutes "government speech."[189] Under the program's rules, donors are dubbed "business partners," with their contributions helping to support "key programs" in the schools.[190] In return for a donation, a business gains public recognition through a banner limited in content to the business's "name, phone number, web address, and logo," as well as a mandated "message thanking the sponsor."[191] In *Mech*, this message was a phrase identifying the plaintiff's business as a "Partner in Excellence."[192]

David Mech is a Boca Raton, Florida, resident[193] who holds a master's degree from Arizona State University and who is certified in the Sunshine State as a

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[187] 806 F.3d 1070 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

[188] The minimum donation for a banner ranges from $250 to $650. *Id.* at 1073.

[189] *Id.* at 1072 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009)).

[190] *Id.* (quoting *Sch. Bd. Policies 7.151*, SCH. BOARD PALM BEACH COUNTY, FLA., http://www.schoolboardpolicies.com/p/7.151 [https://perma.cc/LWU4-Q9DE]).

[191] *Id.* at 1072–73.

[192] *Id.* at 1073.

[193] Scott Travis, *Former Porn Star Loses Appeal in Tutoring Business Lawsuit*, SUN SENTINEL (Fla.), Nov. 24, 2015, at 3B.

secondary math teacher.[194] He successfully sought to have his business participate in the banner program.[195] After making the requisite donations in 2010, Mech received fence-hung banners at three different schools, each bearing the name, phone number, and website address for his "The Happy/Fun Math Tutor" business.[196] In considering Mech's application, a school board representative observed that Mech "apparently is a very good tutor."[197]

Unbeknownst to the board, however, Mech apparently was also very good, at least during an earlier phase of life, at something entirely different: performing adult sex scenes on camera.[198] As the owner of Dave Pounder Productions, Mech "performed in hundreds of pornographic films."[199]

A *Tampa Tribune* article notes that "Mech worked in the porn industry from 2001 to 2010, as an actor, director, and producer. He has appeared as Dave Pounder in such films as 'I Scored a Soccer Mom,' 'Entering the Student Body,' and 'University Coed Oral Exams 14.'"[200] In 2010, however, Mech stopped making adult movies, and Dave Pounder Productions, in turn, began "producing a documentary about the psychological impact of working in adult films called 'Risky Business' and a book analyzing relationships."[201] The book, *Obscene Thoughts: A Pornographer's Perspective on Sex, Love, and Dating*, was published in 2013 under Mech's porn name.[202] *Kirkus Reviews* calls it a "brisk, enjoyable dissertation on the ways of love and lust" and "[a]n iconoclastic, argument-starting take on the battle of the sexes."[203] When not writing or tutoring math, Mech advocates for the health and safety of adult performers, including mandatory condom usage in the adult industry.[204] He also has

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[194] *Mech*, 806 F.3d at 1072.

[195] *Id.* at 1072–73.

[196] *Id.* at 1073.

[197] *Id.* (quoting a representative of the School Board).

[198] *Id.* at 1072.

[199] *Id.*

[200] Scott Travis, *Ex-Porn Actor Loses Free-Speech Lawsuit Against School District*, TAMPA TRIB., Nov. 4, 2014, at 5.

[201] Jason Schultz, *Former Adult Film Star Will Run for Seat on School Board*, PALM BEACH POST (Fla.), June 18, 2014, at 2B.

[202] DAVID POUNDER, OBSCENE THOUGHTS: *A PORNOGRAPHER'S PERSPECTIVE ON SEX, LOVE, AND DATING* (W.B. King ed., 2013).

[203] *Kirkus Review: Obscene Thoughts: A Pornographer's Perspective on Sex, Love, and Dating*, KIRKUS REV. (Aug. 21, 2013), https://www.kirkusreviews.com/book-reviews/dave-pounder/obscene-thoughts [https://perma.cc/4G2L-Z4JW].

[204] *See Biography—Dave Pounder*, DAVE POUNDER, http://www.davepounder.com/bio.html [https://perma.cc/8J8L-JA8K] (noting that Pounder "played an active role in advocating for performer health and safety, having consulted with BioCollections Worldwide to expand STI testing and to develop secure online producer access to performer test results," and adding that he "is a strong proponent of federal legislation mandating condom use in the production, distribution, and retail sales of adult content").

consulted for the Los Angeles County Health Department and the California Division of Occupational Safety and Health.[205]

Such noble efforts and literary endeavors in his post-porn life earned Mech no favor, however, with school officials in Palm Beach County. Upon learning of his carnal career—parents complained after discovering Mech's math-tutoring business and Dave Pounder Productions were commonly owned—the banners for his tutoring enterprise were removed.[206]

This came despite the fact that Mech's banners, as the *Broward—Palm Beach New Times* colorfully put it, "just advertised his tutoring business and made no reference to his days of lady-pounding."[207] As Mech told a reporter, "If I was advertising 'Dave Pounder Productions' at school, I'd be okay with people saying 'What are you doing?'. . . . But what I did was perfectly lawful."[208] In brief, the banners did not contain any offensive messages. Instead, it was the former occupation of the business's owner that drew the school board's wrath.

With his banners no longer hung, the erstwhile porn star fired back, filing a lawsuit in federal court claiming their removal violated his First Amendment right of free speech.[209] The district court, however, granted summary judgment for the school board, holding, in a pre-*Walker* ruling, that "the schools did not abridge the First Amendment because they removed the banners due to the common ownership of Mech's companies, not the content of the banners."[210]

On appeal, the Eleventh Circuit ordered the parties to brief how the Supreme Court's *Walker* ruling affected the case.[211] While Mech argued the banners are private speech in a limited public forum, the school board countered that they are government expression.[212]

In analyzing the government speech issue, the Eleventh Circuit initially noted that the Supreme Court has failed to create "a precise test for separating government speech from private speech[.]"[213] In fact, the opening line of its opinion telegraphed that there might be trouble ahead on the government speech issue, as the Eleventh Circuit quoted the epigraph at the start of this Article[214] from *Summum*: "There may

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[205] *Id.*

[206] Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1073 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

[207] Jerry Ianelli, *Ex-Porn Star, Now a Math Tutor, Appealing Legal Case to the Supreme Court*, NEW TIMES BROWARD-PALM BEACH (May 31, 2016, 7:57 AM), http://www.browardpalmbeach.com/news/ex-porn-star-now-a-math-tutor-appealing-legal-case-to-the-supreme-court-7809665 [https://perma.cc/YK6Q-4VQD].

[208] *Id.*

[209] *Mech*, 806 F.3d at 1073.

[210] *Id.*

[211] *Id.* at 1074.

[212] *Id.*

[213] *Id.*

[214] *See supra* text accompanying note 1.

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[.]"[215]

The appellate court nonetheless observed that the Supreme Court in *Walker* focused on three factors: 1) the history of the speech; 2) whether a reasonable observer would consider that the government agrees with or endorses the speech's content; and 3) whether the government has "direct control over the messages."[216] Tidily identifying each factor in a single word—"history, endorsement, and control"—the Eleventh Circuit added that these *Walker* factors arose from the Court's earlier ruling in *Summum*.[217]

Applying this tripartite test, the appellate court concluded the banners are government speech.[218] Starting with the history factor, the Eleventh Circuit set forth the principle that while "[a] medium that has long communicated government messages is *more likely* to be government speech," a lengthy history is not determinative of the issue or even a requirement to hold that expression is government speech.[219] As the court wrote, "a long historical pedigree is not a *prerequisite* for government speech," and an "absence of historical evidence can be overcome by other indicia of government speech."[220] In a nutshell, even new programs and media for expression may be government speech.

Applying these principles regarding history to the facts in *Mech*, the Eleventh Circuit found the banner program to be of "relatively recent vintage: the School Board launched it in 2008 and codified it in 2011."[221] Unfortunately, this newness did not help Mech's cause.

Indeed, the appellate court reasoned that while the "absence of historical evidence weighs in Mech's favor," the lack of historical evidence supporting a government speech determination was "not decisive."[222] In brief, although the banner program lacked a lengthy history, this factor was given short shrift. The Eleventh Circuit used an example to explain why even a new medium of expression might constitute government speech: "[I]f the School Board posted a message about school closings for inclement weather on Facebook or Twitter, we would have little difficulty classifying the message as government speech, even though social media is a relatively new phenomenon."[223]

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[215] *Mech*, 806 F.3d at 1071 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).

[216] *Id.* at 1074–75 (quoting Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015)).

[217] *Id.* at 1075.

[218] *Id.*

[219] *Id.* at 1075–76 (emphasis added) (citations omitted).

[220] *Id.* at 1076.

[221] *Id.* at 1075.

[222] *Id.*

[223] *Id.* at 1076 (citations omitted).

Turning to what it called the "endorsement" factor,[224] the Eleventh Circuit found that it "strongly suggests that the banners are government speech. The banners are hung on school fences, and government property is 'often closely identified in the public mind with the government unit that owns the land.'"[225] In addition, the court recognized two other variables suggesting endorsement: 1) the banners used school colors, not ones chosen by the businesses; and 2) the banners featured the phrase "Partner in Excellence," suggesting "that the sponsor has a close relationship with the school[.]"[226]

Focusing heavily on inclusion of the "Partner in Excellence" tagline, the court speculated that the "positive association" it allegedly generates "is likely why sponsors participate in the banner program, instead of appealing to parents and students through 'purely private' media."[227] The Eleventh Circuit added that "Partner in Excellence" amounts to "the schools' way of saying 'thank you'"[228] and that, in turn, "[s]uch gestures of gratitude are a common form of government speech,"[229] akin to a public radio station thanking a contributor.[230]

In considering the endorsement factor, the Eleventh Circuit also rebuffed Mech's argument that the banners "are private speech because they are essentially advertisements; they invite the reader to do business with the sponsor, not the school."[231] The appellate court reasoned that the banners lack the traditional trappings of "purely private advertising[.]"[232] Specifically, the court wrote:

> Private advertisements are typically designed by the advertisers: they convey the words, pictures, and colors that the advertiser wants to convey. . . . The banners on the school fences, by contrast, are printed in school colors and are subject to uniform design requirements imposed by the schools. Each banner bears the initials of the school and identifies the sponsor as a "partner" with the school.[233]

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[224] *Id.* As the court explained, this factor considers whether "observers reasonably believe the government has endorsed the message[.]" *Id.*

[225] *Id.* (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).

[226] *Id.* (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015)).

[227] *Id.*

[228] *Id.* at 1077.

[229] *Id.*

[230] *Id.* (citing Wells v. City of Denver, 257 F.3d 1132, 1141–42 (10th Cir.), *cert. denied*, 534 U.S. 997 (2001); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000)).

[231] *Id.* at 1076.

[232] *Id.* at 1077.

[233] *Id.* (internal citation omitted).

Finally, turning to the third government speech factor, control over the speech, the Eleventh Circuit determined that this factor, like the endorsement consideration, "strongly suggests that the banners are government speech."[234] The court reasoned that the schools dictate multiple aspects of the banners, including: 1) color; 2) typeface; 3) design; 4) size; and 5) hanging location.[235] The Eleventh Circuit further pointed out that the program mandates that all banners include school initials and the "Partner in Excellence" tagline.[236]

Mech asserted, on the control factor, "that the schools do not meaningfully control the messages on the banners because the bulk of the information—the logo, name, phone number, and web address—comes from the sponsor, not the school."[237] The Eleventh Circuit spurned this argument, pointing out that in both *Summum* and *Walker*, private entities actually designed their own messages, yet those messages were still treated as government speech.[238] Under the banner program, sponsors like David Mech "have even less say-so about the messages on the banners. The schools do not allow the banners to list anything but the sponsor's name, contact information, and preexisting business logo."[239]

In summary, although the history factor militated for Mech, it was outweighed by evidence supporting a finding of government speech under the endorsement and control variables. The Eleventh Circuit thus concluded the schools' banners were government speech, not private expression, and Mech's First Amendment claim therefore failed.[240]

At least four facets of the Eleventh Circuit's analysis are striking. First, even a very brief history of the government purportedly speaking through the medium in question (in *Mech*, via banners) does not, standing alone, destroy a government speech argument.[241] This logic significantly eases the government's burden and, in turn, its path toward permissible censorship.

By implication, the Eleventh Circuit's approach to history also suggests a totality-of-the-circumstances methodology in analyzing government speech, in which the absence of a factor does not preclude determining the expression is government speech. Instead, the government can win by proving that just two of three factors tilt in its favor.

A second important facet of *Mech* is the Eleventh Circuit's characterization of the second *Walker* factor as one of government *endorsement* of a message rather

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[234] *Id.* at 1078.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.* at 1078–79.
[239] *Id.* at 1079.
[240] *Id.*
[241] *See supra* notes 219–23 and accompanying text (addressing the history factor in *Mech*).

than a mere *association* or identification in the public's mind of the message with the government.[242] In *Walker*, in considering who—either a private person or Texas—observers of the speech at issue would perceive as speaking, the majority speculated 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."[243] Yet in *Summum*, in holding that permanent monuments donated by private entities in public parks constitute government speech, the Court wrote that "[b]y accepting such a monument, a government entity does *not* necessarily *endorse* the specific meaning that any particular donor sees in the monument."[244]

The issue becomes whether there is a difference between a reasonable observer simply *associating* a message with a governmental entity or requiring the observer to perceive that the government is *endorsing* the message, with the latter seeming to be a much more rigorous requirement. Either route, however, is highly speculative, with jurists having to guess how supposedly reasonable observers would perceive and interpret messages.

A third striking facet of the Eleventh Circuit's analysis relates to control. While the schools clearly control many elements of the banners in question, this would not satisfy Justice Alito and the *Walker* dissent's interpretation of this element.[245] Specifically, the *Walker* dissent focused on "selective receptivity"[246] in exercising authority over the messages.

This analysis, as applied to *Mech*, would require the Eleventh Circuit to consider how many other banners it had rejected and, in contrast, how many it accepted. The Eleventh Circuit's opinion fails to cite a single other instance of a sponsor being denied a banner.[247] If David Mech's banner was, in fact, the only one rejected out of dozens of applications, then this indicates that the schools failed to exercise their authority over banners selectively. Such an outcome illustrates the critical importance of the difference in understanding of the meaning of "control" between the five Justices in the *Walker* majority and the four Justices in the dissent.

While the Eleventh Circuit, of course, was not bound to follow the *Walker* dissent's logic here, the distinction between the *Walker* majority's approach to control—who controls the ultimate decision—and the dissent's approach—the degree of selectivity exercised by the government in wielding its power—can prove game-changing. Had the Eleventh Circuit used the tack taken by the *Walker* dissent on

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[242] *See supra* notes 224–33 and accompanying text (addressing the endorsement factor in *Mech*).

[243] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015) (emphasis added).

[244] Pleasant Grove City v. Summum, 555 U.S. 460, 476–77 (2009) (emphasis added).

[245] *See Walker*, 135 S. Ct. at 2260–61 (Alito, J., dissenting).

[246] *Id.*

[247] *See generally* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1073 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

control, it would have resulted in two factors—history and control—tilting in favor of David Mech.

The fourth and, perhaps, most striking aspect of the Eleventh Circuit's ruling meriting further consideration is that it made no difference that the schools discriminated against Mech's banners *not* because of their content, but because of the *identity of the person attempting to speak*—namely, former porn star David Mech.[248] If the government speech doctrine was cast aside, such speaker-based discrimination would be blatantly unconstitutional after the United States Supreme Court's ruling in *Citizens United v. Federal Election Commission*.[249]

There, Justice Anthony Kennedy emphasized for the majority that "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."[250] He elaborated that "[t]he Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. *The First Amendment protects speech and speaker*, and the ideas that flow from each."[251]

Scholars concur about the importance of *Citizens United* when it comes to preventing speaker-based discrimination. For instance, Professor Michael Kagan contends that the Court in *Citizens United*:

> for the first time gave full-throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment, even when there is no content discrimination. This newly articulated doctrine has the potential to reshape free speech law far beyond the corporate and election contexts.[252]

Similarly, Kathleen Sullivan, former dean of the Stanford Law School, asserts that after *Citizens United*, "[g]overnment regulation is suspect not only when it discriminates among *viewpoints* . . . but also when it discriminates among *speakers*."[253]

Mech thus calls attention to another problem with the government speech doctrine—not only can it be used to censor messages the government deems offensive, but it can target private individuals and entities with whom the government does not desire association. In *Mech*, the school board did not want to be linked to David Mech because of his former occupation. The government speech doctrine, in

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[248] *See id.* at 1073.

[249] 558 U.S. 310 (2010).

[250] *Id.* at 340.

[251] *Id.* at 341 (emphasis added).

[252] Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766 (2015).

[253] Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155 (2010) (emphasis added).

other words, provides a vehicle for allowing a person's past to haunt him in perpetuity when it comes to freedom of speech. It is as if Mech, due to his former job, had committed a felony that justified stripping him of his First Amendment right of speech.

In May 2016, Mech petitioned the United States Supreme Court for a writ of certiorari, asking it to consider whether *Walker* "allow[s] the government to place an imprimatur on private advertising and thereby render the advertisement government speech, stripping it of all First Amendment protection?"[254] Suggesting the importance of that issue, the Supreme Court of the United States Blog—better known as SCOTUSblog—later named it a "petition of the day."[255]

Mech argues that the Eleventh Circuit's "reasoning is faulty because it disregards the narrow and limited nature of this Court's 5-to-4 decision in *Walker*."[256] Specifically, the petition asserts, in key part, that:

> Unlike the license plates at issue in *Walker*, the banner advertisements here are not government IDs over which the School Board exercises absolute control over language or design. Nor do they have the history as government speech found so significant in *Walker*. And while the circuit court's decision places great weight on the language "Partners in Excellence," this statement is nothing more than a passing reference to the paid affiliation with the school that permitted the placement of the banner. Also, while license plates are required on all motor vehicles, schools are not required to have banner ad programs, nor are businesses required to advertise on school fences.[257]

Focusing heavily on the Eleventh Circuit's analysis of the mandatory inclusion on banners of a thank-you message to sponsors—the "Partners in Excellence" language—Mech's petition contends that the appellate court decision "represents a stark departure from the narrowly defined realm of government speech delineated in *Walker* and permits the government to avoid any constitutional scrutiny of its actions merely by affixing a meaningless affiliation to private speech and advertising."[258]

Unfortunately, the Supreme Court denied Mech's petition for a writ of certiorari in October 2016.[259] In doing so, the Court passed on a great opportunity to clarify, if not roll back, the scope of *Walker*.

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[254] Petition for Writ of Certiorari at i, Mech v. Sch. Bd. of Palm Beach Cty., 137 S. Ct. 73 (2016) (No. 15-1412) [hereinafter Mech Petition].

[255] Kate Howard, *Petition of the Day: Mech v. School Board of Palm Beach County*, SCOTUSBLOG (June 20, 2016, 11:25 PM), http://www.scotusblog.com/2016/06/petition-of-the-day-951/ [https://perma.cc/K4XD-X6SC].

[256] Mech Petition, *supra* note 254, at 8.

[257] *Id.* at 8–9.

[258] *Id.* at 11.

[259] *Mech*, 137 S. Ct. 73.

B. Welcome to Virginia! Riding the Highway to the Rest Stops of Government Speech

In March 2016, United States District Judge Robert Doumar held in *Vista-Graphics, Inc. v. Virginia Department of Transportation*[260] that displays of informational and advertising materials for private businesses and other entities located in highway welcome centers and rest stops owned by the Commonwealth of Virginia "are government speech and not subject to First Amendment analysis[.]"[261] In reaching this result, the judge openly acknowledged that "[a] non-lawyer confronted with the resulting displays would be unlikely to conclude that they were government speech."[262]

This observation, of course, immediately casts doubt on the judge's pro-government speech determination, at least under the *Walker* majority's consideration of whom a reasonable observer—a non-lawyer—of the speech would consider to be the speaker.[263] Judge Doumar nonetheless found that "[t]he facts of this case fall squarely within the doctrine as it has been expounded in recent Supreme Court cases."[264] How did he reach this conclusion?

Judge Doumar began with a brief policy analysis. Citing *Summum*, he asserted that the government speech doctrine stems "from a simple and uncontroversial premise: when the government speaks it may say what it wants."[265] He found that the facts in the case before him were controlled by "[t]he branch of the resulting evolutionary tree" of the government speech doctrine developed in *Summum* and *Walker*, both of which illustrate that government speech may "come in unexpected forms."[266]

Turning to the three-part test for government speech allegedly created in these cases, Judge Doumar wrote that the Court in *Walker*:

> explicitly considered the same three factors it had identified in *Summum*: (1) whether, historically, the government had used this means of expression—license plates—to convey governmental messages; (2) whether the public associated the means of expression with the government; and (3) whether the government exercised editorial control over the messages conveyed.[267]

Judge Doumar's assertion regarding the explicit consideration of "the same three factors"[268] in *Summum* and *Walker*, however, oversimplifies matters. First, it

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[260] 171 F. Supp. 3d 457 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016).
[261] *Id.* at 461, 470.
[262] *Id.* at 470.
[263] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2247 (2015).
[264] *Vista-Graphics*, 171 F. Supp. 3d at 470.
[265] *Id.* (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009)).
[266] *Id.* at 470–71.
[267] *Id.* at 473 (citing *Walker*, 135 S. Ct. at 2247–50).
[268] *Id.*

ignores the *Summum* Court's clear consideration of the spatial-scarcity factor.[269] As Justice Alito wrote for the Court in *Summum*, "public parks can accommodate only a limited number of permanent monuments"[270] and therefore "it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression."[271] Justice Alito reiterated the importance of this factor in penning the dissent for four Justices in *Walker*, writing that "[a] final factor that was important in *Summum* was space."[272] The *Walker* majority, however, found the spatial-limitation issue, while important in *Summum*, simply was not relevant in *Walker*.[273] In brief, the *Walker* majority omitted from its three-factor test a key factor in *Summum*.

Second, Judge Doumar's articulation of the third factor—"whether the government exercised editorial control over the messages conveyed"[274]—fails to recognize the split between Alito's emphasis on the level or degree of selectivity exercised by the government—what he called "selective receptivity"[275] in *Walker*—and the *Walker* majority's apparent focus on bottom-line, ultimate-arbiter control.[276] As with the Eleventh Circuit in *Mech*, of course, Judge Doumar was not bound to consider the *Walker* dissent's interpretation of control.

Regardless of the nuances lost in Judge Doumar's assertion that *Summum* and *Walker* applied the exact same factors, he reasoned that his "analysis of the present controversy begins with the three factors laid out in *Summum* and *Walker*."[277] That controversy centered on plaintiff Vista-Graphics, Inc., which publishes visitor guides for some Virginia cities, such as Virginia Beach and Williamsburg, that list local restaurants, hotels, and attractions and include advertisements.[278] Importantly, Vista-Graphics's travel guides also feature political and religious materials.[279]

The company had distributed its guides freely[280] for eight years at Virginia's highway welcome centers and rest areas,[281] but filed suit after budget problems led

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[269] *See Summum*, 555 U.S. at 478.

[270] *Id.*

[271] *Id.* at 479.

[272] *Walker*, 135 S. Ct. at 2261 (2015) (Alito, J., dissenting).

[273] *Id.* at 2249 (majority opinion)

[274] Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 473 (E.D. Va.) (citing *Walker*, 135 S. Ct. at 2247–50), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016).

[275] *Walker*, 135 S. Ct. at 2260 (Alito, J., dissenting).

[276] *See supra* notes 103–08 and accompanying text (addressing this distinction).

[277] *Vista-Graphics*, 171 F. Supp. 3d at 474.

[278] *Id.* at 461.

[279] *Id.* at 463.

[280] *See id.* ("According to Plaintiffs, '[w]elcome centers and rest areas have traditionally allowed business such as Vista-Graphics to distribute printed materials *without charging for this right*, ostensibly because free speech protections afforded by the United States and Virginia Constitutions.'" (alteration in original) (emphasis added) (citation omitted)).

[281] *Id.* at 461.

to changes "requiring Vista-Graphics to pay fees to place materials" in these venues.[282] Vista-Graphics claimed the fees were "unconstitutionally excessive."[283] It also objected to several related substantive changes in the program that it asserted violated its First Amendment right to free speech, including provisions banning political and religious advertising in the welcome centers and rest areas.[284]

As applied to *Vista-Graphics*'s facts, Judge Doumar wrote that the first factor—history—"asks whether the Sta[t]e has used the displays in the Welcome Centers to convey governmental messages."[285] He found it irrelevant that some information distributed at these venues takes the form of private advertisements[286] because Virginia could "adopt these advertisements as its own speech just as in *Summum* Pleasant Grove City adopted the donated monuments as its own."[287] The fact that Virginia generated revenue from accepting this speech also did not change the analysis for Doumar, who observed that the specialty plates deemed government speech in *Walker* also produced money.[288]

Turning to whether speech displayed at welcome centers and rest areas is associated in the public's mind with the government, the judge observed the venues "are attached to public roads, chiefly interstate highways, and are likewise connected in the public mind with the state and federal governments that maintain such roads."[289] The fact that Virginia prohibits advertisers who use its displays from claiming that such placement constitutes an endorsement by Virginia of their goods or services is irrelevant, Doumar reasoned.[290] He intimated that it is the *association* with the state—not an *endorsement* by the state—in the mind of the public that is key.[291] This distinction—*association-versus-endorsement*—seems slippery, but could be useful in future cases if the explication of both concepts is elaborated in greater detail to explain the difference. It will be recalled from earlier that Justice Breyer speculated in *Walker* that people may purchase specialty plates precisely because they intend "to convey to the public that the State has *endorsed* that message."[292] The Eleventh Circuit in *Mech* also suggests there might be a difference between association and endorsement.[293]

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[282] *Id.* at 462.

[283] *Id.* at 464.

[284] *Id.*

[285] *Id.* at 474.

[286] *See id.* ("It is of no consequence that one way that Virginia has disseminated this information is through private advertisements.").

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *See id.* (reasoning that for the *Walker* "majority it was enough that license plates were associated with the State" (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248–49 (2015))).

[292] *Walker*, 135 S. Ct. at 2249.

[293] *See* cases cited *supra* notes 242–44.

Finally, Judge Doumar turned to whether Virginia "exercises editorial control over the content of the speech, in this case the Welcome Center displays."[294] He found that Virginia, in fact, has "extensive requirements for what material may be placed in the Welcome Centers"[295] and that the state "retains final approval authority over the advertisements or brochures placed in" these venues.[296]

Although all three factors militated for concluding the displays are government speech[297] and that the government message in question is the promotion of "the many attractions that Virginia has to offer[,]"[298] Judge Doumar criticized the third factor as "frustratingly circular. Plaintiffs cannot challenge the government's regulation of the Welcome Center displays because the displays are government speech. Why are they government speech? Because the government regulates them. Subtler minds may quarrel with this analysis."[299]

Judge Doumar thus went beyond analysis of the three factors to explain *why* it is important to conclude that Virginia's rest area displays of literature are government speech and not, in contrast, public fora. Judge Doumar illustrated the rather "perverse" fiscal effects that classifying rest-area displays as public fora might have on a state's interests.[300] Specifically, if such venues were public fora in which a state could not control viewpoints, then it would be forced to display speech adverse to its economic interests.[301] As Judge Doumar explained, if the rest-area displays were public fora, then Virginia:

> would be forced to allow advertisements that disparaged Virginia's many wonderful attractions. It would be forced to display advertisements that suggested that Maryland and North Carolina were more worthy travel destinations. Allowing such material would undermine the entire purpose of the Welcome Center displays. The government speech doctrine preserves the State's ability to promote itself through means such as the Welcome Center displays.[302]

Judge Doumar's approach here sensibly suggests that, in cases where the government claims it may censor speech of private entities as it pleases because the venue should be treated as one for government speech rather than a public forum, the government should carry the burden of proving *why* a public forum analysis is

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294 *Vista-Graphics*, 171 F. Supp. 3d at 475.
295 *Id.* (internal citation omitted).
296 *Id.* at 462.
297 *Id.*
298 *Id.* at 476.
299 *Id.* at 475.
300 *Id.*
301 *Id.*
302 *Id.* (citation omitted).

inappropriate. In *Vista-Graphics*, that case is clear: Categorizing displays for brochures and tourist guidebooks at state-owned rest areas as public fora would force Virginia to either: a) accept speech that harms its own fiscal interests; or b) cause the state to close and shutter all such displays for all brochures in order both to avoid viewpoint-based discrimination and to not convey speech contrary to its financial well being.

In other words, Virginia would face a Hobson's choice of take it or leave it: either to take and to display fiscal-harming speech or to leave the business of providing such displays entirely (i.e., to shut down all speech—both pro-Virginia and anti-Virginia) at welcome centers and rest areas. Simply put, classifying brochure displays at state-owned rest areas as public fora provides a strong financial disincentive for states to engage in speech transmission.

In contrast to *Vista-Graphics*, the impracticality problem on the public forum question in *Summum* was not fiscal but physical. Simply put, there would be too little physical space in a public park to accommodate all of the permanent monuments that private entities might want to donate.[303] Eventually, a park would become a veritable forest of densely clustered monuments if the government had to accept them all, thereby crowding out room for many other forms of important expression such as political marches, rallies, and speeches, as well as reducing space for even more basic forms of freedom of association such as family picnics. As Justice Alito explained for the Court in *Summum*:

> A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.[304]

In summary, here is what might happen under Judge Doumar's suggested tack in government speech cases of examining the negative consequences that would occur if, instead of government speech, a public forum analysis was deemed appropriate:

> Categorizing displays for tourist brochures in rest areas as public fora in *Vista-Graphics* could harm Virginia's own fiscal interests (by being forced to display ads disparaging Virginia towns and businesses, as well as ads promoting businesses in other, rival states) and thus could provide Virginia with a strong incentive for abolishing all such displays.

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[303] *See supra* notes 67–68 and accompanying text (addressing the spatial limitations at issue in *Summum*).

[304] Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009).

> Categorizing government parks as traditional public fora when it comes to the inclusion of permanent monuments in *Summum* would pose vast physical space difficulties that, in turn, would be detrimental to other forms of expression in those same parks if permanent monuments were to proliferate unabated. And, as with the brochure displays in *Vista-Graphics*, governments would have a very strong incentive for shutting down public parks entirely as venues for permanent monuments—a point Justice Alito stressed in *Summum*.[305]

In brief, abolishing all displays for all tourist brochures at government-owned rest areas and prohibiting all permanent monuments in public parks are potentially realistic—and decidedly non-speech friendly—consequences in *Vista-Graphics* and *Summum*, respectively, if a public forum analysis applies to those venues. Just as the United States Supreme Court in *Miami Herald Publishing Co. v. Tornillo*[306] recognized that forcing newspapers to print viewpoints with which they disagree might cause those papers to refrain from all commentary about political candidates,[307] so too does a public forum analysis in *Vista-Graphics* and *Summum* risk squelching all speech of the specific varieties—namely, tourist brochures and donated permanent monuments—at issue in those cases.

The question, of course, becomes this: What harms would befall Texas—or any state, for that matter—if specialty license plates like those in *Walker* are categorized as public fora in which viewpoint-based discrimination is not permissible? A strong case can be made that neither the harm in *Vista-Graphics* nor that in *Summum* would result from such a determination.

Initially, being compelled to offer a Confederate battle flag plate under a public forum analysis is not akin, under *Vista-Graphics*, to being forced to offer speech that

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[305] As Justice Alito explained in *Summum*:

> The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Id. at 480.

[306] 418 U.S. 241 (1974).

[307] *Id.* at 257. As the Court wrote in *Tornillo*:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

Id. (footnote omitted).

is directly counter to Texas's fiscal interests by either disparaging the state's own businesses or promoting those of competing businesses in other states. If anything, Texas should be able to generate even more money through the sale of specialty license plates that express messages opposing the one that many people see as symbolized by the Confederate battle flag.[308] In other words, groups that believe the Confederate battle flag symbolizes racism, bigotry, and hatred could propose their own specialty plates featuring messages and images of tolerance, love, and racial equality. Those groups should, in brief, engage in counterspeech,[309] with Texas, in turn, reaping the financial benefits that come when such counterspeech is situated on specialty plates.

For instance, one can imagine a plate featuring the slogan "Texans for Racial Equality" accompanied by the image of a peace sign or, perhaps more provocatively, a Confederate battle flag overlaid with the international "no" sign (a red circle with a line struck across it). Indeed, calling specialty license plates public fora would allow for revenue-generating counterspeech on other topics, such as pro-choice views on abortion in states like North Carolina.[310]

Seemingly, the only conceivable financial harm to Texas from calling specialty plates a public forum would be indirect. One might imagine, for instance, a civil rights organization calling on businesses not to locate in Texas because the state allows license plates sporting the Confederate battle flag.[311] Such financial injury,

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[308] *See supra* note 103 and accompanying text (describing the revenue generated in Texas by specialty license plates).

[309] As Justice Louis Brandeis explained ninety years ago, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). *See generally* Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553 (discussing the counterspeech doctrine and providing examples of its use).

[310] *See supra* Section II.A (addressing the battle in *Tennyson* over North Carolina's specialty license plate program offering a pro-life plate but rejecting several pro-choice alternatives).

[311] The possibility of such a boycott is more than purely speculative. For instance, and by way of analogy, the National Collegiate Athletic Association (NCAA) refused for many years to hold its annual basketball championship in South Carolina because the Confederate battle flag flew on the state's capitol grounds. Paul Kane & Abby Phillip, *Battle Over Flag Erupts in U.S. Capitol*, WASH. POST, July 10, 2015, at A2. The NCAA ended its boycott in 2015 after South Carolina's governor signed legislation ordering the flag to be removed. *Id.* In addition to the NCAA, the National Association for the Advancement of Colored People (NAACP) in July 1999 called for a boycott against South Carolina "as a protest of the flags atop the State House and inside the House and Senate chambers. The NAACP called on groups and individuals to avoid traveling to the state for business or pleasure and discouraged residents from visiting South Carolina beaches or patronizing restaurants and motels." Roddie A. Burris, *NAACP Takes Another Look at South Carolina Boycott*, WASH. POST, Oct. 22, 2006, at A10.

In 2015, Georgia legislator LaDawn Jones called for a boycott of Stone Mountain Park in DeKalb County "to protest the fact that it still displays Confederate battle flags." Richard

were such a boycott to occur, stems from the offense taken by an organization (or organizations) with Texas in permitting a hateful symbol to be displayed on specialty plates. In contrast, the potential financial injury to Virginia—addressed by Judge Doumar in *Vista-Graphics*—has nothing to do with any group being offended by Virginia permitting a hateful symbol to circulate in rest areas.

Additionally, the spatial-shortage justification for not categorizing privately donated permanent monuments in public parks as public fora in *Summum* does not apply in *Walker*. There is no danger in *Walker* that Confederate battle flag specialty plates will somehow crowd out other forms of speech or other messages. As Justice Alito wrote for the dissent in *Walker*, "[t]he only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too."[312] In contrast, both the non-speech functions (baseball fields, playgrounds, picnic areas) and speech functions (rallies, marches, concerts) of public parks would be impossible if those venues had to be "opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression."[313]

The bottom line is that the only reason for *not* classifying specialty license plates as a public forum is simply to prevent Texas from having to be associated with speech that it (and some members of the public) finds offensive, be it the Confederate battle flag or other divisive symbols. If specialty plates are classified as public fora and, in turn, Texas did not want to be associated with offensive messages, Texas has the option of shutting down its entire specialty license plate program (akin to Virginia having to close all displays for tourist literature at its rest areas or Pleasant Grove City forbidding all privately donated permanent monuments in Pioneer Park, but for a very different reason—not wanting to be associated with something that offends).

That would be a very tough option for Texas to choose, given that its specialty plate "program brings in many millions of dollars every year."[314] But by calling specialty plates government speech, the Court in *Walker* gave Texas a pass on having to make such choice. Indeed, Texas gets to keep its revenue stream and discriminate against viewpoints in the process.

Fausset, *A Plan to Honor Dr. King Among Confederates*, N.Y. TIMES, Oct. 22, 2015, at A15. Stone Mountain Park is owned by Georgia, and the park operates today, via Georgia statutory authority, through an entity called the Stone Mountain Memorial Association, which acts "for the proper development, management, preservation, and protection of Stone Mountain as a Confederate Memorial and public recreation area." *What Is SMMA*, STONE MOUNTAIN MEMORIAL ASS'N, http://stonemountainpark.org/about-us/what-is-smma [https://perma.cc/8MZH-VQGE].

[312] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2261 (2015) (Alito, J., dissenting).

[313] Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009).

[314] *Walker*, 135 S. Ct. at 2262 (citation omitted).

C. Lunch Programs, Food Trucks, and Offensively Named Businesses: Government Speech Grows More Confusing

Headquartered in Schenectady, New York, the provocatively named Wandering Dago catering business touts itself as:

> a full-service catering company that just happens to work out of a food truck. Having a full commercial kitchen on board, allows us to instantly transform any location into your wedding venue. So whether your reception is going to be in a remote rustic barn, on a private estate under a tent or in an urban warehouse—we can provide you and your guests with a unique culinary experience.[315]

The term "dago," however, is an ethnic insult that "was generally applied in the United States from the 1820s to Spaniards and Mexicans, but from the 1880s it was used more [for] Italians."[316] As Geoffrey Hughes explains, "Italian immigrants to the United States were initially viewed as aliens and outsiders,"[317] and "dago" was one of many derisive nicknames with which they were labeled.[318]

"Dago," which former New York Governor Mario Cuomo once called, along with the terms "wop" and "guinea," one of "those cruel epithets" for Italians,[319] can still cause deep offense. It did so in 1989, for example, when a Florida judge used the word in open court, provoking calls for an apology from the Italian-American Club of Greater Clearwater.[320] Clint Eastwood's bigoted Walt Kowalski character spouted the term in the 2009 movie *Gran Torino*.[321] More recently, when the reality television show *Jersey Shore* used the term "guido," many Italian Americans objected to it as a modern-day version of slurs like "dago" and "wop."[322]

But when Andrea Loguidice and Brandon Snooks, both of whom are Italian Americans, decided around 2012 to name their food truck "Wandering Dago," they

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[315] *About Us*, WANDERING DAGO, http://www.wanderingdago.com/about.html [https://perma.cc/XKH2-9EH3].

[316] GEOFFREY HUGHES, THE ENCYCLOPEDIA OF SWEARING: THE SOCIAL HISTORY OF OATHS, PROFANITY, FOUL LANGUAGE, AND ETHNIC SLURS IN THE ENGLISH-SPEAKING WORLD 148 (2006).

[317] *Id.* at 258.

[318] *Id.* Other early offensive nicknames for Italians include "wop" and "guinea." *Id.*

[319] Mary McGrory, *Cuomo's Ethnic Challenge*, WASH. POST, Oct. 23, 1990, at A2.

[320] Thomas C. Tobin & Barbara Hijek, *Italian-Americans Call for an Apology*, ST. PETERSBURG TIMES (Fla.), Dec. 13, 1991, at 3B.

[321] Leonard Pitts, *Eastwood, Sensitivity and 'Gran Torino,'* CHARLESTON GAZETTE (W. Va.), Jan. 8, 2009, at 4A.

[322] Rebecca Nappi, *Making the Most of the Situation Italian-Americans Say 'Jersey Shore' Stereotypes Are a Chance to Raise Awareness*, SPOKESMAN-REV. (Spokane, Wash.), Feb. 21, 2010, at 1D.

apparently did not foresee any problems.[323] As Loguidice told a reporter for the *New York Times*, "Our daily pay depends on what happens that day, so we just thought it was a fun play on words. . . . We didn't think it was derogatory in any manner. It's self-referential. Who would self-reference themselves in a derogatory manner?"[324]

Officials at the New York State Office of General Services (OGS), however, thought "Wandering Dago" was anything but a fun play on words. Loguidice and Snooks applied in 2013 for a permit to participate in an outdoor summer lunch program held on the grounds of the state-owned Empire State Plaza (ESP) in Albany, New York.[325] In reviewing the application, OGS Executive Deputy Commissioner Joseph Rabito "conducted a computer search of the term 'dago,' which not only confirmed that it is an offensive derogatory term, but also revealed that it has been used to refer to people of Spanish and Portuguese descent, as well as Italians."[326] The OGS thus denied the application on the grounds that "dago" was an offensive ethnic slur[327] and did not comport "with OGS' policy of providing family-friendly programming."[328] Somewhat remarkably, Wandering Dago was the only applicant denied a permit to participate in the 2013 summer lunch program.[329]

History repeated itself in 2014, as Wandering Dago's application for the summer's lunch program was again denied due to the business's name.[330] The offending moniker, in fact, was the sole basis for denial, given that Wandering Dago's 2014 application otherwise "was scored and received a passing score sufficient for acceptance into the program."[331]

Wandering Dago sued multiple officials within the New York State Office of General Services in *Wandering Dago, Inc. v. Destito*,[332] contending that the denial of its application violated the First Amendment freedom of speech clause for at least two reasons.[333] First, Wandering Dago argued that the OGS failed to implement a

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[323] Thomas Kaplan, *Barbecuers Ejected From Saratoga Over an Ethnic Slur on Their Food Truck*, N.Y. TIMES, July 23, 2013, at A18.

[324] *Id.* (quoting Andrea Loguidice).

[325] Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046, *7–13 (N.D.N.Y. Mar. 1), *appeal filed sub nom.* Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[326] *Id.* at *16 (citation omitted).

[327] *See id.* at *18 (noting that "the name 'Wandering Dago' was the basis for the denial of the application" and the assertion by the government defendants that Wandering Dago "was the only applicant to the 2013 Summer Outdoor Lunch Program that had a name which contained a derogatory ethnic or offensive term as part of its name" (citations omitted)).

[328] *Id.* at *16 (citation omitted).

[329] *Id.* at *17.

[330] *Id.* at *22.

[331] *Id.* (citation omitted).

[332] No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046 (N.D.N.Y. Mar. 1), *appeal filed sub nom.* Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[333] *Id.* at *25–26.

"clearly-articulated, consistently-enforced policy" regarding the permissible names of food vendors and that the absence of precise rules, in turn, gave the OGS "unbridled discretion" to restrict speech and posed "too great a danger of censorship[.]"[334] Second, Wandering Dago argued that OGS's rejection of its application amounted to "unconstitutional viewpoint discrimination."[335]

In her March 2016 ruling in *Wandering Dago*, United States District Judge Mae D'Agostino considered, sua sponte, the impact of *Walker* and the government speech doctrine on Wandering Dago's First Amendment claim.[336] She initially articulated the three-prong test from *Walker* by explaining that in *Walker*, the Court concluded that specialty license plates were government speech "because (1) the States have historically used license plates to communicate with the public, (2) license plates are often closely identified in the public mind with the State, and (3) Texas effectively controlled the expressive content of the license plates by exercising final approval authority over submitted designs[.]"[337] Judge D'Agostino ultimately concluded "that all three factors identified in *Walker* are satisfied" in *Wandering Dago*, thereby leaving the food truck's owners remediless.[338]

Initially turning to the history factor as applied to the summer lunch program at ESP, Judge D'Agostino noted that "the government has a history of sponsoring programs of all varieties. Implicit in that sponsorship is the fact that the government endorses the message or messages conveyed."[339] She added that "the programs sponsored and promoted by OGS have long conveyed messages to the people of the State[.]"[340]

This history analysis, however, ignores the fact that 2013 was the first time OGS had run the summer lunch program on its own; in prior years, a single private entity was in charge of supplying all food for the plaza.[341] In other words, the judge focused only on history at what might be considered the *macro level*—"the government has a history of sponsoring programs of *all varieties*"[342]—rather than at the *micro level* of the sponsorship of the specific lunch program at issue in the case. Thus, even a brand new program—much like the relatively new banner program in *Mech*[343]—can become a medium for government speech.

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[334] *Id.*

[335] *Id.* at *26 (citation omitted).

[336] *Id.* at *75. As the judge wrote, "[a]lthough the parties have not addressed the implications of *Walker* on the present matter, the Court finds that a discussion of that case and the government speech doctrine discussed therein is appropriate for the resolution of the present matter." *Id.*

[337] *Id.* at *76 (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015)).

[338] *Id.* at *81.

[339] *Id.* at *77.

[340] *Id.* at *79.

[341] *See id.* at *7.

[342] *Id.* at *77 (emphasis added).

[343] *See supra* notes 219–23 and accompanying text (addressing the history factor in *Mech*).

Turning to the second factor—who a member of the public would identify as the speaker—she concluded "there is little chance that the observer will fail to see the identity of the speaker"[344] is OGS because "OGS informed the public about the Program in several different ways."[345] Specifically, it promoted the lunch program in email ads from its "sponsorship department," on closed-circuit televisions throughout the concourse of the plaza, and "on its Facebook page and other social media websites."[346] In brief, the sponsorship of the program itself became a form of government speech[347] and the OGS, in turn, cannot be compelled to embrace speech—within the ambit of that sponsorship—with which it disagrees.[348] In brief, the freedom granted to the government under the government speech doctrine, as Judge D'Agostino put it, "also includes the choice to not speak."[349] Just as in *Walker*, the government in *Wandering Dago* could not be compelled to express the plaintiff's message.[350]

Finally, turning to the control factor, the judge found that "the undisputed evidence clearly demonstrates that OGS maintains tight control over any messages that are sent during events it sponsors at the Empire State Plaza. OGS has long history of only sponsoring programs that are 'family friendly,' and suitable to persons of all ages."[351] Although not directly relating to the summer lunch program at ESP, Judge D'Agostino pointed out that "during OGS sponsored events, OGS employees have refused to hire performers because of the nature of their acts or attire, removed a performer from the stage when he used the 'N-word,' and required vendors to remove offensive and racially insensitive merchandise."[352] As with the history factor, then, this analysis is at the macro level of control of content across all OGS-sponsored events, not at the micro level of the ESP summer lunch program challenged by Wandering Dago.

Additionally, it seems likely that the *Walker* dissent's interpretation of control may have tilted in favor of the food truck's owners. Why? Because Justice Alito in *Walker* concentrated on the amount or degree of selectivity exercised by the government under the program at issue.[353] In *Wandering Dago*, however, the degree of selectivity appears very minimal, given that the Wandering Dago truck was the *only* food vendor denied a permit for the ESP summer lunch program in 2013.[354]

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[344] *Wandering Dago*, 2016 U.S. Dist. LEXIS 26046, at *77.

[345] *Id.* (citation omitted).

[346] *Id.* at *78 (citation omitted).

[347] *Id.* ("In sponsoring the Summer Outdoor Lunch Program, the State has engaged in a form of speech[.]").

[348] *See id.*

[349] *Id.* at *80.

[350] *See supra* Section I.B.

[351] *Wandering Dago*, 2016 U.S. Dist. LEXIS 26046, at *78–79.

[352] *Id.* at *79 (citation omitted).

[353] *See supra* notes 103–06 and accompanying text.

[354] *See Wandering Dago*, 2016 U.S. Dist. LEXIS 26046, at *17 ("Defendant Walters was

That point was for naught, however, before Judge D'Agostino, who concluded that the speech occurring as part of the OGS-sponsored summer lunch program at ESP is government expression.[355] The remedy for Loguidice and Snooks thus "lies with the political process, not the courts"[356] and not in the First Amendment protection of speech.

D. Rejecting the Government Speech Doctrine in Federal Trademark Registration of a Disparaging Term

In December 2015, the United States Court of Appeals for the Federal Circuit in *In re Tam*[357] concluded "there is no government speech at issue in the rejection of disparaging trademark registrations," that would shield those rejections from First Amendment scrutiny.[358] The case, which was petitioned for and granted a writ of certiorari by the United States Supreme Court in September 2016,[359] centered on the constitutionality of a provision of the Lanham Act that prohibits, in pertinent part, the federal registration of a trademark that "may disparage" individuals and institutions.[360] The United States Patent and Trademark Office (PTO) used this statutory authority to reject the registration of "The Slants," which is the name of an Asian American dance band fronted by Simon Shiao Tam, because the term is disparaging to individuals of Asian descent.[361]

Specifically, a PTO "examiner found that the mark likely referred to people of Asian descent in a disparaging way, explaining that the term 'slants' had 'a long history of being used to deride and mock a physical feature' of people of Asian descent."[362] Simon Tam countered that the band used the term as a cultural and political tool to try to reclaim the meaning of the word.[363]

In turning back the government speech argument, the United States Court of Appeals for the Federal Circuit reasoned that "[t]rademark registration is a regulatory

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directed to advise all applicants, other than Wandering Dago, that they had been accepted into the 2013 Summer Outdoor Lunch Program as vendors." (citations omitted)).

[355] *Id.* at *80–81.

[356] *Id.* at *81 (citations omitted).

[357] 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 137 S. Ct. 30 (2016).

[358] *Id.* at 1345.

[359] *Lee*, 137 S. Ct. 30; *see* Petition for Writ of Certiorari, Lee v. Tam, 137 S. Ct. 30 (No. 15-1293). The Supreme Court heard oral arguments in the case on January 18, 2017, but a decision had not been reached when this Article went to press. *See* SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?FileName=/docketfiles/15-1293.htm [https://perma.cc/D6TY-YPEZ].

[360] 15 U.S.C. § 1052(a) (2016), *held unconstitutional by In re* Tam, 808 F.3d 1321 (Fed. Cir. 2015).

[361] *Tam*, 808 F.3d at 1331–32.

[362] *Id.* at 1331 (citation omitted).

[363] *Id.*

activity. These manifestations of government registration do not convert the underlying speech to government speech."[364] In other words, there is a key distinction between government *conduct* (the registration process) and government *speech*, with the former at play in *In re Tam*. The only speech or message conveyed by registration of a trademark is simply "that a mark is registered."[365]

The court illustrated the fallacy of the government's argument by pointing out that if trademark registration was to be considered government speech, then so too would copyright registration be considered government speech.[366] This, in turn, would give the government the right to "prohibit the copyright registration of any work deemed immoral, scandalous, or disparaging to others. This sort of censorship is not consistent with the First Amendment or government speech jurisprudence."[367]

Considering the *Walker* majority's focus on who a reasonable observer would believe is speaking, the court found that:

> Trademarks are understood in society to identify the source of the goods sold, and to the extent that they convey an expressive message, that message is associated with the private party that supplies the goods or services. Trademarks are not understood to convey a government message or carry a government endorsement.[368]

Finally, the court rejected the argument that giving the right to federal trademark holders to affix the "®" symbol next to their trademarks transforms those trademarks into government speech.[369] Once again reverting to a copyright analogy to demonstrate the weakness of the government's argument, the court noted that affixing the "©" symbol "does not convert the copyrighted work into government speech or permit the government to grant some copyrights and deny others on account of the work's message."[370]

Ultimately, the court concluded that "[w]hen the government registers a trademark, it regulates private speech. It does not speak for itself."[371]

E. Summary

Of the four cases examined in Part III, three were determined to involve government speech. In those cases, government speech took the form of: 1) banners,

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[364] *Id.* at 1346.
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.* at 1347.
[369] *Id.*
[370] *Id.*
[371] *Id.* at 1348.

identifying private businesses as school partners in exchange for cash donations, that are hung from public school fences;[372] 2) brochures and advertisements developed by private businesses for tourists and travelers that are distributed at state-owned highway rest areas and welcome centers;[373] and 3) the names of privately owned food trucks that participate in a government-run summer lunch program held on government property.[374] The practical impact, in turn, of finding government speech in this trio of cases was to allow: 1) a public school to censor banners because it objected to the former occupation of a person—the man behind the message, as it were;[375] 2) a state to censor tourist-targeted literature and advertisements because the literature and advertisements might promote interests and views in conflict with those of the state;[376] and 3) a state to exclude a food truck from a government-sponsored program because the state found the truck's name offensive.[377]

Parsed even more simply, the government speech doctrine allowed the government to target: 1) an offensive person (David Mech);[378] 2) offensive political and religious viewpoints (Vista-Graphics's materials with political and religious content);[379] and 3) an ethnically offensive name ("Wandering Dago").[380] In contrast, another ethnically offensive name—"The Slants"—was shielded from censorship because the government's registration of trademarks amounts to conduct rather than government speech.[381]

CONCLUSION

This Article examined early fallout from the United States Supreme Court's 2015 ruling in *Walker*. *Walker* gave free rein to North Carolina to engage in flagrant, viewpoint-based censorship—and the conservative fashion feared by Erwin Chemerinsky[382]—in rejecting a pro-choice specialty license plate while simultaneously permitting a pro-life version.[383] *Walker* also predictably allowed Virginia

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[372] *See supra* Section III.A.

[373] *See supra* Section III.B.

[374] *See supra* Section III.C.

[375] *See* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1073 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

[376] *See* Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 462–63 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. 2016).

[377] *See* Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046, at *14–16 (N.D.N.Y. Mar. 1), *appeal filed sub nom.* Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[378] *See generally Mech*, 806 F.3d 1070.

[379] *See generally Vista-Graphics*, 171 F. Supp. 3d 457.

[380] *See generally Wandering Dago*, 2016 U.S. Dist. LEXIS 26046.

[381] *In re* Tam, 808 F.3d 1321, 1348 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 137 S. Ct. 30 (2016).

[382] *See supra* notes 17–18 and accompanying text.

[383] *See supra* Section II.A.

to snuff out Confederate battle flag imagery on its specialty plates that a pre-*Walker* judicial ruling had forced it to accept.[384]

Furthermore, *Walker* gave the green light to the Eleventh Circuit to go beyond discriminating against a message's viewpoint and, perhaps more perniciously, to target the person or entity behind the message, as *Mech* makes evident.[385] Put more bluntly, discrimination against both speech and speaker is enabled by the government speech doctrine in a post-*Walker* world. David Mech's past professional life—in a perfectly legal occupation, but one that nonetheless tests cultural norms on sexuality—stymied his ability to speak to potential customers of his tutoring business in a venue (on school grounds via school fences) seemingly ideal for reaching his target audience.[386]

Additionally, businesses with names that the government finds offensive, such as "Wandering Dago," can be easily excluded from government-run programs and, in the process, deprived of a First Amendment opportunity to challenge such decisions due to the government speech doctrine.[387] The government becomes the arbiter of all names that offend.

The government speech doctrine thus allows the government to break free from the shackles of dicta in the Court's 1971 ruling in *Cohen v. California*.[388] In *Cohen*, the majority opined that it is "often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[389] The government speech doctrine, however, affords the government power to make precisely those same ambiguity-laden decisions, free from judicial review.

The government speech doctrine allows states like Virginia in *Vista-Graphics* to squelch any and all political and religious messages, as well as other content targeting tourists, in its highway rest areas and welcome centers.[390] About the only thing the government speech doctrine seemingly cannot do is to permit the government magically to convert the "regulatory activity" of trademark registration into government speech.[391]

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[384] *See supra* Section II.B.

[385] *See* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

[386] *Id.*

[387] *See generally* Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046 (N.D.N.Y. Mar. 1), *appeal filed sub nom.* Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[388] 403 U.S. 15 (1971).

[389] *Id.* at 25.

[390] *See supra* Section III.B.

[391] *In re* Tam, 808 F.3d 1321, 1346 (Fed. Cir. 2015), *cert. granted sub nom.* Lee v. Tam, 137 S. Ct. 30 (2016).

It is vital, however, to go beyond merely tallying up wins and losses. In particular, multiple lessons arise from *Walker* and the half-dozen subsequent lower-court cases involving the government speech doctrine described in this Article. Because these takeaways seem roughly comparable in significance, the order below does not reflect their relative importance. With this in mind, here are seven lessons derived from the cases addressed in this Article.

A. Difficult Cases May Be the Rule, Not the Exception

An initial lesson is that the epigraph opening this Article,[392] drawn from the Supreme Court's 2009 decision in *Summum*, is becoming a substantial understatement. Justice Alito's prediction that "[t]here *may be situations* in which it is difficult to tell"[393] if government or private speech is involved would seem, with the benefit of hindsight, to be much better phrased as "there *will be many situations* in which it is difficult to tell" if government or private speech is implicated. In fact, the scenarios where it is hard to tell might prove to be the rule, not the exception.

For example, the Eleventh Circuit began *Mech* by asserting that "[t]his appeal presents one of those situations" where "it is difficult to tell" if the government is speaking or merely "providing a forum for private speech."[394] In the same vein, United States District Judge Robert Doumar in *Vista-Graphics* ruefully remarked that government speech may take "unexpected forms"[395] and that it "must seem strange" to non-lawyers that the expression in that case is government speech.[396] He elaborated that:

> [t]he brochures and pamphlets in the displays are produced by private groups who pay to place them in the Welcome Centers. A non-lawyer confronted with the resulting displays would be unlikely to conclude that they were government speech. However, the legal doctrine of government speech encompasses far more speech than any natural usage of the phrase government speech would suggest.[397]

Indeed, the term "government speech" is a misnomer. It is more akin to a term of art. It will be recalled from earlier that Judge Doumar also felt compelled to go

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[392] *See supra* text accompanying note 1.

[393] Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) (emphasis added).

[394] Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1071 (11th Cir. 2015) (citation omitted), *cert. denied*, 137 S. Ct. 73 (2016).

[395] Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 471 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. 2016).

[396] *Id.* at 470.

[397] *Id.*

beyond the mere application of factors from *Walker* and *Summum* and to explain why it would be impractical, if not flat out wrong, to classify highway rest areas as public fora for private expression.[398]

In *Wandering Dago*, Judge D'Agostino opined that she "does not believe that the facts of this case fit cleanly within any of the existing First Amendment jurisprudence."[399] Because the facts did not jibe neatly within any one facet of First Amendment law, D'Agostino felt compelled to analyze the case under three different frameworks: a public forum analysis, a government employee/contractor analysis, and the government speech doctrine.[400] Her decision to take all three paths, rather than choosing just one, is not surprising, given Professor George Wright's observation that there is an "often murky and complex choice between classifying the speech in question as government speech or as private party speech."[401]

In a nutshell, three out of the four post-*Walker*, non–license plate cases examined here involved factual scenarios in which courts confessed that it was neither intuitive nor easy to determine if the speech in question was that of the government or whether the government speech doctrine provided the appropriate methodology for analyzing the case. The true danger is that the government can take advantage of this muddle and the proliferation of difficult cases by contending, in any given case, that it has not created a limited public forum for private speech but, instead, is speaking for itself in a forum it controls. The difference is pivotal because viewpoint-based discrimination is not permitted in a limited public forum.[402] In other words, ambiguity provides an entrée for the government to argue that a government speech analysis, rather than a public forum framework, is more appropriate. As far as slippery slopes go then, the long-term danger is that increased usage of the government speech doctrine threatens the continued viability of the limited public forum designation.[403]

B. History May Prove Irrelevant

Of the factors for distinguishing government speech from private expression, history may be the most malleable and least helpful for plaintiffs in making their

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[398] *See supra* notes 300–02 and accompanying text.

[399] Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046, at *33 (N.D.N.Y. Mar. 1), *appeal filed sub nom*. Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[400] *Id.* at *33–34.

[401] Wright, *supra* note 9, at 369.

[402] *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 (2010) (noting that "the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and *viewpoint neutral*" (emphasis added) (citations omitted)).

[403] *See* Inazu, *supra* note 33, at 1182 (contending that a "challenge to the modern public forum anchored in the free speech right lies in the undertheorized realm of government speech").

private-speech arguments. The Justices themselves fractured in *Walker* on the meaning of history.

The Breyer majority focused on the history of license plates generally[404] and Texas's general-issue[405]—not just specialty—plates to find this factor militated in favor of government speech. To the extent the majority did focus on specialty plates, it wrote only that speech on such plates "has appeared on Texas plates for decades."[406]

In contrast, Alito's dissent concentrated on the history of specialty plates in Texas and pointed out that it was only "within the last [twenty] years or so" that they were adopted.[407] He added that "[t]he contrast between the history of public monuments, which have been used to convey government messages for centuries, and the Texas license plate program could not be starker."[408]

In brief, there was disagreement in *Walker* on two aspects of history. First, the Justices split on what constitutes a long history of the government speaking or, in other words, how much time is sufficient or necessary for this factor to tip in favor of the government. For the majority, two decades of Texas speaking through specialty plates was sufficient,[409] but the dissent found this time span was not nearly sufficient.[410] Second, the *Walker* Court divided on the artifacts courts should examine in making this inquiry. Should they consider the history of: a) *license plates generally*, including plates from states other than the one at issue in a case?;[411] 2) *specialty plates generally*, including those in other states?;[412] or 3) *Texas's specialty plates specifically*?[413]

In *Mech*, the Eleventh Circuit made it clear that the lack of a long history does not need to kill or destroy the case in favor of government speech.[414] The banner program in that case was less than a decade old[415] and the appellate court found that this "weigh[ed] in Mech's favor."[416] Yet, this made no difference in the end because

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[404] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015) ("First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States." (citations omitted)).

[405] *See id.* ("In 1936, the State's general-issue plates featured the first slogan on Texas license plates: the word 'Centennial.'" (citation omitted)).

[406] *Id.*

[407] *Id.* at 2260 (Alito, J., dissenting).

[408] *Id.*

[409] *See id.* at 2248 (majority opinion).

[410] *Id.* at 2260 (Alito, J., dissenting).

[411] *See id.*

[412] *Id.* at 2259–60.

[413] *Id.* at 2260.

[414] *See supra* notes 219–23 and accompanying text (addressing the history analysis in *Mech*).

[415] Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1075 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

[416] *Id.*

the Eleventh Circuit held that the absence of a long history "is not decisive"[417] and "a long historical pedigree is not a *prerequisite* for government speech."[418] The school board thus only had to prove two factors—endorsement[419] and control[420]—rather than all three in order to strip Mech of his First Amendment rights.

In *Wandering Dago*, the government had only operated the outdoor summer lunch program at issue since 2013.[421] Yet United States District Court Judge Mae D'Agostino ignored this fact and focused, instead, much more broadly on government-run programs as a whole: "As to the first *Walker* factor, the government has a history of sponsoring programs *of all varieties*[,]" she reasoned.[422] In brief, by focusing on government-sponsored programs collectively rather than on the one at issue specifically, D'Agostino tilted a factor that seemed to militate for private speech in favor of the government. This recalls the split in *Walker* described above regarding the particular artifacts or programs to which courts should direct their attention when evaluating history.[423]

In *Vista-Graphics*, Judge Doumar eliminated any requirement of a lengthy history when he wrote that the first factor of the government speech test simply "asks whether the [State] *has used* the displays in the Welcome Centers to convey governmental messages."[424] Importantly, this phrasing omits any reference to a time-length requirement such as "has *long* used" or "has *historically* used."[425] Additionally, Judge Doumar's analysis of history is devoid of any mention of specific dates or years of the program in question.[426] He simply cited and quoted Vista-Graphics's complaint for the general, non-time-specific proposition that "Virginia's welcome centers and rest areas *have existed* for a variety of purposes, including dissemination of information [and] promotion of tourism."[427]

In brief, history is highly malleable and manipulable. Furthermore, even when history weighs in favor of private speech, as it did in *Mech*, it may be for naught if

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[417] *Id.*

[418] *Id.* at 1076.

[419] *Id.* at 1076–78.

[420] *Id.* at 1078–79.

[421] *See* Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046, at *7 (N.D.N.Y. Mar. 1) ("Although an outdoor lunch program had been operated in prior years by Sodexo, a private company which had a contract to provide food services for the Empire State Plaza, Sodexo's contract was not renewed for 2013, and OGS decided to run its own summer outdoor lunch program." (citations omitted)), *appeal filed sub nom*. Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[422] *Id.* at *77 (emphasis added).

[423] *See supra* notes 405–13 and accompanying text.

[424] Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 474 (E.D. Va.) (emphasis added), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016).

[425] *See id.*

[426] *Id.*

[427] *Id.* (alterations in original) (emphasis added) (quoting Plaintiff's Complaint).

the other two factors tilt for the government. Thus the government need not worry about the history facet of Justice Breyer's test from *Walker*, as long as it prevails on the questions of who a reasonable observer believes is speaking and whether the government controls the speech.

C. The Spatial Scarcity Analysis Goes Missing

In *Summum*, the Court considered a spatial-scarcity factor that weighed in favor of classifying private monuments in public parks as government speech.[428] In *Walker*, the four-Justice dissent similarly addressed whether spatial scarcity would justify classifying specialty plates as government speech.[429] The *Walker* majority, however, held that spatial scarcity was not relevant.[430] Justice Breyer suggested for the majority that spatial scarcity was a relevant factor only in cases involving restrictions affecting "traditional public forums for private speech" like parks.[431]

In the four non–license plate cases analyzed here, spatial scarcity did not play any role in the courts' analyses. The three factors considered by the Eleventh Circuit in *Mech*, for instance, were "history, endorsement, and control."[432] Interestingly, a spatial-scarcity analysis might have proved relevant in *Mech*—and might, in turn, have tilted in favor of the school board. That is because there presumably is a finite amount of wall and fence space from which banners for private entities could be hung on school property.

In *Vista-Graphics*, the district court identified the three government speech factors as "(1) whether, historically, the government had used this means of expression—license plates—to convey governmental messages; (2) whether the public associated the means of expression with the government; and (3) whether the government exercised editorial control over the messages conveyed."[433] A spatial-scarcity factor was not present, despite the fact that such an analysis might have been relevant. In particular, Virginia could have argued that there is a limited amount of space inside highway rest areas that can be devoted to private literature targeting tourists. Other space must be set aside for other things, such as bathrooms, vending machines, drinking fountains, maps, and the usual accoutrements of rest areas.

In *Wandering Dago*, the three factors were history, who reasonable observers would identify as the speaker, and whether the government exercises control over

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[428] *See supra* notes 67–68 and accompanying text.

[429] *See supra* notes 110–12 and accompanying text.

[430] *See supra* note 113–15 and accompanying text.

[431] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249–50 (2015).

[432] Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1075 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016).

[433] Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 473 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016).

the messages.[434] As in *Mech* and *Vista-Graphics*, spatial-scarcity could have played a role in *Wandering Dago* because the plaza level of Empire State Plaza—the venue where the lunch program occurs—is bounded by three streets and a bulkhead wall.[435] In brief, there likely is not adequate space to accommodate all possible food trucks while simultaneously leaving sufficient space for office workers and others to walk through the plaza.

Finally, the United States Court of Appeals for the Federal Circuit in *In re Tam* noted that *Walker* considered "the history of license plates," whether the design of Texas's license plates would be "closely identified in the public mind with the State[,]" and the aspects of license plates controlled by Texas.[436] Spatial scarcity was not evaluated in *In re Tam*. Of course, there is no spatial-scarcity problem in the process of trademark registration; a seemingly infinite number of marks could be registered if they satisfy the government's regulations.

Ultimately then, despite Justice Alito's majority opinion in *Summum* and his protestations in dissent in *Walker* to the contrary, the spatial-scarcity consideration has been read out of the government speech test by lower courts. Justice Breyer's pronouncement for the *Walker* majority that a shortage of physical space is only relevant in cases like *Summum* involving traditional public fora, such as public parks, is holding sway at the lower court level.

D. Speculating About What Reasonable Observers Perceive: Identification, Association, or Endorsement?

This mind-game facet of the government speech test is fraught with trouble. First, it requires courts to make guesses about how mythical reasonable observers would interpret the speech in question and, in particular, who they would perceive to be speaking—the government or a private individual. It is akin to the guessing game played in Establishment Clause cases involving the question of government endorsement of religion.[437] None of the cases examined here offered any demonstrable and objective proof of who observers actually believed was speaking. No surveys, for instance, apparently were conducted of people who pass through Empire State Plaza during the summer lunch program to get their views about who they believe is speaking when they see food trucks on the plaza. Similarly, survey

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[434] Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046, at *76–81 (N.D.N.Y. Mar. 1), *appeal filed sub nom.* Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

[435] *Id.* at *5.

[436] *In re* Tam, 808 F.3d 1321, 1346 (Fed. Cir. 2015) (quoting *Walker*, 135 S. Ct. at 2248), *cert. granted sub nom.* Lee v. Tam, 137 S. Ct. 30 (2016).

[437] *See generally* B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407 (2014) (providing a timely and comprehensive review of the reasonable observer standard in religion cases).

evidence of people who see banners hanging from the fences of Palm Beach County schools played no role in *Mech*.

Compounding the guessing game is fluidity of the perception that ultimately counts in this analysis. Is it whether people *identify* the government as the speaker?[438] Or is it whether they *associate or identify* the government in connection to the message, even if they do not identify the government as the speaker itself?[439] Or, finally, is it whether reasonable observers believe the government is actually *endorsing* the message?[440] In other words, there may be key differences between identifying the government as the speaker, associating the government with the speech, and believing the government actually endorses the speech. This facet of the *Walker* government speech test thus begs for clarification.

E. Bottom-Line Control versus Selective Receptivity

In analyzing the control factor, the difference between the *Walker* majority's focus on whether the government exercises bottom-line or ultimate control over speech[441] and the *Walker* dissent's emphasis on "selective receptivity"[442] appears to be of great consequence. While the courts in *Mech*, *Vista-Graphics*, and *Wandering Dago* all concluded that control militated in favor of government speech,[443] a selective receptivity approach might have resulted in the opposite conclusion.

Specifically, selective receptivity methodology would have forced the court:

1) in *Mech* to consider how many other banners—banners other than David Mech's—the school board had rejected relative to the total number of banners accepted;

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[438] *See Wandering Dago*, 2016 U.S. Dist. LEXIS 26046, at *77 (examining whether "the observer will fail to see the *identity of the speaker*" (emphasis added)).

[439] Am. Civil Liberties Union of N.C. v. Tennyson, 815 F.3d 183, 187 (4th Cir. 2016) (Wynn, J., dissenting) (identifying the second *Walker* factor as "whether there exists a 'routine' and 'reasonable' association between the speech at issue and the government" (citing *Walker*, 135 S. Ct. at 2248–49)).

[440] *See* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1076 (11th Cir. 2015) (identifying the second factor as whether "observers reasonably believe the government has *endorsed* the message" (emphasis added)), *cert. denied*, 137 S. Ct. 73 (2016).

[441] *Walker*, 135 S. Ct. at 2251 (reasoning that Texas "exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum" (citations omitted)).

[442] *Id.* at 2260 (Alito, J., dissenting).

[443] *See Mech*, 806 F.3d at 1078; Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 475 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016); Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053, 2016 U.S. Dist. LEXIS 26046, at *78 (N.D.N.Y. Mar. 1), *appeal filed sub nom.* Wandering Dago Inc. v. N.Y. State Office of Gen. Servs., No. 16-622 (2d Cir. Mar. 3, 2016).

2) in *Vista-Graphics* to consider how many brochures had been rejected and removed from or banned from rest areas relative to the total number placed there without incident; and
3) in *Wandering Dago* to consider the number of applications for food truck permits rejected compared with the total number of applications accepted.

If, as it seems, David Mech was the only person denied a banner,[444] and the owners of the Wandering Dago truck were the only ones denied a permit,[445] then this suggests an abject lack of selective receptivity and, in the *Walker* dissent's view, would lead to the conclusion that government speech was *not* at stake.

It appears that the control factor will almost inevitably tilt toward a finding of government speech in cases like *Mech*, *Vista-Graphics*, and *Wandering Dago* as long as the governmental entity has established criteria for controlling aspects of the speech and has ultimate power to reject or accept it. Drilling deeper, however, into the degree of selectivity with which that control is exercised to actually reject speech would make it much more difficult for the government to prevail on this factor.

F. Two Possible Paths Forward

Perhaps the most intriguing means of addressing problems with the government speech doctrine after *Walker* arise in *Tennyson* and *Vista-Graphics*. Specifically, Judge Wynn, writing in dissent in *Tennyson*, rejected the binary choice between government speech and private speech and, instead, proposed a "mixed speech" category involving "private speech components that prohibit viewpoint discrimination."[446] In Wynn's tripartite approach embodying "private, government, or mixed"[447] categories, a determination of mixed speech affords the expression in question First Amendment protection. As Wynn put it, whenever "the speech is not just the government's," then viewpoint-based discrimination is forbidden.[448]

Although this hybrid category certainly boasts what might be considered curb appeal, as it offers courts an escape hatch from endorsing government-imposed, viewpoint-based censorship, it presently remains murky.[449] How many and which particular private speech components must exist before a government program falls into this mixed classification? Are some aspects of private speech to be weighted

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[444] *See supra* note 247 and accompanying text.

[445] *See supra* note 327 and accompanying text.

[446] Am. Civil Liberties Union of N.C. v. Tennyson, 815 F.3d 183, 186 (4th Cir. 2016) (Wynn, J., dissenting).

[447] *Id.*

[448] *See id.* at 187 ("And because the speech is not just the government's, North Carolina's allowing a 'Choose Life' plate while rejecting a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.").

[449] *See supra* notes 156–61 and accompanying text.

more heavily than others? Judge Wynn intimates that the presence of any shred of private speech might be enough, when he writes that if something is "not *pure* government speech," then viewpoint-based discrimination is prohibited.[450] Clearly, the metes and bounds of a hybrid category would need to be fleshed out in much greater detail to make it both viable and predictable.

A second possible approach to remedying some of the confusion surrounding the government speech doctrine is teed up in Judge Doumar's opinion in *Vista-Graphics*. It would entail requiring the government to not only satisfy a test for government speech, but also to prove "why such speech should be immune from First Amendment challenge."[451] As Doumar put it, the government must demonstrate "the perverse consequences of applying First Amendment doctrine" to the speech in question.[452] In other words, this methodology entails more than applying some three-part government speech test; it demands that the government prove why classifying the program or venue as a limited public forum is misguided. This Article suggested earlier how such a requirement might be applied to *Walker*.[453] Doumar's suggestion makes intuitive sense because it demands more from the government before it can strip speech of all First Amendment protection.

G. Where You Live May Affect What You Can Say

A final lesson is that geography makes a difference.

Do you want, for example, to successfully create a specialty license plate that promotes your liberal viewpoint on global warming—one, perhaps, emblazoned with "Global Warming is Real: Go Green"? In that case, then you should be sure to live in a state with a liberal-controlled legislature, that is headed by a liberal governor. It is a state where you are more likely, under the government speech doctrine, to be able to promote that liberal viewpoint on specialty plates, while also being able to simultaneously deny global warming skeptics a counter-posed plate. That is a fair lesson to be drawn from *Walker* and its specialty-plate progeny, *Tennyson* and *Holcomb*, addressed in this Article.

What if you want to be able to promote your conservative viewpoint on a topic such as taxes—one decorated, for instance, with the slogan "Lower Taxes for All"? Then you should reside in a state with a conservative-dominated legislature and headed by a conservative governor. What's more, you can have your lower-taxes license plate and stop an opposing one—perhaps, one featuring a tagline such as "Tax the One Percent" or "Soak the Rich"—too, all courtesy of the government speech doctrine. That also is a lesson from *Walker* and the specialty-plate cases that follow in its footsteps.

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[450] *Tennyson*, 815 F.3d at 189 (Wynn, J., dissenting) (emphasis added).

[451] Vista-Graphics, Inc. v. Va. Dep't of Transp., 171 F. Supp. 3d 457, 475 (E.D. Va.), *appeal filed*, No. 16-1404 (4th Cir. Apr. 11, 2016).

[452] *Id.*

[453] *See supra* notes 300–05 and accompanying text.

The point is especially made clear in *Tennyson*, where North Carolina was permitted to offer a specialty plate adorned with a conservative viewpoint about abortion and to deny one with a liberal viewpoint.[454] The flipside, of course, could work just as easily in a state like California, where both the legislature and executive branches currently are controlled by Democrats.[455] Besides moving to another state, the only remedy under the government speech doctrine for someone unfortunate enough to live in a state controlled by political opponents, as the Supreme Court made clear in *Walker*, is to vote those lawmakers out of office and to install ones whose beliefs match their own.[456]

In brief, where you live can make a large difference under the government speech doctrine in terms of the messages that can be expressed and censored. In some ways, then, the situation is analogous to the regulation of sexually explicit expression under the United States Supreme Court's 1973 ruling regarding obscenity in *Miller v. California*.[457] There, the Court held that whether expression is obscene, and therefore not protected by the First Amendment,[458] is based on local—not national[459]—"contemporary community standards."[460] As the Court wrote in *Miller*,

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[454] *See supra* Section II.A.

[455] *See* Judy Lin, *Brown, Lawmakers Agree on $115.4 Billion Budget*, FOX BUS. (June 16, 2015), http://www.foxbusiness.com/markets/2015/06/16/brown-lawmakers-agree-on-1154-billion-california-budget-boosting-social-welfare.html [https://perma.cc/9EXF-22KA] (noting California's "Democratic governor" and its "Democratic-controlled Legislature").

[456] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (asserting that "it is the democratic electoral process that first and foremost provides a check on government speech" (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000))).

[457] 413 U.S. 15 (1973).

[458] Obscenity is one of the few categories of expression that is not protected by the First Amendment's guarantee of free speech. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (writing that "obscenity is not within the area of constitutionally protected speech or press"); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (identifying nine categories of unprotected speech, including: 1) "advocacy intended, and likely, to incite imminent lawless action;" 2) "obscenity;" 3) "defamation;" 4) "speech integral to criminal conduct;" 5) "fighting words;" 6) "child pornography;" 7) "fraud;" 8) "true threats;" and 9) "speech presenting some grave and imminent threat the government has the power to prevent" (citations omitted)); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) (observing that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children" (citation omitted)).

[459] *See* Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 34 (2004) (observing that "*Miller* rejected national standards"); John S. Zanghi, *"Community Standards" in Cyberspace*, 21 U. DAYTON L. REV. 95, 101 (1995) (noting that under *Miller*, the content "must be judged according to the accepted local community standard").

[460] The Court's current three-part test for obscenity created in *Miller* asks the factfinder to determine if the material in question: (1) "appeals to a prurient interest" in sex, when "taken as a whole" and as judged by "*contemporary community standards*" from the perspective

"[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[461] Thus, by holding that the community standard is not a nationwide one, but rather is governed by local standards,[462] the *Miller* Court embraced a test which means that one state (in a conservative community) can much more easily censor speech that, in another state (one with more liberal and relaxed standards regarding sexuality), would be fully protected by the First Amendment.[463]

In other words, much as if you want to be able to legally watch sexually graphic imagery in your home, you are better off living in some communities (liberal leaning ones) rather than others (conservative ones), so too then you should pick a state for residence in which the legislative and executive branch leadership comports with your own political ideology if you want to be able to design or purchase a specialty license plate that promotes your political viewpoint.

In summary, the cases from 2015 and 2016 analyzed in this Article highlight multiple lessons and pitfalls with the government speech doctrine in a post-*Walker* world. It is, of course, still too early to tell how other courts will wrestle with the doctrine. Perhaps the best course, however, is for the Supreme Court to soon hear another government speech case and for all nine Justices to agree on a coherent test that does more than just deliver an emotionally satisfying result in a single case. David Mech, for instance, petitioned the Court to review his case,[464] yet the Court denied it in October 2016.[465] At present, however, the government speech doctrine's plasticity provides the government with ample leeway to censor offensive expression and to engage in viewpoint-based discrimination, both of which are verboten under traditional First Amendment principles.[466]

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of the average person; (2) "is patently offensive," as defined by state law; and (3) "lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24 (emphasis added).

[461] *Id.* at 32 (footnote omitted).

[462] *See id.* at 30 (reasoning that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists[,]" and concluding, in turn, that "[t]o require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility" (emphasis added)).

[463] *See* United States v. Peraino, 645 F.2d 548, 551 (6th Cir. 1981) (observing that application of the *Miller* standard "may result in prosecutions of persons in a community to which they have sent material which is obscene under that community's standards though the community from which it is sent would tolerate the same material" (citing United States v. Blucher, 581 F.2d 244 (10th Cir. 1978))).

[464] *See supra* note 264 and accompanying text.

[465] Mech v. Sch. Bd. of Palm Beach Cty., 137 S. Ct. 73 (2016).

[466] Speech cannot be silenced by the government simply because it causes offense. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might

Finally, it is worth recalling Justice Breyer's understanding in *Summum* "that the 'government speech' doctrine is a rule of thumb, not a rigid category."[467] Unfortunately, the amorphousness of the current doctrine after *Walker*—divergence on how far back the history analysis must go, debate about what artifacts count when examining history, speculation (if not outright guessing) by the judiciary about what a mythical reasonable observer of speech might believe, and a disagreement on whether bottom-line control or "selective receptivity"[468] is more important—truly resembles a general rule of thumb that lacks any precision and accuracy. A little bit more rigidity and clarity, despite Justice Breyer's propensity for flexible "rule[s] of thumb,"[469] might go a long way in clarifying what now amounts to—at least from the standpoint of a free-speech advocate—a dangerous doctrine. At present, the metaphorical thumb that is government speech now presses down heavily in favor of censorship on the scales of justice that balance government interests with those of free expression.

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find distasteful or discomforting." (citations omitted)); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (citations omitted)). Furthermore, as noted earlier, viewpoint-based discrimination is typically forbidden in First Amendment jurisprudence. *See supra* notes 34–35 and accompanying text.

[467] Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

[468] *Id.* at 471 (majority opinion).

[469] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) ("In my view, the category 'content discrimination' is better considered in many contexts, including here, *as a rule of thumb*, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation." (emphasis added)).