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Essay

Of Horses, Donkeys, and Mules

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The Court treats matters that are inextricably intertwined as if they were discrete.[1]

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[2] the Supreme Court held that the State of Texas did not violate the First Amendment by rejecting a specialty license plate design that included an image of the Confederate battle flag.[3] All of the justices agreed that the question was whether the message on the plate was government speech or private speech.[4] The four "conservative" justices said it was private speech in a public forum, and therefore the state's rejection of the symbol was viewpoint discrimination forbidden by the First Amendment.[5]

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1. With apologies to Thomas Reed Powell, who said, "[i]f you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 101 (1935) (internal quotation marks omitted).

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

3. *Id.* at 2253. The state rejected the design because of its potential to offend people. *Id.* at 2245. By coincidence, the Court's decision was announced the morning after a mass murder in a South Carolina church by a white supremacist who embraced the Confederate battle flag. Karen Workman & Andrea Kannapell, *The Charleston Shooting: What Happened*, N.Y. TIMES, June 18, 2015, http://www.nytimes.com/2015/06/18/us/the-charleston-shooting-what-happened.html, *archived at* http://perma.cc/ZA6A-VBRC. That event set off a nationwide movement to remove the flag from public places, which may have made the decision less controversial than it would otherwise have been.

4. *See* 135 S. Ct. at 2246 (Breyer, J.); *id.* at 2254 (Alito, J., dissenting).

5. 135 S. Ct. at 2256 (Alito, J., dissenting).

Justice Thomas[6] joined the four "liberal" justices in holding that it was government speech and therefore the state could say (or refuse to say) what it pleased.[7] But the precise speech at issue was neither purely private nor purely governmental.

The case involved what the Court called "specialty plates."[8] A specialty license plate is created by a sponsoring organization, which chooses the message and symbols and submits the design to the Texas Department of Motor Vehicles Board or a state-specified private vendor.[9] If the state approves the design, the vendor manufactures the plate and it becomes available for purchase by the public, with a portion of the price going to the sponsoring organization.[10] The state owns the plate, collects a portion of the fee, and owns the intellectual property in the design.[11]

Some of the speech on license plates is the government's alone. On the standard state-issued license plate, all of the speech is governmental; no one else has any voice in the images, letters, and numbers that appear.[12] On the conventional "vanity plate," all of the speech is governmental except the sequence of letters and numbers chosen by the motorist (subject to the state's approval).[13] The specialty plate at issue in the *Walker* case reflects additional private choices: that of the sponsor, who proposes the background images and message, and that of the vehicle owner, who chooses what sponsor's design to buy.[14] But the state assigns the unique alphanumerical sequence and mandates that the word "Texas" must appear at the top of the plate; those elements reflect no private choice.[15]

This was not a case in which the purely governmental speech could be separated from the speech chosen by private actors. The only speech at issue was the image of the Confederate battle flag, in which speech elements from three sources were inextricably intertwined: the Sons of Confederate

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6. Thomas's vote was not inconsistent with his previous votes in similar cases, although in those cases he was not aligned against his usual conservative allies. *See, e.g*, Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009) (upholding city's power to exclude monument from city park); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 566–67 (2005) (upholding government's power to compel producers to fund advertising with which they disagreed); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992) (upholding city's authority to exclude solicitors from airport terminal).

7. 135 S. Ct. at 2246. The Court decided long ago that the government's own speech is not constrained by the First Amendment's prohibition against viewpoint discrimination. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).

8. 135 S. Ct. at 2244.

9. *Sponsoring a Specialty License Plate*, TEX. DEP'T MOTOR VEHICLES, http://www.txdmv.gov/motorists/license-plates/sponsoring-a-specialty-license-plate, *archived at* http://perma.cc/TS4Q-SJTX.

10. *Id.*

11. TEX. TRANS. CODE ANN. § 504.002(3) (West 2014).

12. 135 S. Ct. at 2244.

13. *Id.*

14. *Id.* at 2244–45.

15. *Id.* at 2244.

Veterans, which chose the symbol; the motorists who would choose that plate; and the state, which would be the distributor of the message.

Both the majority opinion and the dissent relied on the same precedent, *Pleasant Grove City v. Summum*,[16] in which the Court held that a city was free to reject a religious group's proposal to erect a monument in a city park.[17] Both believed *Summum* set forth the test to be used to determine whether the speech was governmental or private, but they drew opposite conclusions from that test.[18] The *Summum* criteria as understood by the majority were (1) whether the medium has historically been used by government to convey its messages; (2) whether customary practice would lead observers to reasonably understand that the message was the government's; and (3) whether the government maintains control over the message.[19] The majority thought each of the three factors indicated that license-plate messages are government speech.[20]

As to history, Justice Breyer's majority opinion pointed out that states have long used symbols (e.g., Idaho's potato, Wyoming's bronco) and slogans (e.g., "Keep Florida Green," "Hoosier Hospitality") on license plates to convey an image or "to urge action, promote tourism, and to tout local industries."[21] Beginning in 1919 Texas license plates carried a Lone Star emblem, changed to a silhouette of the state in 1977.[22] Texas's first slogan was "Centennial" in 1936, followed in later years by "Hemisfair 68" and "150 Years of Statehood."[23] Breyer believed this history showed that license plates "long have communicated messages from the States."[24] As to public understandings, Breyer said license plates are essentially government IDs, which people "routinely—and reasonably—interpret . . . as conveying some message on the property owner's behalf."[25] That implicit state endorsement of the message may well explain why motorists pay money to have a license plate that carries their message instead of simply applying a bumper sticker below the license plate, he argued.[26] Finally, the control factor favored the state, the majority believed, because although messages are initially selected by private persons or entities, the state retains final approval authority and in fact had rejected at least a dozen proposed designs.[27]

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16. 555 U.S. 460 (2009).
17. *Id.* at 464.
18. 135 S. Ct. at 2248 (Breyer, J.); *id.* at 2261 (Alito, J., dissenting).
19. 135 S. Ct. at 2247.
20. *Id.* at 2248–49.
21. *Id.* at 2248.
22. TEX. DEP'T OF TRANSP., THE HISTORY OF TEXAS LICENSE PLATES 9, 62 (1999).
23. *Id.* at 20, 46, 101.
24. 135 S. Ct. at 2248.
25. *Id.* at 2249.
26. *Id.*
27. *Id.* at 2247.

The dissent, by Justice Alito, conceded that messages on Texas license plates were government speech until the 1990s when the state began to allow private entities to obtain plates bearing their own messages.[28] At that point, "Texas crossed the line" into the private speech realm, Alito said.[29] People do not interpret the messages as government speech because "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 [Sons of Confederate Veterans] plate, that offend some who viewed them."[30] He said the program was not selective but was designed to encourage private plates as a means to generate revenue; the state had approved 350 different license-plate designs, and of the few designs that were not approved, most were rejected for running afoul of rules about readability and reflectivity rather than concern over the message.[31]

The 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. The dichotomy might be thought to be a harmless fiction, merely a shorthand way of concluding that the speech should or should not be subjected to First Amendment scrutiny. But the fiction is not harmless; it precludes serious analysis of one of the most significant political phenomena of our time, the "public–private partnership."

Never has the line between the public and private sectors been as blurred as it is today. Private companies run state prisons and public hospitals. Public–private partnerships develop real estate and build sports facilities and office buildings. Management of public schools is delegated to private companies. Private contractors provide personnel to supplement the armed forces. Companies fund university research and universities provide services to private companies. Private security officers are authorized to make arrests, and public officers are allowed to serve as security at private events. Private companies are given the public's power of eminent domain. A particularly eye-opening example involves privately paid prosecutors. In Texas an insurance company pays for a special unit in the district attorney's office that pursues fraud charges against some of the company's claimants.[32]

Government–private collaboration extends to the realm of speech. Governments join with industries in promoting beef, grapes, apples, and

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28. *Id.* at 2260 (Alito, J., dissenting).

29. *Id.*

30. *Id.* at 2261.

31. *Id.* at 2260–61.

32. Jay Root & Tony Plohetski, *Justice for hire?*, AUSTIN AM.-STATESMAN, Sept. 9, 2015, http://projects.statesman.com/news/paid-to-prosecute/main.html, *archived at* http://perma.cc/T69U-6UGY.

citrus fruits.[33] Messages on stadium scoreboards of public universities tout not only the teams and schools, but also soft drinks, banks, and car dealers. Universities sell logo placements on their sports uniforms.[34] The City of Dallas sold the right to use its logo to a private company which used the logo to promote its insurance product.[35] Private parties pay for public monuments and performance venues. Like the messages on specialty license plates, these messages contain both private and governmental genes. Insisting that these collaborations be characterized as either public or private is as foolish as insisting that a mule must be either a horse or a donkey.

To be fair, the misguided binary approach predated this decision. The Court has employed it enough times that it now has its own label, "the government speech doctrine."[36] It flows from the intuition that the usual First Amendment prohibition against favoring one viewpoint over another can't apply to the government's own speech because articulating and expounding selected views is an accepted function of government, from presidential speeches to antismoking campaigns. The 2–1 majority in the *Walker* case in the Fifth Circuit followed other lower court decisions in employing the binary approach.[37]

But the Supreme Court had before it a strong critique of that approach. The dissenting opinion in the Fifth Circuit denounced the idea: "A fundamental error in the majority opinion is describing the government-speech doctrine as presenting a binary choice: government or private,"[38] and

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33. For examples of such collaboration between government and industries, see the cases cited in Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 196 n.8.

34. The University of Michigan will receive about $169 million over ten years for agreeing to clothe its teams in apparel carrying the Nike logo. Rod Beard, *Michigan's Nike Deal Worth $169 Million*, THE DETROIT NEWS July 15, 2015, http://www.detroitnews.com/story/sports/college/university-michigan/2015/07/15/michigans-nike-deal-worth-millions/30185761/, *archived at* http://perma.cc/8GLT-XCV5. Nike is to pay about half in cash and the remainder in merchandise. *Id.*

35. Robbie Owens, *Dallas Can't Get Out Of Contract To Sell Logo*, CBS DFW, June 11, 2015, http://dfw.cbslocal.com/2015/06/11/dallas-cant-get-out-of-contract-to-sell-logo/, *archived at* http://perma.cc/DLG3-4TLP.

36. *See, e.g.*, Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (attaching the "government-speech doctrine" label to the rule that "the government may support valid programs and policies by taxes or other exactions binding on protesting parties" (internal quotation marks omitted)); Keller v. State Bar of Cal., 496 U.S. 1, 10 (1990) (referring to the rule as "the so-called 'government speech' doctrine"); Adams v. Me. Mun. Ass'n, No. 1:10-cv-00258, 2013 WL 9246553, at *15–16 (D. Me. Feb. 14, 2013) (example of a lower court also referring to the rule as the "government speech doctrine").

37. *See, e.g.*, Perry v. McDonald, 280 F.3d 159, 166 (2d Cir. 2001) (holding that vanity plates "concern[ed] private individuals' speech on government-owned property"); Choose Life Ill., Inc. v. White, 547 F.3d 853, 855 (7th Cir. 2008) ("Specialty license plates implicate the speech rights of private speakers, not the government-speech doctrine."); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 967 (9th Cir. 2008) (finding private speech where Life Coalition's logo depicting the faces of two young children was displayed on the license plate with the message "Choose Life").

38. Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 403 n.1 (5th Cir. 2014) (Smith, J., dissenting).

adding, "[i]t is a false dichotomy to suggest, then, that either Texas is speaking or private citizens are speaking,"[39] because "speech on license plates is 'mixed' insofar as it will be associated with both the state and the driver."[40] The dissent also cited law-review commentary challenging the binary conception of the government-speech doctrine and describing such speech as "hybrid."[41] Neither opinion in the Supreme Court mentioned this critique or the law-review articles, even though the result urged in that dissent is the position taken by majority in the Supreme Court.

This is disappointing because the case presented an opportunity to look for a more cogent way to deal with the privatization boom, which presents many issues. When private managers run publicly owned schools or hospitals, are they subject to the same disclosure requirements as public administrators of similar institutions? When a state prison is run by a private company, are its agents state actors for purposes of civil rights liabilities? When a private company is given the power to condemn land, what is the meaning of the Fifth Amendment dictum that property may be taken only for "public use"? Some of these present only policy issues to be resolved by the legislature or the executive. But some present constitutional issues that must be addressed by courts and cannot be sensibly resolved by merely labeling the action "private" or "governmental."

When the public–private partnership in question is speech, the powerful constitutional preference for free speech ought to militate towards results that restrict speech no more than is necessary to permit the government to fulfill its role.[42] I believe that idea is reflected in the Court's public forum jurisprudence. The Court tries to determine whether the government should be allowed to restrict speech on its own property (real or virtual) by classifying these sites as traditional, limited, or nonpublic forums.

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39. *Id.* at 408.

40. *Id.* at 410 (citing Joseph Blocher, *Government Property and Government Speech,* 52 WM. & MARY L. REV. 1413, 1479–80 (2011) ("The unavoidable implication is that the expression emanating from specialty license plates is both governmental and private. . . . [A] reasonable observer would probably conclude that both the owner of the vehicle displaying the plate and the state government that authorized it support the plate's message.")).

41. *See id.* at 407 n.13.

42. This is true even when the speech might be thought to be the government's. Even though the First Amendment doesn't forbid viewpoint discrimination in government speech, it does impose some restraints. For example, the government may not compel individuals to convey the state's message by displaying on their license plates a state motto with which they disagree. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977). One would hope it also prevents the state from using its resources to drown out private speech, *cf.* P.A.M. News Corp. v. Butz, 514 F.2d 272, 276–77 (D.C. Cir. 1975) (rejecting claim that government violated First Amendment by establishing news service that threatened to put plaintiff's competing service out of business), or from inducing private speakers to present the state's messages as their own, *cf.* Robert Pear, *Ruling Says White House's Medicare Videos Were Illegal*, N.Y. TIMES, May 20, 2004 (reporting on government-produced "story packages" that television stations aired as their own), http://www.nytimes.com/2004/05/20/us/ruling-says-white-house-s-medicare-videos-were-illegal.html, *archived at* http://perma.cc/C4KK-8BKT.

This scheme of classification, with varying degrees of control permitted in each, is an attempt to provide categorical answers to a single underlying question: how much control must the government be allowed to exercise to preserve the functioning of the forum? Thus, speech in public parks and streets can be restricted only as necessary to protect their primary function as conduits for traffic and places of relaxation. Speech in a limited public forum may be restricted only as necessary to serve the purposes for which the venue was designated as a forum. Nonpublic forums are those in which the government's own needs are thought to trump those of others who might wish to speak there. This is a grossly oversimplified summary of a vast and bewildering body of public forum law, but I believe it captures the core idea: the government's ownership of property gives it power to exclude speakers only to the extent necessary in light of the reasons for which the government owns the property.

Cases like *Walker* are difficult because the state's claim of necessity rests on grounds that are usually anathema to First Amendment analysis. The state claims it must be allowed to control the messages on specialty license plates to avoid offending the public. If there is any necessity, it is that inability to control the messages might force the state to stop issuing such plates, frustrating the state's policy decision to allow specialty plates to raise revenue and please motorists.[43] But governments frequently claim that they must censor a speaker to avoid the consequences of public hostility, and courts routinely reject those arguments on the ground that free speech is a paramount interest. Maybe the Court didn't do so this time because relegating Confederate images to bumper stickers instead of license plates didn't seem like a serious infringement of First Amendment interests.

Granting certiorari in the *Walker* case would have made sense if the Court intended to use the opportunity to grapple with the phenomenon of hybrid government–private speech, but it did not even recognize that problem. One wonders why the Court took a case with so little real-world importance and resolved it in a way that has little precedential value.

43. The prospect of having to approve license plates that say "Fuck You" or "Support ISIS" makes pretty clear which course the state would have chosen.