COMMENTS

WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC. AND LICENSE PLATE SPEECH: A DANGEROUS ROADBLOCK FOR THE FIRST AMENDMENT

MORGAN E. CREAMER*

On June 18, 2015, the Supreme Court severely limited the protections of the First Amendment of the United States Constitution in Walker v. Texas Division, Sons of Confederate Veterans, Inc. *The Court ruled that the speech displayed on specialty license plates constituted government speech, and thus, the government may exercise viewpoint discrimination in denying any private entity's proposed design or message. This decision is often viewed as protecting civil rights, but it has actually limited a private individual's right to free speech and given the right of unrestricted expression to the government. This Comment therefore argues that the Court reached the wrong decision in* Walker *under the First Amendment and adversely implicated citizens' First Amendment rights because it increased the States' discretion in government speech.*

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* Note & Comment Editor, *American University Law Review*, Volume 66; J.D. Candidate, May 2017, *American University Washington College of Law*; B.S., Political Science, 2013, *Shepherd University*. I would like to thank Professor Stephen Wermiel for his invaluable guidance and remarkable perspective on this topic. I would also like to thank Beth Fisher, my Note & Comment Editor, and my colleagues on the *Law Review* for devoting considerable time to editing and providing feedback. Finally, thank you to my friends and family for your endless encouragement, motivation, and support.

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INTRODUCTION

The First Amendment of the United States Constitution declares that the government may not infringe upon a citizen's right to free speech.[1] On June 18, 2015, the United States Supreme Court decided in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[2] that specialty license plate designs are government speech and the State is, thus, permitted to practice viewpoint discrimination in rejecting any applicant's design proposal. Because the State has the freedom to associate itself with certain views and not others, the State can, under the government speech doctrine, promote certain views while rejecting others without violating the First Amendment.[3] The Texas Department of Motor Vehicles Board ("the Board") rejected the Sons of Confederate Veterans's proposed specialty plate design because it believed a design that included the Confederate battle flag would be viewed as offensive and would incite reactions that could result in reckless driving.[4] Yet, in the same meeting, the Board approved the Buffalo Soldiers' proposed specialty plate design, despite similar concerns about the design's offensiveness.[5]

Many applaud the Supreme Court's decision in *Walker* as a step in the right direction to protect and uphold civil rights. However, the Supreme Court has reached the wrong decision. Relying almost exclusively on *Pleasant Grove City v. Summum*,[6] the Court incorrectly found that specialty license plates are comparable to monuments erected within public parks.[7] Instead of examining license plate speech under traditional First Amendment analysis, the Court held that specialty license plates, like park monuments, constitute government speech because their purpose is to convey government messages.[8]

The government speech doctrine exempts a state from First Amendment scrutiny when it speaks on its own behalf.[9] However, by

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1. U.S. CONST. amend. I.

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

3. *Walker*, 135 S. Ct. at 2245; *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (asserting that the First Amendment's Free Speech Clause does not restrict government speech).

4. *Walker*, 135 S. Ct. at 2245; *id.* at 2258 (Alito, J., dissenting).

5. *Id.* at 2258 (Alito, J., dissenting) (noting that some Native Americans were offended by the Buffalo Soldiers plate).

6. 555 U.S. 460 (2009).

7. *Walker*, 135 S. Ct. at 2251.

8. *Id.*

9. *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 611 (2008) (explaining that the doctrine is a "recent development" of First Amendment jurisprudence).

allowing the State to reject something as simple as a license plate design under the government speech doctrine, the Supreme Court's decision also gives the State immense discretion to pursue whatever speech it so desires, as long as it is labeled as "government speech."[10] Although some have applauded *Walker* for protecting and upholding civil rights, it permits the government to discriminate against unpopular viewpoints under the label of "government speech," which ultimately debilitates citizens' First Amendment rights while fortifying states' rights.[11] If the State has the power to pursue its own interests as government speech and practice viewpoint discrimination, not much can stop the State from infringing on a citizen's First Amendment right to free speech. Because the Court declined to apply First Amendment analysis, the Court improperly decided that the license plate speech in *Walker* constituted government speech.

Consider, for example, if the State of Alabama put up a billboard along a major highway that read, "ALABAMA CHOOSES LIFE, and YOU should too!" Alabama is widely known as a pro-life advocate, and under *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[12] the State has a substantial interest in "potential life throughout pregnancy."[13] After the decision in *Walker*, there is little that prevents the State from acting in such a way. This hypothetical billboard would undoubtedly offend many drivers just as the *Walker* Court said a Confederate battle flag symbol would offend many drivers. The Court's decision permits states to reject speech it chooses not to promote, and to promote any speech it wants as long as it is labeled "government speech"; thus, a state could emblazon its name on practically any medium and call it "government speech." This presents a dangerous obstacle for citizens' First Amendment rights. It is not possible for citizens to freely express their own views if states can choose to reject their views but decide to approve others'. Such an act exemplifies a blatant violation of the First Amendment and should not be permitted simply because the State labels it as "government speech."

This Comment argues that the Supreme Court incorrectly decided not to apply First Amendment analysis in *Walker*, and that the decision adversely affects citizens' First Amendment rights because it increases the scope of government speech. This Comment asserts

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10. *See Walker*, 135 S. Ct. at 2246 ("[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position.").

11. *Id.* at 2256, 2263 (Alito, J., dissenting).

12. 505 U.S. 833 (1992).

13. *Id.* at 876.

that appropriate limits should be placed on government speech to protect citizens' rights to free speech and expression and thereby preserve the fundamental purpose of the First Amendment. Part I provides a general overview of free speech under the First Amendment, discusses the differences between government speech and private speech, and provides background information on license plate speech and *Walker*. Part II compares this jurisprudence with the *Walker* decision and applies *Walker* to hypothetical examples, showing the effect the decision can have on both citizens' First Amendment rights and states' rights. Part II further argues that appropriate limits should be placed on government speech. Finally, the Conclusion asserts that the Supreme Court's decision in *Walker*, although it has been applauded as a decision upholding civil rights, was decided incorrectly and can actually harm citizens' First Amendment rights and fortify states' rights.

I. THE SPEECH DOCTRINES AND *WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.*

A. Free Speech Is More than the Spoken Word Under the First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . . ."
—The First Amendment to the U.S. Constitution[14]

The freedom of speech, as provided in the First Amendment, is not merely limited to spoken words, but extends to the "most amount of speech possible."[15] Furthermore, the First Amendment enables individuals to hold views that differ from those of the majority and to refuse to adopt "an idea they find morally objectionable."[16]

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14. U.S. CONST. amend. I.

15. David Mangone, *Speech at a Crossroads: The Intersection of Symbolic Speech, Government Speech, and the State License Plate*, 8 FED. CTS. L. REV. 97, 101 (2014) (explaining that since the First Amendment was drafted, "music, film, theater, public marches, advertisements, certain visual arts, and even exotic dancing" have all been recognized as constitutionally-protected forms of speech); *see also* Snyder v. Phelps, 562 U.S. 443, 452 (2011) (noting that the Supreme Court's guiding principles on First Amendment analysis are broad so as to prevent courts themselves from becoming censors); United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

16. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

The First Amendment not only serves to protect speech but also the abstinence from speech.[17] In *West Virginia State Board of Education v. Barnette*,[18] local school officials compelled children to salute the American flag and recite the pledge, although such symbolic acts were against their religion.[19] When the children did not comply, they were expelled from the school.[20] Because the flag salute was considered a form of symbolic speech under the First Amendment, the Court held that the local officials exceeded their constitutional authority.[21] The Court reasoned that such power constituted substantial interference with an individual's freedom of thought and expression, which was constitutionally impermissible under the First Amendment.[22] Thus, the First Amendment provides a constitutional safeguard to protect the majority of citizens' speech, whether spoken or expressed.

1. Distinguishing between government speech and private speech

Although the First Amendment protects the speech of private speakers, the government speech doctrine exempts the government from First Amendment scrutiny when it speaks on its own behalf.[23] When the government speaks, it is not obliged to "provide for opposing viewpoints"; the government does not violate the First Amendment when it chooses to support one viewpoint over the other.[24] When speech is labeled as government speech, that label

17. *Id.* at 714 (asserting that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

18. 319 U.S. 624 (1943).

19. *Id.* at 628–29.

20. *Id.* at 629.

21. *Id.* at 632, 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

22. *Id.* at 642 (declaring that the actions of the local officials, in requiring the flag salute and recitation of the pledge, "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

23. Corbin, *supra* note 9, at 611; *see also* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (stating that the government does not engage in viewpoint discrimination when it chooses to fund one program over another).

24. Amy Riley Lucas, Comment, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971, 1975–77 (2008) (acknowledging that the government speech doctrine gives the government "wider latitude in its ability to discriminate based on viewpoint than it ordinarily would receive under the First Amendment").

allows the government to engage in viewpoint discrimination, promoting one viewpoint over another.[25]

The government speech doctrine allows the government to convey its own views and principles to the voting public.[26] Accordingly, statements, designs, and symbols that convey messages on behalf of the State constitute government speech.[27] Unlike private speech, which is the speech of a non-governmental entity protected by the First Amendment right to free speech, government speech is not considered an actual *right* of the government under the First Amendment.[28] Rather, the government speech doctrine serves as the government's justification for "what otherwise might be unconstitutional interference" with private speech.[29] Thus, government speech is not private speech, and private speech is not government speech.

Although courts have dealt with government speech in many cases, they have not created well-defined boundaries for it, and they continue to struggle with its application.[30] The Supreme Court initially articulated the government speech doctrine in *FCC v. League of Women Voters*.[31] The Court invalidated a provision of the Public Broadcasting Act that banned noncommercial educational broadcasting stations from receiving federal funding for editorializing in public broadcasting.[32] The Court held that the ban "merely bar[red] a station from specifically communicating such views on its own behalf or on behalf of its management,"[33] and there were already numerous regulations in place "that intruded far less drastically upon the 'journalistic freedom' of noncommercial

25. *Id.*

26. *Id.* at 1975; *accord* Alyssa Graham, Note, *The Government Speech Doctrine and Its Effect on the Democratic Process*, 44 SUFFOLK U. L. REV. 703, 707–08 (2011) (explaining that the government speech doctrine provides the government "a greater ability to express itself").

27. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009); *see* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696 (2011) (noting that the scope of the government speech doctrine continues to grow).

28. *See* Blocher, *supra* note 27, at 708 (clarifying that the government does not have a "constitutional protection" for its speech; it cannot raise "First Amendment claims against itself").

29. *Id.* (discussing the manner in which the government can justify its restrictions on a private individual's speech).

30. Graham, *supra* note 26, at 706.

31. 468 U.S. 364 (1984).

32. *Id.* at 366, 369 (noting that Congress intended to protect the noncommercial educational broadcasting stations from government interference).

33. *Id.* at 397.

broadcasters."[34] However, Justice Stevens warned against invalidation of the ban in his dissent, stating that such action could result in the proliferation of government propaganda favoring one viewpoint over another.[35] In so doing, he recognized that federal funding allowed the government to act as a speaker in the marketplace of ideas.[36]

In *Rust v. Sullivan*,[37] the Supreme Court specifically articulated the government speech doctrine in deciding whether the government's decision to fund certain programs but not others constituted an infringement on First Amendment rights.[38] Specifically, the government permitted Title X fund recipients to use the funds for family planning services that would "lead to conception and childbirth," but declined to allow the fund recipients to engage in abortion-related activities.[39] The Court held that prohibiting government funding for abortion-related activities constituted a valid, non-discriminatory choice of the government.[40] Although the *Rust* decision was the first to specifically explain the government speech doctrine, it did not accord government speech with permissible viewpoint discrimination.[41] However, a few cases have interpreted *Rust* as though the decision had explained government speech in terms of permissible viewpoint discrimination.[42] The meanings of government speech and viewpoint discrimination have developed over time, but applying the government speech doctrine to determine whether the government has engaged in impermissible viewpoint discrimination continues to be difficult.

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34. *Id.* at 398 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)).

35. *League of Women Voters*, 468 U.S. at 409 (Stevens, J., dissenting) (asserting that the concern for maintaining government neutrality in the marketplace of ideas outweighs the force of the statute's ban).

36. *See* Graham, *supra* note 26, at 706 (explaining *League of Women Voters*'s significance in the creation of the government speech doctrine).

37. 500 U.S. 173 (1991).

38. *Id.* at 193–94.

39. *Id.* at 193.

40. *Id.* at 193–94.

41. *Id.* at 194 (holding that the government's decision was not made on the basis of viewpoint discrimination but on the basis of policy to advance a government objective).

42. Graham, *supra* note 26, at 707 n.33; *see, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (stating that the Court's understanding of the *Rust* decision on government speech is that funding decisions were based on viewpoint and permissible when the government was the speaker); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (recognizing that the government "used private speakers to transmit specific information pertaining to its own program," which constituted government speech in *Rust*).

a. Impermissible viewpoint discrimination in private speech

A government may exercise viewpoint discrimination in its own speech, but it may not restrict private speech in the same way.[43] Private speech is the speech of an individual that is protected under the Free Speech Clause of the First Amendment, and such protection is extended when private individuals "access certain public property for speech purposes."[44] The Court has found that there is a distinction between "content" discrimination and "viewpoint" discrimination in private speech, although the two are often difficult to distinguish.[45] "Content" involves subject matter, while "viewpoint" concerns one's opinion on the particular subject matter.[46] Therefore, the expression of ideas on public property is subject to reasonable regulation, but may not be stifled "merely because public officials oppose the speaker's view."[47]

The government cannot require an individual to agree with and support the views of the government, and the government cannot partake in viewpoint discrimination against the individual for his or her differing views.[48] In *Wooley v. Maynard*,[49] the Court held that the State could not require individuals to display the state motto, "Live Free or Die," on their vehicle license plates because, just as the First Amendment protected free speech and expression, it also protected the right to refrain from speech and expression that is repugnant to one's beliefs.[50] Thus, when the government partakes in viewpoint

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43. Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009); *Rosenberger*, 515 U.S. at 829; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (noting that regulation of speech must be reasonable and not an effort to suppress expression based on viewpoint); Lucas, *supra* note 24, at 1975 (stating that the Supreme Court has never found that speech could be both government speech and private speech in a public forum).

44. Lucas, *supra* note 24, at 1978–79.

45. *Id.* at 1979–80 ("The Court acknowledges that the difference between content discrimination and viewpoint discrimination sometimes is a matter of semantics, but has looked generally to whether the prohibition is on a particular perspective (viewpoint) or on a general subject matter (content).").

46. *See Rosenberger*, 515 U.S. at 829 (noting that viewpoint discrimination is "an egregious form of content discrimination").

47. *Perry Educ.*, 460 U.S. at 46 (recognizing that the government may regulate content in order to preserve a limited purpose public forum's objective, but it may not cross the line into restricting a speaker's viewpoint or opinion).

48. Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977).

49. 430 U.S. 705 (1977).

50. *Id.* at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

discrimination of private speech, its action constitutes a blatant violation of the First Amendment.[51]

First Amendment rights also cannot be denied solely based on a person's affiliation with a group or organization that the government finds disagreeable.[52] In *Healy v. James*,[53] a college president denied recognition to a local student organization because some of the national organization's chapters had been affiliated with violent and disruptive campus activity.[54] The Court held that although the organization could exist and express its views outside of the school, the school's decision not to recognize the organization based on its negative affiliations suppressed the group's right to free speech.[55]

Similarly, in *Robb v. Hungerbeeler*,[56] Missouri prevented a Knights of the Klu Klux Klan ("KKK") organization from participating in the state's Adopt-A-Highway program due to the group's affiliation with the national KKK organization and its history of violence.[57] The Supreme Court found this denial to be unconstitutional viewpoint discrimination because the KKK's participation in the Adopt-A-Highway program constituted a form of private expression under the First Amendment.[58] Therefore, viewpoint discrimination under the First Amendment is unacceptable when private speech is involved.

b. First Amendment forum analysis

If the speech in question is found not to constitute government speech, "traditional First Amendment forum analysis applies," and government

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51. *Id.*; *Rosenberger*, 515 U.S. at 829 (asserting that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant").

52. *See* Healy v. James, 408 U.S. 169, 185–86 (1972) ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."); Robb v. Hungerbeeler, 370 F.3d 735, 742 (8th Cir. 2004) (citing *Healy* for the associational rights implicit in the First Amendment).

53. 408 U.S. 169 (1972).

54. *Id.* at 186.

55. *Id.* at 183, 194 (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)) (reasoning that although the infringement of constitutional rights will often result from the necessity to maintain an ordered society, such rights must be shielded from "more subtle governmental interference").

56. 370 F.3d 735 (8th Cir. 2004).

57. *Id.* at 737–38.

58. *Id.* at 744–45 (citing Spence v. Washington, 418 U.S. 405, 409 (1974)) (acknowledging that First Amendment protection not only covers verbal speech, but also extends to "symbolic or expressive conduct that is 'sufficiently imbued with elements of communication.'").

property is classified as a public forum, limited purpose public forum or designated forum, or nonpublic forum.[59] Classifying the different types of forums allows a court to analyze properly which kinds of government regulations on speech and expression, if any, are appropriate.

To create a public forum, the government must intentionally decide to open "a nontraditional forum for public discourse."[60] In *International Society for Krishna Consciousness v. Lee*,[61] the Supreme Court ruled that an airport was not a traditional public forum because airports have traditionally been used for the purpose of air travel, not to promote the free exchange of ideas.[62] The Court reasoned that the mere fact that an airport allows the general public to freely visit does not mean the government purposely created a public forum.[63] When the government decides to create a public forum and subsequently limits the speech of private individuals, the Court applies strict scrutiny to determine whether the government's regulation is narrowly tailored to achieve a compelling objective.[64]

In a nonpublic forum, which concerns public property that is neither a public forum nor a limited purpose public forum, the government is reasonably permitted to restrict speech and expressive activity on the basis of content, but it may not restrict on the basis of viewpoint.[65] In *PMG International Division, LLC v. Rumsfeld*,[66] while considering a restriction on the availability of sexually explicit materials at military exchanges, the United States Court of Appeals for the Ninth Circuit held that a military exchange constituted a

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59. PMG Int'l Div., L.L.C. v. Rumsfeld, 303 F.3d 1163, 1169 (9th Cir. 2002); *see* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (recognizing the "forum based" approach that courts use to analyze restrictions placed on government property); *see also* Graham, *supra* note 26, at 712–13 (designating the forums as "traditional public forums, designated public forums, and non-public forums"); Lucas, *supra* note 24, at 1978–79 (citing the three types of public forums the Court has established).

60. *Krishna Consciousness*, 505 U.S. at 680 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 801 (1985)).

61. 505 U.S. 672 (1992).

62. *Id.* at 680.

63. *Id.* (citing Greer v. Spock, 424 U.S. 828, 836 (1976)).

64. *See* Lucas, *supra* note 24, at 1978–79 (discussing the applicability of strict scrutiny when the government restricts private speech in public forums, "requiring that [government] regulations be necessary and narrowly tailored to achieve a compelling state interest").

65. PMG Int'l Div., L.L.C. v. Rumsfeld, 303 F.3d 1163, 1171 (9th Cir. 2002) (citing Gen. Media Commc'ns, Inc. v. Cohen, 131 F.3d 273, 280 (2d Cir. 1997)).

66. 303 F.3d 1163 (9th Cir. 2002).

nonpublic forum.[67] Because the regulation restricted sexually explicit *content* in military exchanges, not a viewpoint, the regulation was found to be reasonable under the First Amendment.[68]

Unlike both public and nonpublic forums, a limited purpose public forum or designated forum[69] is a "nontraditional forum that the government has opened up for expressive activity by part or all of the public."[70] The basis for the limited purpose public forum is that the government can, at its discretion, purposely open up government property for the exchange of ideas.[71] However, a limited purpose public forum cannot simply be opened by government inaction; the opening of such a forum must be a voluntary decision by the government.[72] Thus, when deciding whether the government has created a limited purpose public forum, the courts examine "the nature of the property and its compatibility with expressive activity" and the "policy and practice" of the government to conclude whether the intent was to open up a nontraditional forum for engaging public discourse.[73]

Once the State creates a limited purpose public forum, it cannot regulate private speech based on the views and opinions of the speaker.[74] In *Perry Education Association v. Perry Local Educators'*

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67. *Id.* at 1170, 1172.

68. *Id.* at 1171–72.

69. While First Amendment jurisprudence recognizes more nuanced forum classifications, those distinctions are beyond the scope of this Comment, and this Comment uses those terms interchangeably. For further analysis on these classifications, see generally Ronnie J. Fischer, *"What's in a Name?": An Attempt to Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639 (2003).

70. *Id.* at 1169–70 (quoting Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976 (9th Cir. 1998)); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (noting that regulations of limited forums receive strict scrutiny).

71. Lucas, *supra* note 24, at 1979 (acknowledging that government property that has not traditionally been used for the purpose of disseminating ideas may be voluntarily opened as a new forum for that purpose).

72. *Id.* (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

73. *Id.* (quoting *Cornelius*, 473 U.S. at 802).

74. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."); *see also Rosenberger*, 515 U.S. at 829 (reasoning that the government must not regulate based on one's view of a particular subject); Graham, *supra* note 26, at 717–18 (elucidating that

Association,[75] the Indiana Education Employment Relations Board allowed the teachers' union, which had been elected as the sole bargaining representative for the district's public school teachers, to access the board's interschool mail system, but it denied access to a competing union.[76] The Court held that the school board's decision did not constitute a violation under the First Amendment.[77] Further, the Court rejected the respondent union's argument that the interschool mail system represented a limited purpose public forum because—even if the system was made available to some organizations, like the Girl Scouts and the YMCA—the forum would only be available to similar student-involved groups and not teacher unions.[78] Therefore, the Court ruled that because the interschool mail system was neither a limited purpose public forum nor a public forum, it was permissible for the Perry Local Educators' Association to be treated differently than the teachers' exclusive bargaining representative.[79]

In a limited purpose public forum, the government may not engage in viewpoint discrimination. The government may only regulate speech based on content in a limited purpose public forum if the regulation "preserves the purposes" of the forum.[80] Accordingly, government regulation of speech in a limited purpose public forum is subject to strict scrutiny and must be narrowly tailored to achieve a compelling state objective.[81] For example, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[82] a school refused to pay the printing costs for a Christian student publication solely because the publication "primarily promote[d] or manifest[ed]

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private speech within a limited purpose public forum is subject to "reasonable content limitations . . . so long as the limits are viewpoint neutral").

75. 460 U.S. 37 (1983).

76. *Id.* at 40.

77. *Id.* at 44 (reasoning that the First Amendment does not oblige "equivalent access to all parts of a school building in which some form of communicative activity occurs").

78. *Id.* at 47. The Perry Local Educators' Association argued that the interschool mail system constituted a limited purpose public forum due to the fact that "private non-school-connected groups" periodically used the system. *Id.*

79. *Id.* at 55 (emphasizing that "not all speech is equally situated" in a nonpublic forum, and "the State may draw distinctions which relate to the special purpose for which the property is used").

80. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1983); Lucas, *supra* note 24, at 1979 (noting that the government has some control over a limited purpose public forum, but once it is created, it is to be regarded as if it were a traditional public forum).

81. *Rosenberger*, 515 U.S. at 829; *Perry Educ.*, 460 U.S. at 46.

82. 515 U.S. 819 (1995).

a particular belief in or about a deity or an ultimate reality."[83] Because the university's Student Activities Fund represented a limited purpose public forum, the Court found the denial of payment for printing costs, solely based on the publication's message, to be unconstitutional viewpoint discrimination under the First Amendment.[84] Similarly, in *Good News Club v. Milford Central School*,[85] the Court held that when a school denied a religious organization access to school facilities, which the Court assumed was a limited purpose public forum, it was impermissible viewpoint discrimination.[86] Therefore, the First Amendment protects speech within a limited purpose public forum from viewpoint discrimination.[87]

c. Pleasant Grove City v. Summum *and permissible viewpoint discrimination in government speech*

Unlike private speech, for which viewpoint discrimination is impermissible, the State can, as part of *government* speech, engage in viewpoint discrimination without violating the First Amendment.[88] The Supreme Court rigorously examined the constitutional exemption of the government speech doctrine in *Pleasant Grove City v. Summum*,[89] in which a religious organization, Summum, requested permission from Pleasant Grove City, Utah, to erect a stone monument containing "the Seven Aphorisms of SUMMUM"—the religion's core principles—in the city's Pioneer Park.[90] Summum was

83. *Id.* at 822–23.

84. *Id.* at 824, 830 (finding the Student Activities Fund to be a limited purpose public forum, although it was "a forum more in a metaphysical than in a spatial or geographic sense," because its purpose was to "support a broad range of extracurricular student activities" related to the University's educational mission).

85. 533 U.S. 98 (2001).

86. *Id.* at 106, 112 (rejecting the school's argument that the restriction on access to its facilities was necessary in order to comply with the Establishment Clause of the First Amendment).

87. *Id.* at 106–07; *see also Rosenberger*, 515 U.S. at 829 (ruling that when the government targets a specific viewpoint instead of content in a limited purpose public forum, the government unmistakably violates the First Amendment); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983) ("When speakers and subjects are similarly situated, the State may not pick and choose.").

88. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (illustrating that the government entity has similar freedoms to express viewpoints under the First Amendment).

89. 555 U.S. 460 (2009).

90. *Id.* at 464–65. Summum bases its religious philosophy on seven "aphorisms" or principles: (1) psychokinesis, (2) correspondence, (3) vibration, (4) opposition,

founded in 1975 and is based in Salt Lake City, Utah,[91] which is about thirty-five miles from Pleasant Grove City.[92]

When Summum requested permission to erect its stone monument in Pioneer Park, the park had fifteen permanent displays, including eleven donated by private entities.[93] Examples of these privately-donated displays included a September 11 monument and a Ten Commandments monument.[94] The city denied Summum's request, stating that its practice was "to limit monuments in the Park to those that 'either (1) directly relate[d] to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community.'"[95] Two years later, the president of Summum again requested permission for the erection of the organization's monument, but the city council denied the request again.[96]

The organization responded by filing suit, alleging that the city's rejection of its monument constituted a violation of the Free Speech Clause of the First Amendment because the city accepted the Ten Commandments monument but denied the Summum monument.[97] Summum sought a preliminary injunction to require the city to allow the erection of its Seven Aphorisms monument.[98] The United States District Court for the District of Utah denied Summum's preliminary injunction.[99] On appeal, the United States Court of Appeals for the Tenth Circuit reversed, holding that the city could not reject Summum's monument without a compelling government objective

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(5) rhythm, (6) cause and effect, and (7) gender. *Seven Summum Principles*, SUMMUM, http://www.summum.us/philosophy/principles.shtml (last visited Aug. 19, 2016).

91. *Summum*, 555 U.S. at 465.

92. Driving Directions from Pleasant Grove City, Utah, to Salt Lake City, Utah, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for "Pleasant Grove City, Utah" and search destination field for "Salt Lake City, Utah").

93. *Summum*, 555 U.S. at 464–65.

94. *Id.* at 465.

95. *Id.* (quoting Joint Appendix at 61, *Summum*, 555 U.S. at 460 (No. 07-665), 2008 WL 2415597) (the city passed a resolution putting the monument policy into writing one year later).

96. *Id.* at 466 (noting that Summum's letter failed to address the city policy requirements by describing the monument, its historical significance, or Summum's connection to the community).

97. *Id.*

98. *Id.*

99. *Id.*

because parks have traditionally been considered public forums involving private speech.[100]

Reversing the Tenth Circuit's decision, the Supreme Court held that the city's decision did not violate the First Amendment because the placement of such a monument in a public park constituted government speech.[101] The Court found that it was necessary for the city to discriminate based on viewpoint in selecting donated monuments to reduce "clutter" in the park and to keep the park's "longstanding and cherished" monuments in place.[102] The Court reasoned that the erection of a monument was a form of government speech because the monuments that were ultimately permitted were accepted with the intent to convey a government message.[103] Accordingly, traditional First Amendment forum analysis is inapplicable to "the installation of permanent monuments on public property."[104]

B. License Plate Speech Jurisprudence

The Supreme Court in *Walker* departed from the jurisprudence of traditional license plate speech analysis. In *Wooley*, individuals were arrested for covering up a part of their vehicle license plates that included New Hampshire's motto, "Live Free or Die."[105] The individuals asserted that the motto was offensive to their "moral, religious, and political beliefs."[106] The Court found that requiring state residents to display a motto they disagreed with discriminated against the residents' viewpoint.[107] Although the Court recognized the State had a legitimate interest in promoting its motto, it found that a state could not do so by infringing on one's First Amendment

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100. Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 n.2, 1050 (10th Cir. 2007) (remarking that the Tenth Circuit had previously held that the Ten Commandments monument represented private, not government, speech), *rev'd*, 555 U.S. 460 (2009).

101. *Summum*, 555 U.S. at 472.

102. *Id.* at 479–80 (holding that characterizing public parks as traditional public forums would cause parks to reject all donated monuments and would, thus, lead to the parks' closure as a forum).

103. *Id.* at 472 ("Public parks are often closely identified in the public mind with the government unit that owns the land . . . . Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.").

104. *Id.* at 480.

105. Wooley v. Maynard, 430 U.S. 705, 707–08 (1977).

106. *Id.* at 707.

107. *See id.* at 715 (asserting that just because the majority of people agree with the state's motto does not mean that those who oppose it must comply against their will).

right to refrain from supporting speech the individual finds morally, religiously, and politically objectionable.[108]

Similar to the issue before the Supreme Court in *Walker*, the plaintiff in *Choose Life Illinois, Inc. v. White*[109] claimed that the State's rejection of the "Choose Life" plate, which conveyed the message of choosing life over abortion, violated the First Amendment.[110] Finding that the messages displayed on a specialty plate were more closely associated with the driver of the vehicle than the government, the United States Court of Appeals for the Seventh Circuit held that license plate speech was not the speech of the government.[111] Applying traditional First Amendment forum analysis, the court found that specialty license plates represented nonpublic forums, emphasizing that their overall purpose was to serve as a form of vehicle identification.[112] Because the government may restrict speech based on content in a nonpublic forum, the court held that the rejection of the "Choose Life" specialty plate was a valid "content-based but viewpoint-neutral restriction."[113] The State outlawed *all* specialty license plates that involved the subject of abortion, which the Court ruled to be a permissible regulation on the basis of content.[114]

The United States Court of Appeals for the Second Circuit also recently found that specialty license plates constitute nonpublic forums.[115] In *Children First Foundation, Inc. v. Fiala*,[116] the court followed the Seventh Circuit's decision in *Choose Life*, holding that rejecting the plaintiff's anti-abortion license plate constituted permissible content-based discrimination, not viewpoint discrimination.[117] The court recognized that New York employed the same type of content-based regulation as Illinois employed in *Choose Life*, explaining that, by rejecting such a controversial issue, New York

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108. *Id.* at 713, 717 (concluding that "the State's interest is to disseminate an ideology" and that interest must not outweigh an individual's First Amendment rights).

109. 547 F.3d 853 (7th Cir. 2008).

110. *Id.* at 855 (arguing that the Secretary's failure to issue the license plates constituted viewpoint discrimination).

111. *Id.* at 864 (calling the driver the "ultimate communicator of the message").

112. *Id.* at 865.

113. *Id.* (finding that "Illinois has not . . . prohibited the display of a viewpoint-specific symbol," such as the Confederate battle flag).

114. *Id.* (clarifying that there is a vast difference between discriminating against a viewpoint on a subject and a restriction against the subject altogether).

115. Children First Found., Inc. v. Fiala, 790 F.3d 328, 350 (2d Cir. 2015), *withdrawn*, 611 F. App'x 741 (2d Cir. 2015).

116. 790 F.3d 328 (2d Cir. 2015).

117. *Id.* at 350.

was intending to "preserve viewpoint neutrality" instead of discriminate against particular viewpoints.[118]

The federal courts of appeals have applied First Amendment forum analysis to license plate speech in a way that completely differs from the Supreme Court's analysis in *Walker*.[119] Recognizing that license plate speech is not governmental but private, the circuit courts appropriately considered forum analysis in their examinations of the license plate speech issue. Further, the Supreme Court had already established in *Wooley* that the First Amendment protects an individual from government control of license plate speech.[120] Therefore, the Supreme Court in *Walker* departed from the jurisprudence of license plate speech by declining to apply traditional First Amendment forum analysis.

C. Walker v. Texas Division, Sons of Confederate Veterans, Inc.

Under Texas statutory law, vehicle owners must display license plates, which are owned by the state, for the purpose of vehicle registration and identification.[121] Like in other states, the state name, "TEXAS," is displayed in large lettering across the top of its license plates, including specialty license plates.[122]

For an additional fee, Texas and many other states allow vehicle owners to choose from a selection of specialty license plates instead

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118. *Id.* at 351 (finding that by implementing such a measure, the State was intending to ensure "that plates issued by the State do not present or support *either* side").

119. *Compare* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015) (rejecting traditional First Amendment forum analysis and, instead, analyzing license plate speech as government speech), *with Children First*, 790 F.3d at 334 (employing forum analysis and finding license plate speech to represent speech within a nonpublic forum), *and Choose Life*, 547 F.3d at 855 (applying forum analysis and concluding that specialty license plates are nonpublic forums).

120. Wooley v. Maynard, 430 U.S. 705, 717 (1977).

121. TEX. TRANSP. CODE ANN. § 504.943 (West 2013).

122. *Walker*, 135 S. Ct. at 2244. Texas's standard license plates display, in addition to the state name, "a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan 'The Lone Star State.'" *Id.* (citing *The Texas Classic FAQs*, TEX. DEP'T MOTOR VEHICLES, http://www.txdmv.gov/motorists/license-plates (click "General Issue License Plates" hyperlink and then click "The Texas Classic FAQs") (last visited Aug. 19, 2016)). Historically, Idaho was the first state to display a slogan on its plates in 1928, which led other states to follow suit. *Id.* at 2248. Since then, states have used specialty license plates to promote certain industries, encourage tourism, and urge action. *Id.* In 1936, Texas displayed its first slogan, "Centennial," on its standard license plates. *Id.* The Texas plates promoted a San Antonio event in 1968 by displaying "Hemisfair 68." *Id.* In 1995, Texas included "150 Years of Statehood" on its plates. *Id.*

of standard plates.[123] Texas now offers more than 400 varieties of specialty license plates to "give your vehicle a personal touch."[124] The specialty plates offered in Texas include choices such as "I'd Rather Be Golfing," "Mighty Fine Burgers," "Oklahoma State University," and "Fight Terrorism."[125]

Texas's specialty license plate designs are selected in three different ways: (1) the Texas Legislature specifically requests the creation of a new specialty license plate;[126] (2) a private individual or organization requests a design to be created by a private vendor designated by the State and approved by the Board;[127] or (3) the Board approves the creation of a new specialty license plate "on its own initiative" or after receiving an application from a nonprofit entity who wants to sponsor a specialty plate.[128] Each time a new specialty plate is created for a private entity, the private entity must pay an $8,000 deposit.[129]

In both 2009 and 2010, the Sons of Confederate Veterans ("SCV") applied for a Texas specialty license plate, proposing a design that featured the Confederate battle flag surrounded by a gold border and the words "Sons of Confederate Veterans 1896."[130] The SCV is an organization comprised of male descendants of Confederate soldiers.[131] The purpose of the organization is to "honor and keep alive the memory of the Confederacy and the principles for which Confederates fought, thus giving the world an understanding and appreciation of the

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123. *Id.* at 2244.

124. *Specialty License Plates*, TEX. DEP'T MOTOR VEHICLES, http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (last visited Aug. 19, 2016).

125. *Id.*

126. *See, e.g.*, TEX. TRANSP. CODE ANN. § 504.602 (West 2013) (requiring the "Keep Texas Beautiful" specialty plate).

127. TRANSP. § 504.6011(a).

128. TRANSP. § 504.801(a)–(b). The approval process for specialty license plates varies by state. In Florida, the legislature—not the Department of Highway Safety and Motor Vehicles—considers proposals from organizations and enacts legislation to create a new specialty license plate. *See* FLA. STAT. ANN. § 320.08053 (West) (2014). Missouri also requires legislative approval of new specialty license plate proposals, but its process allows public commentary before submission of the proposal to the Missouri Legislature. *Specialty License Plate Development Process*, MO. DEP'T OF REVENUE, http://dor.mo.gov/motorv/plateprocess (last visited Aug. 19, 2016).

129. TRANSP. § 504.702(b)(3); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2261 (2015) (Alito, J., dissenting).

130. *Walker*, 135 S. Ct. at 2245 (majority opinion).

131. Buddy Patterson, *A Brief History of the Sons of Confederate Veterans*, SONS CONFEDERATE VETERANS, TEX. DIVISION, http://scvtexas.org/What_Is_The_SCV.html (last visited Aug. 19, 2016).

Southern people and their brave history."[132] Thus, the SCV views the Confederate battle flag as a positive symbol of the South that commemorates their ancestors and southern history.[133]

After the SCV applied for its specialty license plate, the Board invited public comment on the design on its website and at an open meeting.[134] The Board ultimately considered the design at a separate meeting in November 2011 after receiving public comments and letters from elected officials.[135] The Board unanimously rejected the proposed design due to concerns that many would view the plate as offensive and react in a way that resulted in reckless driving.[136]

This specialty plate design was particularly challenging for the Board. Under Texas statutory law, the Board may reject the creation of a specialty license plate proposed by a nonprofit entity "if the design might be offensive to any member of the public . . . or for any other reason established by the rule."[137] For many people, the Confederate battle flag symbolizes white supremacy and a system of perpetual subordination of African-Americans.[138] The flag is often associated with white supremacist organizations such as the KKK and the White Aryan Resistance.[139] However, the Confederate battle flag's history and initial purpose tell quite a different story. The Confederate battle flag was originally designed and created by General P.G.T. Beauregard after the inability to distinguish between the Union flag and the similar Confederate flag caused mass

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132. *Id.*

133. *See, e.g.*, Barbara Liston, *Confederate Flag Supporters Rise Up to Defend Embattled Symbol*, REUTERS (July 12, 2015, 6:20 PM), http://www.reuters.com/article/us-usa-confederate-ride-idUSKCN0PM11Q20150712 (reporting on some people expressing support for the Confederate battle flag during a debate across the South on whether the flag should be displayed in public spaces).

134. *Walker*, 135 S. Ct. at 2245.

135. *Id.*; *id.* at 2258 (Alito, J., dissenting).

136. *Id.* at 2258 (Alito, J., dissenting).

137. TEX. TRANSP. CODE ANN. § 504.801(c) (West 2013).

138. *See* James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 513–14 (1991) (quoting Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV)) (discussing that such supremacy during the Civil War era left blacks with "no rights which the white man was bound to respect"); *see also* Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 543 (2002) (asserting that the Confederate battle flag represents a "badge of servitude").

139. Tsesis, *supra* note 138.

confusion on the battlefield.[140] As a result, General Beauregard created a flag that was markedly different from "the Stars and Stripes," allowing the Confederate soldiers to easily identify the Confederate flag from the Union flag during battle.[141] Thus, the Confederate battle flag provided a "rallying symbol for Confederate troops heading into battle."[142]

These same concerns did not appear to trouble the Board, however, when it approved a design for another potentially offensive specialty license plate by the Buffalo Soldiers. It approved the Buffalo Soldiers design by a 5–3 vote in the same meeting in which it denied the SCV's design.[143] Those who would select the Buffalo Soldiers plate design would pay a fee, the proceeds of which would go to the Buffalo Soldier National Museum.[144] The museum exists in order to "preserv[e] the legacy and honor of the African American soldier," who "fought with distinction" against Native Americans in the Indian Wars.[145] Some Native Americans expressed through the comment process that they found the design offensive: one leader stated that his feelings about the Buffalo Soldiers were identical to African-Americans's feelings regarding the Confederate battle flag.[146] Although Native Americans expressed concerns about the Buffalo Soldiers plate similar to those who commented against the SCV's proposed plate, the Board ultimately approved the Buffalo Soldiers plate, and it is now an available specialty plate option in Texas.[147] In addition to the Buffalo Soldiers plate, Texas has also approved a selection of specialty plates that involve potentially offensive issues, including slogans and messages such as "Choose Life," which refers to the pro-life stance opposing

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140. C.D. Jaco, *The Stars and Bars Is Not a Racist Symbol*, WASH. POST (Feb. 13, 1988), https://www.washingtonpost.com/archive/opinions/1988/02/13/the-stars-and-bars-is-not-a-racist-symbol/fa3fddcf-93a7-4441-91fc-2e2a74ab246f/; *see also* Forman, *supra* note 138, at 505, 513 (examining the flag's initial purpose).

141. Jaco, *supra* note 140.

142. Forman, *supra* note 138, at 505.

143. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2258 (2015) (Alito, J., dissenting).

144. *Id.* (citing BUFFALO SOLDIERS NAT'L MUSEUM, http://buffalosoldiermuseum.com (last visited Aug. 19, 2016)).

145. *Id.*

146. *Id.*; *see also* Gary Scharrer, *Indian Group Objects to Buffalo Soldiers Plates*, HOUS. CHRON. (Nov. 26, 2011, 8:08 AM), http://www.chron.com/news/houston-texas/article/Indian-group-takes-issue-with-Buffalo-Soldier-2293128.php (quoting the president of the American Indian Genocide Museum as saying Native Americans are "forced to relive an American holocaust" when they see symbols of the Buffalo Soldiers).

147. *Walker*, 135 S. Ct. at 2258 (Alito, J., dissenting); *Specialty License Plates*, *supra* note 124.

abortion, and "Come & Take It," a slogan that commonly symbolizes rebellion against the deprivation of citizens' rights.[148]

Following the rejection of its proposed specialty plate design, SCV brought suit against the chairman and members of the Board in 2012, arguing that the Board's decision to reject its proposed design was a violation of the Free Speech Clause of the First Amendment.[149] The SCV also sought an injunction requiring the Board to approve its proposed design.[150] The District Court ruled in favor of the Board, finding that designs on specialty license plates represent government speech.[151] The Court of Appeals for the Fifth Circuit reversed, holding that the license plate design constituted private speech, and the Board's rejection of the SCV's design was unconstitutional viewpoint discrimination.[152]

On June 18, 2015, the Supreme Court ruled that specialty license plate designs are government speech and the State could therefore practice viewpoint discrimination in rejecting the SCV's proposed design.[153] Relying on *Summum*, the Court reasoned that forum analysis was inapplicable to specialty license plates because the State was speaking on its own behalf.[154] The Court stated that, like monuments erected in public parks, the "specialty license plate designs 'are meant to convey and have the effect of conveying a government message.'"[155] The Court explained that Texas's policies and the nature of the state's license plate led to the conclusion that Texas did not purposely create a limited purpose public forum on its specialty license plates.[156] The Court further reasoned that the

148. *Specialty License Plates*, *supra* note 124; Craig Hlavaty, *The Story Behind the Co-Opting of "Come and Take It,"* HOUS. CHRON. (Oct. 2, 2015, 1:59 PM), http://www.chron.com/houston/article/Come-and-take-it-in-Texas-turns-179-5796732.php (explaining the origins of the phrase and how it has evolved over time).

149. Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, No. A-11-CA-1049-SS, 2013 WL 1562758, at *1 (W.D. Tex. Apr. 12, 2013), *rev'd*, 759 F.3d 388 (5th Cir. 2014), *rev'd sub nom. Walker*, 135 S. Ct. 2239 (2015).

150. *Id.*

151. *Id.* at *25–26 ("[T]he First Amendment does not require [Texas] to endorse the battle flag by putting it on government-controlled property where the state does not want it.").

152. Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 400 (5th Cir. 2014), *rev'd sub nom. Walker*, 135 S. Ct. 2239 (2015).

153. *Walker*, 135 S. Ct. at 2253.

154. *Id.* at 2250.

155. *Id.* at 2251 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).

156. *Id.* The Court provided three reasons for negating the limited purpose public forum argument: (1) the State has the final say regarding each specialty plate

specialty license plate did not represent a public or a nonpublic forum.[157] Therefore, First Amendment protection that is typically afforded to private speech in such forums is unwarranted in regards to specialty license plates.[158]

II. ANALYSIS OF *WALKER* AND ITS POTENTIAL CONSEQUENCES FOR PRIVATE SPEECH

A. Walker *Incorrectly Relied on* Summum

In *Walker*, the Supreme Court relied almost exclusively on *Summum* to conclude that First Amendment forum analysis was inapplicable to specialty license plates because the State was speaking on its own behalf.[159] Further, the Court ruled that the government could discriminate against a viewpoint as a valid practice of government speech.[160] As a result of relying on *Summum*, the Court chose to strip specialty license plates of any First Amendment protections that safeguard citizens' private speech from government interference.[161]

1. Monuments are distinguishable from specialty license plates

Specialty license plates differ from the monuments discussed in *Summum* because the plates are not created for the purpose of conveying government messages, states are not particularly selective when approving specialty license plate designs, and specialty license plates are neither rare nor subject to spatial limitations.[162]

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design, (2) Texas is the owner of each specialty plate design, and (3) the characteristics of the license plate, such as its display of the state name and the plate's tradition of displaying government speech, exemplify Texas's association with the designs on the specialty license plates. *Id.*

157. *Id.* (finding that specialty license plates involve "expressive conduct" on the part of the government, and thus, constitute government speech that renders forum analysis inapplicable).

158. *Id.* at 2250.

159. *Id.* at 2249–50.

160. *Id.*

161. *Id.* at 2255 (Alito, J., dissenting).

162. *Id.* (listing three factors that led the *Summum* court to find monuments to be government speech).

a. Specialty license plates were not created for the purpose of conveying government messages

Governments have used monuments throughout history to communicate authority, power, and national principles.[163] Unlike monuments, license plate slogans have not always constituted government messages.[164] In the 1990s, Texas began offering specialty license plates with ten different slogan choices.[165] Since then, the State has allowed private entities to propose their own messages and display them on specialty license plates, like "Mighty Fine Burgers," "I'd Rather Be Golfing," and "I am a Texas Realtor."[166]

Thus, a license plate's purpose is fundamentally different from a monument's purpose. Monuments do not serve as sources of advertisements where private entities display their own messages.[167] One would not expect to see "Mighty Fine Burgers" or "I'd Rather Be Golfing" emblazoned on the Statue of Liberty, the Lincoln Memorial, or even monuments in a local park. Unlike license plates, monuments are created for the sole purpose of expressing and embodying a specific government message.[168]

In contrast to monuments, states allow private entities to alter the states' standard license plates. The very existence of the opportunity for a private entity to pay to create specialty license plates proves this fact. Monuments, however, are created and erected with permanence in mind and are not likely to be altered, changed, or moved.[169] For example, the government does not give a private entity the opportunity to pay to alter the Lincoln Memorial by displaying its own message or design on the monument.

Further, a private entity or individual's choice to *pay* to create or display a specialty license plate indicates that the plate's message is

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163. *Id.* at 2258–59 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)) ("[S]ince ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power.").

164. *Id.* at 2259–60 (noting that it took more than seventy years for license plates to begin displaying specialty messages).

165. *Id.* at 2260 (citing TEX. DEP'T OF TRANSP., THE HISTORY OF TEXAS LICENSE PLATES 101 (1999), ftp://ftp.dot.state.tx.us/pub/txdot-info/vtr/plate_history.pdf).

166. *Id.* at 2255–57; *see Specialty License Plates*, *supra* note 124 (listing the many specialty license plates Texas now offers).

167. *See Walker*, 135 S. Ct. at 2260 (Alito, J., dissenting) (contrasting monuments, "which have been used to convey government messages for centuries," to Texas's specialty places, which have allowed private entities to propose and display their own messages for twenty years).

168. *Id.* at 2258–59.

169. *Id.* at 2261.

his or her own and not the government's. To create a new specialty license plate, one must pay a costly deposit,[170] and to display a specialty plate instead of a standard plate on one's vehicle, the individual must pay an increased annual registration fee.[171] The typical vehicle owner would not want to pay an increased amount to display a government message and not his or her own. The State asserts that the messages it displays on specialty license plates constitute speech on behalf of the government, but if that is true, then Texas is being paid to speak.[172] If the State really desires to speak out in support of eating Mighty Fine Burgers instead of McDonald's burgers, golfing instead of going to work, or being a realtor instead of an insurance agent, the State does not need to be paid to say such messages.[173] Texas is fully capable of saying what it wants to say, without receiving funds from the public, if it feels so strongly about a particular subject or activity.[174]

There is a great distinction between Texas speaking its own message and Texas stamping its approval on a private speaker's message.[175] The mere fact that the state name, "TEXAS," is displayed on the specialty license plate does not strip the plate of its private speech characteristics.[176] If a license plate's innate purpose is to serve as vehicle identification in Texas, as the government asserts, it seems illogical for the government to desire displaying its own messages on something that is solely meant to provide vehicles with identification, and then require payment from an individual who displays such messages. It is more rational to conclude that, because the government asserts that the purpose of a license plate is to provide vehicle identification, the government has made a deliberate decision to open the plate up as a forum, giving individuals and organizations

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170. *Id.* (identifying that an $8,000 deposit is required to create a new specialty license plate).

171. *Id.*; *Types of Specialty License Plates in Texas*, DMV.ORG, http://www.dmv.org/tx-texas/special-license-plates.php (last visited Aug. 19, 2016).

172. *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting) (noting that the fees go beyond the program's administrative costs).

173. *Id.*

174. *Id.*

175. *Id.* (discussing the difference between government speech, which is "speech by the government in furtherance of its programs," and government approval of private speech).

176. *Id.* at 2261–62 (asserting that Texas's specialty license plates serve as "little mobile billboards" in which the State sells the available space to private entities for the purpose of expressing their own personal ideas and messages).

a choice to pay to personalize their license plates as a form of private speech. Because private entities propose personal designs and ultimately pay a vastly higher price to create those designs, the specialty plates represent private speech.[177] Therefore, Texas's specialty license plate program serves the purpose of generating revenue, not conveying its own government messages.[178]

b. States do not practice extreme selectivity when choosing which specialty license plate designs to approve

The parks mentioned in *Summum* practiced significant selectivity when determining which monuments they will erect.[179] Although many park monuments were privately donated, the city "t[ook] some care" in approving such monuments to ensure they conveyed approved government messages.[180] In *Summum*, the city explained that it limited monuments in its Pioneer Park to only those that met its selection criteria based on its relation to the city's history or the group's ties to the community.[181] Unlike the selectivity practiced in choosing monuments, the specialty license plate program does not limit designs to purely governmental messages.[182] The proposed plates only need to meet the State's standards of reflectivity, legibility, and design.[183] Clearly, a specialty plate promoting Mighty Fine Burgers over McDonald's burgers, golfing over going to work, or being a realtor over being an insurance agent is private, not government, speech.

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177. *Id.*

178. *Id.* (citing *Special Plates Revenue 1994–2014*, TEX. DEP'T MOTOR VEHICLES, http://www.txdmv.gov/reports-and-data/doc_download/5050-specialty-plates-revenue-fy-1994-2014 (last visited Aug. 19, 2016)) (indicating that the program brings in millions of dollars for the state each year).

179. *Id.* at 2260; *see also* Pleasant Gove City v. Summum, 555 U.S. 460, 471–72 (2009) (explaining that both the federal government and local governments accept private donations for memorials but still control their selection process and content).

180. *Summum*, 555 U.S. at 472; *see also Walker*, 135 S. Ct. at 2259 (Alito, J., dissenting) (recognizing that *Summon* provided no examples of parks open to any monument that a group or individual desired).

181. *Summum*, 555 U.S. at 465; *see also supra* text accompanying note 95.

182. *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting).

183. *Id.* at 2260 (citing TEX. DEP'T OF MOTOR VEHICLES, PROPOSING A SPECIALTY LICENSE PLATE (2004), http://www.txdmv.gov/motorists/license-plates/sponsoring-a-specialty-license-plate (click "How to Propose a Specialty License Plate")).

c. Specialty license plates are widely available and not subject to spatial limitations

Public parks are subject to spatial limitations that restrict the number of permanent monuments that can be built in a given space;[184] therefore, state governments only allow construction of monuments that serve a government purpose.[185] Unlike monuments, individuals and organizations do not design specialty license plates with a government purpose in mind.[186] The purpose of creating a "Mighty Fine Burgers" specialty license plate is not synonymous with the purpose of erecting the Lincoln Memorial. The "Mighty Fine Burgers" specialty license plate was likely created for the purpose of advertising, and drivers that have paid to display the license plate on their vehicles are likely fans and loyal customers of Mighty Fine Burgers. The Lincoln Memorial, on the other hand, was not created for advertisement purposes; it was created and erected to serve a government purpose—honoring Abraham Lincoln and his contributions to the United States.[187]

Likewise, states do not create specialty license plates with permanency in mind. In *Summum*, it was important for the city to consider the spatial limitations in its Pioneer Park before allowing another monument to be erected.[188] The city decided not to construct the proposed Summum monument because it did not conform with the city's selection criteria.[189] If the city had allowed Summum's monument, it would have taken space from a future monument that met the city's selection criteria and thus served a government purpose. Unlike the monument at issue in *Summum*, specialty license plates can be moved, changed, and altered.[190] They are lightweight, mobile, and unlimited.[191] As of now, Texas has more than 400 specialty plates to choose from, boasting an array of

184. *Id.* at 2261.
185. *Id.* at 2259.
186. *Id.* at 2259–60.
187. *Lincoln Memorial*, NAT'L MUSEUM AM. HIST., http://americanhistory.si.edu/changing-america-emancipation-proclamation-1863-and-march-washington-1963/1963/lincoln-memorial (last visited Aug. 19, 2016) (stating that the Lincoln Memorial was erected in 1922 for the purpose of "heal[ing] national divisions caused by the Civil War").
188. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 478–79 (2009) ("[P]ublic parks can accommodate only a limited number of permanent monuments.").
189. *Id.* at 465.
190. *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting).
191. *Id.*

different designs and slogans.[192] If the government were concerned about space and amount, it would have stopped accepting specialty license plate applications well before it approved 400 designs.[193] Thus, the availability of specialty license plates is not constrained by spatial limitations.

In *Walker*, the Court relied almost entirely on *Summum*.[194] However, as explained above, such reliance was inappropriate because specialty license plates are not analogous to the monuments at issue in *Summum*: specialty plates serve different purposes, have different selection criteria, and are widely available.[195] Therefore, by relying on *Summum*, the *Walker* Court reached the wrong decision.

2. Specialty license plates are limited purpose public forums and therefore customized messages and designs constitute private speech

Texas's specialty license plate program turns such license plates into limited purpose public forums because it allows private entities to purchase space on its license plates to convey a private, personal message.[196] To generate revenue for the state, Texas has opened up something that was initially created to identify vehicles, now allowing private entities to personalize their license plate and to promote their individual cause for an increased fee.[197] By purposely creating a limited purpose public forum, the State is barred from discriminating based on viewpoint.[198] However, the State may still reasonably restrict speech on the basis of content in a limited purpose public forum, just as New York and Illinois restricted content on the subject of abortion in *Children First* and *Choose Life*.[199]

Specialty license plate designs serve individual purposes because they identify personal preferences and ideals, and promote hobbies and activities. When viewing a specialty license plate that displays the message "I'd Rather Be Golfing," one can easily conclude that such a

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192. *Specialty License Plates*, *supra* note 124.

193. *See Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting) (explaining that the only limitation on the amount of specialty license plates in a state is the amount of registered vehicles in that state).

194. *Id.* at 2258.

195. *See supra* Sections II.A.1(a)–(c).

196. *Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting).

197. *Id.* at 2261–62.

198. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

199. *See* Children First Found., Inc. v. Fiala, 790 F.3d 328, 350 (2d Cir. 2015), *withdrawn*, 611 F. App'x 741 (2d Cir. 2015) (finding the rejection of an anti-abortion license plate to be a permissible content restriction based on a category of speech, not viewpoint); Choose Life Ill., Inc. v. White, 547 F.3d 853, 865 (7th Cir. 2008) (same).

slogan represents the views of the individual driving the vehicle, not the views of the State.[200] The individual is saying that he would much rather be golfing than sitting in traffic on his way to work, or doing anything else for that matter. When passing a vehicle displaying such a message, one would not conclude that the government is conveying the message.[201] A similar conclusion arises when observing a vehicle that displays a license plate stating "I am a Texas Realtor," "Mighty Fine Burgers," or "Oklahoma State University." The State of Texas would likely not say that it is a Texas realtor, or that it supports Oklahoma State University over one of its own schools, the University of Texas. Thus, the speech and expression displayed on specialty license plates should be private speech because it is conveying a message from a private individual or entity, not the government. Because specialty license plate speech should represent private speech in a limited purpose public forum and not government speech, Texas cannot practice viewpoint discrimination in choosing one plate's design over another.[202]

3. The Court exercised impermissible viewpoint discrimination in denying the SCV's proposed specialty plate design

As the State cannot compel an individual to display a motto he disagrees with on a standard license plate under the First Amendment,[203] the State should not be permitted to reject an individual's specialty plate design based on his ideas or views, even if the State does not agree with these views. Texas has practiced unconstitutional viewpoint discrimination by rejecting SCV's proposed specialty plate design. Discriminating against a proposed design, solely because its message has the potential to offend many

200. *See, e.g.*, Sumner Fontaine, Recent Development, *The South Will Ride Again: License Plates and First Amendment Speech in* Texas Division, Sons of Confederate Veterans, Inc. v. Vandergriff, 89 TUL. L. REV. 921, 930 (2015) (arguing that the messages displayed on specialty license plates can logically be associated with the driver or owner of the vehicle, which would, thus, represent private speech).

201. *Id.*

202. *Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting); *see Rosenberger*, 515 U.S. at 829 (emphasizing that the government may not discriminate based on a speaker's view "even when the limited public forum is one of its own creation"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (noting that reasonable regulations on limited public forums are permitted to maintain its intended purpose, but it shall not be based on the viewpoint).

203. Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977) (holding that New Hampshire could not compel a state resident to display "Live Free or Die" on a license plate as a condition to drive).

people, is discriminating against a viewpoint.[204] In *Wooley*, the Court declared that just because the majority of people agreed with New Hampshire's motto, "Live Free or Die," did not mean that one who opposed the motto was required to continue displaying it on his license plate.[205] In *Walker*, many people disagreed with the SCV's proposed Confederate battle flag design, evidenced by the influx of public comments voicing many people's objections.[206] However, even if a majority of people in Texas opposed the design, it does not mean that those who support it should have their license plate design rejected: under *Wooley*, it is a violation of the First Amendment to require an individual to submit to the views of the majority when he finds those views objectionable.[207]

The Board's argument that the SCV's proposed design would be offensive and warranted rejection is unpersuasive because the Buffalo Soldiers' design was approved in the same meeting, despite being offensive to some Native Americans.[208] If the SCV's specialty plate design was rejected because of offensiveness, then the Buffalo Soldiers' design should have also been rejected. The Board should have decided whether to approve the SCV's design and the Buffalo Soldiers' design using the same standard; it should not be able to choose when it wants to analyze the offensiveness of a particular design. The mere fact that the Board approved the Buffalo Soldiers' design in the same meeting in which it rejected the SCV's design constituted viewpoint discrimination.[209] The Board was clearly not concerned that the Buffalo Soldiers' design offended Native Americans, but it was concerned about the offensive nature of the

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204. *Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting) (arguing that the stated basis of the rejection—that it was offensive—"indisputably demonstrate[s] that the Board denied Texas SCV's design because of its viewpoint"); *see also Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals to hold a view different from the majority . . . .").

205. *Wooley*, 430 U.S. at 715 (noting that "[t]he fact that most individuals agree . . . is not the test").

206. *See Walker*, 135 S. Ct. at 2245 (quoting Joint Appendix at 64, *Walker*, 135 S. Ct. 2239 (2015) (No. 14-144), 2014 WL 7498018) (identifying that the Confederate battle flag design was rejected "because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable").

207. *Wooley*, 430 U.S. at 715; *see* Mangone, *supra* note 15, at 124 ("A government cannot make its citizens use their private property to act as a canvas for government paint.").

208. *Walker*, 135 S. Ct. at 2258 (Alito, J., dissenting).

209. *Id.* at 2262–63 ("Allowing States to reject specialty plates based on their potential to offend is [unconstitutional] viewpoint discrimination.").

SCV's design. There could not be a better example of viewpoint discrimination than what is apparent here.

Furthermore, many of the already-approved specialty license plates in Texas have the potential to offend.[210] Texas has approved and offers the "Choose Life" plate, yet New York has denied the plate design because it is "so incredibly divisive" and offends so many.[211] Similarly, the Texas Trophy Hunters Association's specialty plate has the potential to offend those who strongly uphold animal rights, and the "Come & Take It" specialty plate may offend those who are avid proponents of gun control.[212] The Board's concern for offensiveness is a weak argument justifying the rejection of SCV's proposed specialty plate design.

Given that the purpose of Texas's specialty plate program is raising state revenue,[213] the Board's rationale for denying the SCV's proposed specialty plate design is hardly sufficient when it has accepted other potentially offensive designs. The purpose of specialty license plates is not to promote government messages; the purpose is to raise state revenue, evidenced by the fact that a private entity is required to pay a costly deposit to create a new specialty plate.[214] It is irrational to conclude that an individual would want to pay more to display the government's speech and not his or her own. When individuals apply for specialty license plates, it is highly doubtful that they go through the process believing that their message or design, for which they are paying an additional fee, will be construed as the government's speech. Thus, if the SCV wants to pay an $8,000 deposit to create its own specialty plate with its own message and design, then it should not be barred from participating in Texas's program.

The fact that many associate the Confederate battle flag with negative, racial connotations[215] is not a sufficient basis to deny the SCV's proposed plate design. Many others, like the members of the

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210. *Id.* at 2262.

211. *See id.* (citing Children First Found., Inc. v. Fiala, 790 F.3d 328, 352 (2d Cir. 2015), *withdrawn*, 611 F. App'x 741 (2d Cir. 2015)).

212. *See Specialty License Plates*, *supra* note 124 (displaying the Texas Trophy Hunters Association and "Come & Take It" plates among the more than 400 options).

213. *Walker*, 135 S. Ct. at 2261–62 (Alito, J., dissenting).

214. *See supra* notes 170–71 and accompanying text (discussing the financial requirements for private entities to secure their own specialty license plate).

215. *See, e.g.*, Naomi Shavin, *The Confederate Flag Is a Racist Symbol. Just Ask the KKK.*, NEW REPUBLIC (July 1, 2015), https://newrepublic.com/article/122216/confederate-flag-still-flying-today-because-kkk (describing the history of the flag's use as a symbol of the KKK).

SCV, view the Confederate battle flag as a commemorative symbol of their ancestors who represented the South in the Civil War, and thus, a symbol of southern pride.[216] Whatever *view* one has about the Confederate battle flag, "the flag expresses a *viewpoint*."[217] Just because many view the flag as a symbol of overt racism does not mean the SCV should not be allowed to participate in the Texas specialty plates program and to contribute to state revenues.[218] Therefore, a specialty license plate's potential to offend should not be a consideration during the application and approval process because it represents unconstitutional viewpoint discrimination.

In a limited purpose public forum, the State may not determine what viewpoint is right or wrong, good or bad. Speech in a limited purpose public forum is treated as speech within a traditional public forum, and therefore, regulation of such speech is subject to strict scrutiny.[219] The Supreme Court thus incorrectly relied on *Summum* because the speech in that case concerned government speech as applied to permanent monuments, which are too different even to be compared to specialty license plates.[220] Because the speech on specialty license plates represents private speech and may not be discriminated against because of viewpoint, the Supreme Court reached the wrong conclusion under the First Amendment.

B. Applying Walker *to Hypothetical Examples Leads to Dangerous Consequences that are Contrary to the Purpose of the First Amendment*

Many consider the Supreme Court's decision in *Walker* to be a step in the right direction for protecting and upholding civil rights.[221]

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216. *Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting); Liston, *supra* note 133.

217. *Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting) (emphasis added) (asserting that regardless of whether a person appreciates the Confederate flag or finds it disagreeable, the flag, as a symbol, exemplifies a viewpoint).

218. *Id.*; *see* Robb v. Hungerbeeler, 370 F.3d 735, 742–43 (8th Cir. 2004) (holding that there was no rationale for barring certain groups, such as the KKK, from participating in the State's Adopt-A-Highway program).

219. *See supra* Section I.A(1)(b) (explaining that restrictions on private speech within a limited purpose public forum must only restrict speech on the basis of content and be narrowly tailored to achieve a compelling state objective).

220. *See Walker*, 135 S. Ct. at 2259–61 (Alito, J., dissenting) (arguing that "the Texas specialty plate program has none of the factors that were critical in *Summum*," namely permanency, selectivity, and spatial limitations).

221. *See e.g.*, Scott Lemieux, *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 (arguing that individuals have the right to express "hateful" speech, but the State is not required to endorse such speech); Arnold Loewy & Charles Moster, *It's Debateable:*

They argue that the ruling protects and upholds civil rights because it allows the State to reject potentially offensive messages and symbols.[222] For example, they assert that this ruling allows the State to prevent an organization from displaying a racist message or a swastika on a license plate.[223]

Walker, however, has the potential to have the opposite effect. By allowing the State to reject something as simple as a license plate design, the Supreme Court's decision also gives the State immense discretion to pursue whatever speech it desires, as long as it is labeled as "government speech."[224] Therefore, little prevents the State from ultimately approving a racist message or a swastika on a license plate under the guise of government speech. Similarly, not much prevents the State from rejecting a gay pride symbol, such as the rainbow-colored flag, from being displayed on a license plate. If the State can label speech that is seemingly private as government speech, then the State could practice viewpoint discrimination and infringe on citizens' First Amendment rights.

The *Walker* decision essentially allows a state to assert its own views on specialty license plates at the expense of the individual vehicle owner.[225] For example, a state could decide that it wants to speak out against gay marriage by offering license plates that state "Marriage should only exist between one man and one woman." Additionally, the State may decide to reject any specialty license plate designs that display the rainbow-colored flag, which symbolizes support for gay marriage. Ultimately, the State would be elevating the views of the driver who displayed the "Marriage should only exist between one man and one woman" plate above the views of other drivers who did not have the same opportunity to create a plate to reflect their

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On the Fates of State's Plates, LUBBOCK AVALANCHE-J., (Dec. 12, 2015, 10:48 PM), http://lubbockonline.com/editorials/2015-12-12/its-debatable-fates-states-plates (same).

222. Lemieux, *supra* note 221; Loewy & Moster, *supra* note 221; *see also* Tony Mauro & Mark Hamblett, *Texas Ban on Confederate Flag on License Plates Upheld*, N.Y.L.J. (June 19, 2015), http://www.newyorklawjournal.com/id=1202729873113.

223. Mauro & Hamblett, *supra* note 222 (identifying several of the Supreme Court justices' concerns and their "fear that if they ruled that Confederate flag plates must be allowed on free speech grounds, it [would] be impossible to stop motorists from displaying swastikas or foul language on license plates as well").

224. Corbin, *supra* note 9, at 671 (asserting that treating specialty license plate speech as pure government speech permits the government "to escape accountability for its speech and . . . [distort] the marketplace of ideas").

225. *Id.* at 667–68.

support of gay marriage.[226] Furthermore, bystanders and passersby would only be able to observe the government-supported view and not the opposing viewpoint, and would likely assume that "Marriage should only exist between one man and one woman" is the prevailing view of the people in the state.[227] Yet, such a view would only prevail because the government was suppressing the opposing viewpoint.[228] *Walker*'s extension of the government speech doctrine to specialty license plates, however, would remove many protections for what should be considered private speech.[229]

In the hypothetical billboard example proposed in the Introduction, the state of Alabama put up a billboard that strongly advocated a pro-life viewpoint.[230] Such a billboard might be offensive to passersby and would be a prime example of state-sponsored speech that does not necessarily reflect the view of all state residents.[231] Yet, the *Walker* ruling, by allowing a state to reject whatever messages it so chooses because it represents "government speech," also allows a state to pursue or support any issue it so desires as long as it is labeled as "government speech." The ruling, therefore, essentially takes away an individual's First Amendment right to express his or her views and transfers the right of unrestricted expression to the State: it allows states' rights to expand at the expense of citizens' rights. This redistribution of rights is completely contrary to the purpose of the First Amendment.

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226. *See id.* at 669 (labeling such action as the "distortion of the marketplace of ideas" and expression).

227. *Id.*

228. *Id.* Mirroring the above example but replacing the State's view of rejection of gay marriage with pro-life support, Corbin contends that "[b]ystanders, seeing traffic awash with pro-life specialty plates but not a single pro-choice plate, might conclude that the former position is more popular than the latter, when in fact the lack of pro-choice plates is a result of government suppression and not a dearth of support by private citizens." *Id.*

229. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2255 (2015) (Alito, J., dissenting) (declaring that the majority's decision, in classifying private speech as government speech, deprives private speech of its constitutionally afforded First Amendment protection).

230. *See supra* text accompanying notes 12–13.

231. *See* Corbin, *supra* note 9 at 669 (suggesting that highly visible messaging, such as billboards, would increase the likelihood of individuals making decisions based on a position's perceived popularity rather than its merits).

C. Recommendations for Limiting Government Speech

Courts should place appropriate limitations on government speech. States should not be entitled to circumvent the First Amendment by simply labeling speech "government speech"; government speech should not be allowed to infringe upon private speech. Thus, courts should apply First Amendment forum analysis whenever government speech contains characteristics of private speech, and a state should not be permitted to restrict such speech unless those restrictions are content-based and viewpoint-neutral.

Courts should treat specialty license plate designs as private speech within the context of a limited purpose public forum. If a specialty license plate is categorized as a limited purpose public forum, the State could still regulate designs based on content.[232] Therefore, instead of discriminating against certain viewpoints and treating unfairly those who hold such viewpoints, the State could outlaw specialty plates altogether and only issue standard license plates.[233] By doing so, the State would adhere to the initial purpose of license plates as vehicle identification.

If license plate speech is not purely private, then it constitutes a hybrid within a limited purpose public forum, and the State should not be permitted to engage in viewpoint discrimination.[234] Classifying specialty license plate speech in this way recognizes that, although the State owns specialty license plates and displays its name on the plates, private speakers are expressing their own messages and ideas on those plates, and they ultimately pay an increased cost to do so.[235] This classification would ensure that the private speaker's First Amendment rights are not violated, providing a necessary and appropriate check on the State's power.

CONCLUSION

The Supreme Court reached the wrong decision under the First Amendment in *Walker*. By incorrectly relying on *Summum*, the Court categorized messages, ideas, and slogans of private individuals as the

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232. *See supra* notes 80–84 and accompanying text.

233. Chief Justice Roberts made a similar point in the *Walker* oral arguments. Mauro & Hamblett, *supra* note 222.

234. Corbin, *supra* note 9, at 609 (reasoning that license plate speech is neither purely governmental nor purely private; it is mixed).

235. *See generally* Corbin, *supra* note 9 (recognizing that the government and private individuals have competing interests in specialty license plate speech, and both of their interests could be improved by classifying such speech as "mixed speech").

messages, ideas, and slogans of the government. The decision creates dangerous consequences for the First Amendment and the freedom of individual speech and expression. Government control of specialty license plate designs, although a seemingly minor issue, has broader implications for private speech as a whole. If the government is able to control individual private speech on something as small as a specialty license plate, it is unforeseeable what speech it will attempt to take control over next. Perhaps individuals will soon be barred from peaceably assembling to express their ideas on public property. The First Amendment safeguards the individual citizen from this very issue.[236] As the Court stated in *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[237] The decision in *Walker* ultimately gives the government the power to "prescribe what shall be orthodox" by allowing the State to reject the viewpoints it does not favor and to set aside the free speech protections afforded by the First Amendment.

236. *See supra* Part I.A (discussing free speech and its protections, generally, under the First Amendment).

237. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).