

THE CONCEPT OF THE SPEECH PLATFORM:  
*WALKER V. TEXAS DIVISION*

*Abner S. Greene\**

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\* Leonard F. Manning Professor of Law, Fordham Law School. The title of this Article pays homage to Harry Kalven Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. Thanks to Alissa Black-Dorward and Clare Huntington for help throughout. For helpful comments, many thanks to Larry Alexander, Aditi Bagchi, Corey Brettschneider, Caroline Mala Corbin, Leslie Gielow Jacobs, Jim Kainen, Leslie Kendrick, John Nagle, Helen Norton, David Post, Geof Stone, Nelson Tebbe, Ben Zipursky, and participants at Fordham University School of Law and UConn School of Law workshops.

## INTRODUCTION

Government often provides space for private speech but doesn't want to help foster hateful or vulgar messages. Under current Supreme Court case law, however, such viewpoint restrictions<sup>1</sup> are impermissible whether the state is regulating private speech or limiting it in speech platforms it creates (often called "limited public forums"). Only if we could properly see the speech as that of the state may it discriminate on the basis of viewpoint, but usually it is a mistake to view the speech that way.

My main claim in this Article is that the First Amendment, properly understood, permits greater state control over speech platforms than current case law allows. Thus, the state should be permitted to open public school classrooms for after-school student speech activities without having to host the KKK or Nazi club. It should be permitted to open advertising space on public transit vehicles without having to allow ads that disparage persons by race or other protected characteristics. It should be permitted to offer specialty or vanity license plates without having to allow hateful or vulgar messages. Despite the arguments of several scholars and the Court itself, the case for such viewpoint-based speech platform restrictions does not properly arise from the state's fear that the hateful or vulgar messages will be misattributed to it. Nor is it proper, as some scholars have suggested, to see these settings as "mixed speech" of the state and the private person. The misattribution argument is mostly mistaken, and although mixed speech might occur in some settings, in many of these settings the speech is clearly that of the private person. We should understand the concept of the speech platform as a new idea in free speech doctrine, distinguishing more sharply the reasons supporting strong free speech protection from government regulation, and analogizing more closely to why we permit great latitude for government speech. In so doing, we should permit government to draw some lines based on speech content, even viewpoint, and back down from our normal regulatory concerns about the dangers and difficulties of drawing such lines.

The insistence on sticking with the government speech/limited public forum dichotomy led the Court to the unsatisfying but instructive opinions in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*<sup>2</sup> When Texas established a system of selling specialty license plates, and permitted all manner of statements on those plates, it put itself in a bind when it

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1. Restrictions on hate speech are clearly based on viewpoint; restrictions on vulgarity are arguably viewpoint based (I argue below that they are). See *infra* text accompanying notes 257–64.

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

wanted to reject a specialty plate with a Confederate flag.<sup>3</sup> It's hard to see all the specialty plate messages as that of the state; it's also hard to accept a symbol of the Confederacy in this state-created speech forum (and hard to have to accept what would follow, i.e., pretty much everything else anyone wanted to say via a specialty plate). The competing opinions don't make sense—the majority's attempt at deeming these specialty plate messages government speech doesn't ring true; but the result of the dissent's more speech-protective view would mean that the state has to allow all sorts of odious messages if it wants to offer specialty plates. The right answer is to see this not as state speech or through the limited public forum model that, borrowing from the regulatory speech model, forbids viewpoint restrictions. Instead, we should understand settings such as this as state-created platforms for private speech. Because such settings aren't regulatory—no jail time, no fines, just acceptance or rejection of the message for the forum—we should not hold the state to a firm rule against viewpoint restrictions.

This Article develops the concept of the speech platform<sup>4</sup> in six parts. Part I explores public forum doctrine, with a focus on limited public forums. It makes sense to have standard tough free speech doctrine for traditional public forums and designated public forums, but insisting on a rule of viewpoint neutrality for limited or nonpublic forums has been a mistake.<sup>5</sup> This rule has been stated mostly in dicta; the holdings are about religious speech and justifiable in narrower ways. One of the lessons from the religious speech cases is a properly cabined understanding of when private speech is attributable to the state, an understanding that will help us when we turn to the concern about misattribution in speech platform settings more generally.

Part II sets forth the case for a robust understanding of government speech, an understanding supported by Court doctrine. The state as speaker rather than regulator is not subject to standard free speech rules. Although the state may not coerce or monopolize speech in the guise of state speech, and although the state should be transparent about its role in speaking or hiring agents to speak for it, mostly these concerns are not dominant, and we should accept a broad range of state speech, on matters both

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3. *See id.* at 2245.

4. When I use the term “speech platform” I will always be referring to state-provided opportunities for private speech.

5. As I discuss further, *infra* text accompanying note 15, the Court has sometimes called this third type of forum “limited” and sometimes “nonpublic” (and sometimes it has used the term “limited” to describe a certain type of “designated” public forum). We should be concerned about the concepts, though, and not the nomenclature, and I will refer to the type of forum at issue in *Walker* and similar settings as a “limited public forum.”

uncontroversial and controversial. The state is usually just one speaker in a broad social conversation; citizens understand this; and the state has a role to play in advancing its notions of the good. This strong view of government speech will lay the foundation for the speech platforms concept—although there I will shift ground from state speech to the creation of opportunities for private speech.

Part III turns to *Walker*. The opinions rely on the limited public forum and government speech models in ways that are true to the models conceptually. I share the majority's instinct that Texas should have some discretion here, but deem it unfortunate that doctrinally the only way to reach this result was to deem the specialty plates government speech. That doesn't make sense at first blush (is Texas really advancing as its own the hundreds of disparate specialty plate messages?), and the concern about avoiding misattribution is an error. The dissent's tracking limited public forum doctrine seems sound, and its answer correct per that doctrine, but the fallout would be dramatic: either accept all manner of hateful, vulgar, odious messages in state-created speech forums, or shut those forums down. If a state or locality didn't want to accept the KKK or Nazi specialty plate, or vanity plate, or transit ad, or after-school club, then it would have to shut down those forums entirely. That doesn't seem right,<sup>6</sup> and the core affirmative thrust of this Article explores ways of understanding the First Amendment anew to permit the state to provide, but limit, the speech platforms it creates.

Part IV explores an issue that is key to the majority in *Walker* and to much case law and scholarship regarding speech forums—the risk of the public misattributing private messages to the state. I will make three main points here: first, a key lesson from the religious speech limited public forum cases is that when the state opens a forum for a wide array of speech, we don't reasonably attribute any of the messages to the state, and thus the state's interest in limiting speech in these forums isn't to avoid misattribution; second, it's unclear whether the state has a legitimate interest in avoiding misattribution to it, except perhaps insofar as a constitutional right is implicated by state action; third, rather, the state's interest is in not providing a platform for hateful, vulgar, and other similar messages.

Part V responds to scholars who also deem the majority/dissent debate in *Walker* unsatisfying, but who believe a “mixed speech” model is the way to go. That approach claims that some state-provided speech opportunities

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6. Speech platforms have value to many speakers, providing audiences and/or settings for expression that might be hard to duplicate. This is clearly so for transit ads and public school classrooms for after-school activities, perhaps less so for specialty and vanity license plates.

are best seen as a blend of state and private speech, and thus that we need a blend of doctrine from the government speech and limited public forum models. Although perhaps mixed speech accurately describes the occasional setting, it does not accurately capture what is usually going on—the state providing a platform for private speech, but not wanting to aid and abet offensive messages. Part of the problem with the mixed speech model is that it too turns on an overly expansive concern about misattribution of private speech to the state.

Part VI develops the concept of the speech platform.<sup>7</sup> Most of the settings discussed in the Article—state-created spaces for speech (oral or written)—are not best deemed government speech, but a strict rule of viewpoint neutrality would require the state to help foster (although not endorse) a wide variety of odious messages. If we stick with standard free speech doctrine, we will be stuck with this all-or-nothing answer. But standard free speech doctrine has been developed to limit the government as a regulatory entity. Affirmative First Amendment values can be preserved by ensuring strong protection against state regulation. At the core of the case for similar protection in the speech platforms setting is “negative theory,”<sup>8</sup> i.e., the idea that content-based restrictions on speech may reflect improper bias or may involve line-drawing void of properly neutral principles.<sup>9</sup> This idea, though, stems from the need to limit the government as regulator; negative theory should occupy a smaller place when the state is providing speech opportunities. Although these are not instances of government speech, we can borrow from government speech doctrine—just as negative theory is the wrong approach there, so is it the wrong approach to thinking about speech platforms. There are good reasons for not opening speech platforms to hateful or vulgar messages, i.e., the direct harm to persons from hate speech and the more diffuse but still real harm to public sensibilities from vulgarity. Although we would not allow regulation of private speech on these grounds, we should treat speech platforms differently.

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7. For prior sketches of this idea, see Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253 (2011) [hereinafter Greene, *Speech Platforms*]; Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 850–53 (2010) [hereinafter Greene, *(Mis)Attribution*].

8. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80–86 (1982).

9. A similar idea is that a kind of “evaluative neutrality” is crucial to limiting state action regarding expression. See LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 11, 81, 177 (2005).

## I. LIMITED PUBLIC FORUMS: DESCRIPTION AND CRITIQUE

Justice Alito's dissent in *Walker* deems Texas's specialty license plates a limited public forum, in which reasonable content-based restrictions are allowed but viewpoint-based restrictions (a type of content-based restriction) are barred.<sup>10</sup> He correctly states the Court's doctrine in this area. But once we examine how the Court has developed its limited public forum doctrine, we'll see that the connection to the rest of public forum doctrine is thin and that much of the "no viewpoint restrictions" rule is from dicta rather than holdings. There's less here than one might think, opening the door to a different way of seeing limited public forums, as speech platforms over which the state should have more control.

The Court sorts public forums into three categories—traditional public forums, designated public forums, and limited public forums.<sup>11</sup> The first are mostly streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>12</sup> The middle category "consists of public property which the State has opened for use by the public as a place for expressive activity."<sup>13</sup> A good example here would be a municipal auditorium or similar space on a public college campus. In the third category,

the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . . "[T]he State, no less than a private owner of property, has power to preserve the

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10. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2262 (2015) (Alito, J., dissenting).

11. See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). The term "public forum" was perhaps coined by Kalven, *supra* note \*, at 11–12 ("[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer . . .").

12. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion); see also *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring in the judgment) ("Public places are of necessity the locus for discussion of public issues, as well as protest . . ."); *United States v. Kokinda*, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting) ("Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations."); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("[O]pportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.").

13. *Perry*, 460 U.S. at 45.

property under its control for the use to which it is lawfully dedicated.”<sup>14</sup>

I have to pause to clarify terms. The Court has used both “limited public forum” and “nonpublic forum” to refer to the third category mentioned above.<sup>15</sup> Although at times I will use “nonpublic forum” to report the Court’s language, otherwise I will use “limited public forum” to refer to the third category—where the state limits speech by content in a speech platform. “Nonpublic forum” isn’t a felicitous term, since these settings involve some public access and speech and the question is whether the restrictions are constitutionally valid. Even the phrase “limited public forum” could use some sprucing up, and I will introduce the term “speech platform” to take its place.

Beginning with *Hague v. Committee for Industrial Organization*,<sup>16</sup> the Court has rejected the argument that because streets and parks are public property, the state may do with them what it pleases, including limiting expression broadly. In so doing, the Court has refused to defer to governmental statements of purpose regarding these spaces. That streets are built primarily to facilitate getting from one place to another, and that parks are built primarily for recreation, may be true facts, but they are of limited relevance to public forum doctrine. Although in dissent, Justice Brennan made the point nicely: “Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has

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14. *Id.* at 46 (quoting *U.S. Postal Serv. v. Council of Greenburg Civics Ass’ns*, 453 U.S. 114, 129–30 (1981)).

15. For use of “limited public forum” to refer to the third category, see, e.g., *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2262 (2015) (Alito, J., dissenting); *Martinez*, 561 U.S. at 679 & n.11; *Good News Club v. Milford Central School*, 533 U.S. 98, 105–06 (2001); *Widmar v. Vincent*, 454 U.S. 263, 272 (1981). For use of “nonpublic forum” to refer to the third category, see, e.g., *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 797, 800, 806 (1985) and *Perry*, 460 U.S. at 49. The Court has sometimes used “limited public forum” to refer to a speaker-based limit in a designated public forum—for example, a public college auditorium open for student use only. See, e.g., *id.* at 46 n.7. For a recent example of a Justice using the terms interchangeably, see *American Freedom Defense Initiative v. King County*, 136 S. Ct. 1022, 1022 (2016) (Thomas, J., dissenting from denial of certiorari) (“But if the government creates a limited public forum (also called a nonpublic forum) . . .”).

One commenter on a draft of this Article insisted that we keep “designated” and “limited” public forums cordoned off from “nonpublic” forums, that there is a presumption in favor of speech in the former two categories, and that the latter “aren’t public forums in any sense of the term.” Perhaps the Court has used “nonpublic” forum for more idiosyncratic settings in which speech opportunities are created in a more structured way—e.g., *Perry* and *Cornelius*. I am focusing on settings in which the state’s principal action is setting up opportunities for private speech; I admit the doctrine (sometimes dicta) is (mostly) favorable to free speech (but see *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)); my goal is to justify a somewhat broader content-based authority for the government regarding what I suggest are best termed “speech platforms.”

16. 307 U.S. 496 (1939) (plurality opinion).

not constructed them for expressive purposes.”<sup>17</sup> Instead, we have a cultural commitment to streets and parks as, in addition to their primary purposes, places for expressive activity.<sup>18</sup> In a key early case, *Schneider v. New Jersey*, the Court struck down a ban on leafleting, stating that “the streets are natural and proper places for the dissemination of information and opinion.”<sup>19</sup>

The First Amendment “right of the people peaceably to assemble”<sup>20</sup> plays a role here along with freedom of speech.<sup>21</sup> The Court has made clear that assembly, often for expressive purposes, is an important function of traditional public forums. This started with *Hague*, rejecting the state’s plenary power view of regulating public space: streets and parks “have been used for purposes of assembly.”<sup>22</sup> Albeit in dicta, the Court referred to the “right of assembly” in *Cox v. New Hampshire*<sup>23</sup> and then, as part of its holding, to the “rights of free speech and assembly” in *Cox v. Louisiana*.<sup>24</sup> Later, Justice Kennedy wrote: “At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places.”<sup>25</sup>

Furthermore, because of the cultural commitment to parks and streets as places to assemble to exchange ideas, not only are statements of state purpose insufficient to limit such expression, but also the state may not shut down streets and parks altogether for expression. Thus, the Court has “held

17. *Kokinda*, 497 U.S. at 744 (Brennan, J., dissenting); see also *Lee*, 505 U.S. at 696–97 (Kennedy, J., concurring in the judgment) (internal citations omitted) (“The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction. The types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks. It would seem apparent that the principal purpose of streets and sidewalks . . . is to facilitate transportation, not public discourse, and we have recognized as much. Similarly, the purpose for the creation of public parks may be as much for beauty and open space as for discourse.”).

18. See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 61–67 (2000).

19. 308 U.S. 147, 163 (1939).

20. U.S. CONST. amend. I.

21. But see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 205 (1995) (originally published as *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987)) (“There is . . . no implicit concept of a public forum, at least insofar as the phrase is meant to signify a special geographical location or category of government property where speech merits unusual protection.”). For instructive writing on the right or freedom of assembly, see JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012); TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009).

22. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion).

23. 312 U.S. 569, 574 (1941); see also *Adderley v. Florida*, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting) (referring to the “constitutional right to assemble”).

24. 379 U.S. 536, 554 (1965); see also *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (“[G]overnment may not prohibit others from assembling or speaking on the basis of what they intend to say.”).

25. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring in the judgment).



that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them.”<sup>26</sup>

In traditional public forums, standard free speech rules apply. That means the state may regulate speech based on content only pursuant to various categorical tests (e.g., incitement, fighting words, obscenity, libel) or if the state action otherwise satisfies ad hoc strict scrutiny.<sup>27</sup> It may regulate speech in a non-content-based way by controlling the time, place, or manner of expression (subject to intermediate scrutiny)<sup>28</sup> or pursuant to a law of general applicability that burdens expression as a side effect only (ostensibly subject to intermediate scrutiny).<sup>29</sup>

Finally, almost all of the cases about expression in traditional public forums, or about whether such a forum exists, involve political or other high-value speech.<sup>30</sup>

All of these points—the cultural commitment to traditional public forums as a place for expression notwithstanding state purpose otherwise; the connection to the right of assembly; the bar to total elimination of expression in traditional public forums; and the holdings and dicta stating that standard free speech rules apply, but almost always in political speech cases—will help us distinguish what the Court is up to when it assesses state power and individual expressive rights in limited public forums.

Before turning to the focus here—limited public forums and the purported rule against viewpoint restrictions therein—first a word about the middle category, so-called “designated public forums.” The idea is that the

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26. *Marsh v. Alabama*, 326 U.S. 501, 504–05 (1946) (citing *Jamison v. Texas*, 318 U.S. 413 (1943)); *see also Lee*, 505 U.S. at 700 (Kennedy, J., concurring in the judgment) (“[W]hen property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property’s forum status.”); *POST*, *supra* note 21, at 231; *Kalven*, *supra* note \*, at 15–21; Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 244–46. *But see Cox v. Louisiana*, 379 U.S. 536, 555 & n.13 (1965) (discussing arguments both ways on this point).

27. *See United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality opinion); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

28. *See Perry*, 460 U.S. at 45.

29. *See United States v. O’Brien*, 391 U.S. 367, 377 (1968). The *O’Brien* test is often said to be intermediate scrutiny, but it operates like rational basis scrutiny.

30. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lee*, 505 U.S. at 672, 830; *Burson v. Freeman*, 504 U.S. 191 (1992); *Kokinda*, 497 U.S. 720 (plurality opinion); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Police Dep’t v. Mosley*, 408 U.S. 92 (1972); *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Jamison*, 318 U.S. 413 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (plurality opinion).

state sometimes might set up space for expressive activity generally, without content limits; if so, the state is held to the same free speech rules as in traditional public forums. There are few Court holdings, however, deeming public space to be a designated public forum.<sup>31</sup> Furthermore, although several dissents have argued that once the state has opened space for certain expressive activity it is estopped from denying such space to other expression, the Court has consistently allowed the state to establish speech opportunities for more limited ends without opening the door to having created a designated public forum.<sup>32</sup> These holdings have led some Justices and commentators to suggest the designated public forum category is more ephemeral than real.<sup>33</sup>

Turning to the third type of public forum, the limited public forum: The state often makes space available for expression but in a limited way only. Sometimes the limit is just on speaker identity, and here we might better term the space a designated public forum. For example, if a public college opens auditorium space for students of that college only, that space is limited in a sense, but not in an interesting sense. More often when forums are limited they are limited by subject matter or type of expression, or, perhaps, by viewpoint. The Court's stated rule for limited public forums is

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31. The Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), considered a public university's open meeting space for its students generally. The Court struck down the university's exclusion of religious worship/discussion. *See id.* at 276–77. It's not clear whether we should treat the forum as designated or limited. *Widmar* becomes the anchor case for a series of limited public forum holdings, which I discuss below. *See infra* text accompanying notes 58–75. We could treat the forums in these cases as designated public forums (although limited to students at the school in question) or as limited public forums (because the school in each case limited speech by viewpoint or subject matter, depending on how one sees it). For discussion of the difficulty of determining whether transit ad space is a designated or limited public forum, see *American Freedom Defense Initiative v. King County*, 136 S. Ct. 1022, 1022–26 (2016) (Thomas, J., dissenting from denial of certiorari). If speech platforms were properly considered designated public forums, the leeway given for reasonable subject-matter restrictions in limited public forums would disappear. But my focus is on the “no viewpoint restrictions” rule. Because that rule is the same in designated and limited public forums, my argument for relaxing it would be the same either way.

32. *See Kokinda*, 497 U.S. 720 (upholding postal service permitting various types of organized speech activity outside post offices, while denying access for in-person solicitation of funds by political group) (plurality opinion); *Cornelius*, 473 U.S. 788 (upholding federal rule permitting various nonprofits to participate in the Combined Federal Campaign, a charity drive aimed at federal employees, while denying participation to legal defense and political advocacy organizations); *Perry*, 460 U.S. 37 (upholding public school permitting privileged access to interschool mail system and teachers' mailboxes to the elected teachers' union, while denying similar access to rival union); *Greer v. Spock*, 424 U.S. 828, 831 (1976) (upholding army base permission of various civilian speakers and clergy onto the base, as well as some theatrical and musical productions, while denying “[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities”); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (upholding city practice permitting commercial and public service ads on public transit vehicles, while denying political ads).

33. *See Kokinda*, 497 U.S. at 750–51 (Brennan, J., dissenting); *Cornelius*, 473 U.S. at 814, 823, 825 (Blackmun, J., dissenting); POST, *supra* note 21, at 224–26; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 98–99 & n.74 (1998).

that content-based restrictions must be reasonable (a highly deferential test) but may not be based on viewpoint (a sharply restrictive test).<sup>34</sup>

Perhaps the first example of the Court's upholding restrictions in a limited public forum was *Lehman v. City of Shaker Heights*.<sup>35</sup> On its public transit vehicles, the city allowed commercial advertising and ads from groups promoting public service, but rejected political advertising.<sup>36</sup> Five Justices deemed this space not a traditional or designated public forum (without using those precise terms).<sup>37</sup> Treating the space as what it would come to call a limited public forum, the plurality deemed the subject-matter restriction reasonable, the city's purpose being "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."<sup>38</sup> Concurring in the judgment, Justice Douglas focused on the captive audience concern.<sup>39</sup> *Lehman* remains one of the clearest examples of the Court upholding a limited public forum under a highly deferential reasonableness test, with no viewpoint restriction to worry about.

The Court has upheld restrictions in limited public forums several times since. In *Greer v. Spock*,<sup>40</sup> it upheld a U.S. Army base's decision to prevent Dr. Benjamin Spock, a presidential candidate, from holding meetings on the base and from distributing campaign literature. Civilian passage into and through the base was generally allowed, and entry and exit were not guarded.<sup>41</sup> Some civilians and clergy had been invited to speak on the base; some theatrical and musical productions had been permitted.<sup>42</sup> But "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" were prohibited, and distribution of any publication required military approval.<sup>43</sup> All of this would be unconstitutional for regulation of private speech, or in a traditional or

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34. See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993); *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 46; see also POST, *supra* note 21, at 260; Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 625 (2008).

35. 418 U.S. 298 (1974) (plurality opinion).

36. The policy denied all political advertising, and although a political campaign ad was at issue in the case, the policy would reject political issue ads as well, as Justice Brennan pointed out in dissent. *Id.* at 317–18 (Brennan, J., dissenting).

37. See *id.* at 299, 301–02 (plurality opinion); *id.* at 305–08 (Douglas, J., concurring in the judgment).

38. *Id.* at 304 (plurality opinion).

39. See *id.* at 307–08 (Douglas, J., concurring in the judgment).

40. 424 U.S. 828 (1976).

41. *Id.* at 830.

42. *Id.* at 831.

43. *Id.*

designated public forum. But, deeming this space a limited public forum (though not using that term), the Court deferred on the ground that the military wanted to remain and appear neutral regarding partisan politics.<sup>44</sup> This is a concern with misattribution, similar to *Lehman*'s concern with "appearance of favoritism."<sup>45</sup> The case did not involve a viewpoint restriction (or at least was not decided that way; perhaps the exclusion decision was based on dislike for Spock's left-wing views).

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,<sup>46</sup> a public school gave the elected teachers' union privileged access to the interschool mail system and teachers' mailboxes, excluding the rival teachers' union (except during union representation elections). The school also granted access to the mailboxes to some outside users (such as the Cub Scouts).<sup>47</sup> The Court upheld the exclusion of the rival teachers' union, deeming the relevant space nonpublic and the exclusion reasonable given that one union had won the election and was representing the teachers and the other had lost and was not.<sup>48</sup> The Court refused to see this distinction as viewpoint based.<sup>49</sup>

*Cornelius v. NAACP Legal Defense & Education Fund, Inc.*<sup>50</sup> involved a forum of the subsidy type, as opposed to the more standard physical space forum. The Combined Federal Campaign is a charity drive aimed at federal employees. It permitted fundraising from various nonprofits, but excluded legal defense and political advocacy organizations.<sup>51</sup> Deeming the forum nonpublic, the Court held the exclusion to satisfy the reasonableness standard, because the government might determine that the included groups are in greater need of the funds and to avoid appearance of favoritism.<sup>52</sup> We have seen that latter reason before—in *Lehman* and in *Greer*—and I will say more about it later when discussing misattribution. No viewpoint restriction was involved here (although the matter was remanded to consider an allegation of viewpoint bias).<sup>53</sup>

The most recent case to uphold restrictions in a limited public forum is *Christian Legal Society Chapter of the University of California, Hastings*

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44. *Id.* at 839.

45. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion).

46. 460 U.S. 37 (1983).

47. *See id.* at 47.

48. *See id.* at 46–54.

49. *See id.* at 49.

50. 473 U.S. 788 (1985).

51. *See id.* at 790.

52. *See id.* at 809.

53. *See id.* at 812–13.

*College of the Law v. Martinez*.<sup>54</sup> Hastings Law School (a state school) insisted that for a student group to get “official recognition” and “attendant use of school funds and facilities” the group had to make membership and leadership opportunities available to all students.<sup>55</sup> When the Christian Legal Society couldn’t comply because of its policies relating to gay and lesbian sexuality, it was cut off from much of what student groups otherwise get from the school (although the school granted it meeting space and access to some school communications).<sup>56</sup> Deeming the package of money and space subsidies for eligible student groups a limited public forum, the Court upheld Hastings’ policy as reasonable and not viewpoint based.<sup>57</sup>

The Court has four times invalidated a restriction in a limited public forum, each time deeming the restriction impermissibly viewpoint based against religious speech. There are several points to make in describing these cases: it’s not clear whether these forums should be described as designated or limited public forums, but that doesn’t matter for purposes of this Article; the Court may have been mistaken in deeming the restrictions viewpoint based rather than subject-matter based, and arguably that could have affected the outcome of the cases, but that is specific to religion-clause analysis and again doesn’t hit the center of my argument; the failure of the state’s justification in each case turned on an erroneous attribution argument, and this will come in handy when we turn to the misattribution concern at the heart of the debate over cases such as *Walker*; finally, that the viewpoint-based invalidations in the limited public forum setting came in religious speech cases, in part in response to the erroneous attribution claims of the state, and that the other mentions of the no-viewpoint-restrictions rule in limited public forums appeared in dicta, will help my argument for rethinking the apparently categorical rule against viewpoint-based restrictions in limited public forums (and pave the way to a new understanding of the many speech platforms the state sets up).

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54. 561 U.S. 661 (2010). Three other cases are worth mentioning. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267–70 (1988), the Court deemed a newspaper produced as part of a high school journalism class a nonpublic forum (probably better to see that under the “government as educator” heading). In *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion), along with holding a U.S. Post Office sidewalk not a traditional public forum, the Court held that opening the space to some speakers did not turn it into a designated public forum. In *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 676 (1998), the Court deemed a public television station’s candidate debate a nonpublic forum.

55. *Martinez*, 561 U.S. at 668.

56. *See id.* at 672–73.

57. *Id.* at 682, 697.

The seminal case in this line—although not the most fully analyzed by the Court—is *Widmar v. Vincent*.<sup>58</sup> A public university made its facilities generally available for student groups to meet, but excluded a group from engaging in religious worship and discussion. The Court ruled in favor of the excluded group, reasoning that once the university opened its space for student speech activity, its content-based exclusion was subject to strict scrutiny, which it could not meet.<sup>59</sup> The Court rejected the university's argument that the exclusion was necessary to avoid an Establishment Clause problem; because the space was available to a wide array of student groups, permitting the religious group access would not place the state's imprimatur on religion.<sup>60</sup> The Court didn't specify that the exclusion was viewpoint based, although Justice Stevens did in a separate opinion.<sup>61</sup> And the Court didn't specify whether the meeting spaces were a designated public forum subject to normal free speech rules or a limited public forum subject to a reasonableness and no viewpoint restriction rule. Either way the exclusion would be invalid if seen as a bar on religious viewpoints.

Perhaps that's the right way to see it. One could argue, though, that the restriction is subject matter rather than viewpoint based, the excluded subject matter being religion. If that's the right way to see it, it would be invalid in a designated public forum (subject-matter restrictions generally flunk strict scrutiny), but would be subject to the weaker reasonableness test in a limited public forum (as was the case in *Lehman, Greer, and Cornelius*). One might contend that the exclusion of religious subject matter is unreasonable, and that might be right, especially if the only argument in its favor is to avoid an Establishment Clause violation, for the Court was right to say that when space is open to a wide array of speakers, it's a mistake to attribute any of the speech to the state. However, if reasonableness is the test, arguably the state has an interest—pursuant to what we might call Establishment Clause values rather than an Establishment Clause rule—in avoiding possible association with or advancement of religious doctrine. This point was key to Chief Justice Rehnquist's opinion for the Court in *Locke v. Davey*,<sup>62</sup> upholding the exclusion of devotional theology from a state scholarship program, even though the Establishment Clause didn't require such exclusion. Although this is interesting material, we can put it aside now, and focus on the central points from *Widmar*: the invalidation of what is arguably a viewpoint

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58. 454 U.S. 263 (1981).

59. *Id.* at 270, 277.

60. *See id.* at 274–75.

61. *See id.* at 280 (Stevens, J., concurring in the judgment).

62. 540 U.S. 712 (2004).

restriction on religious speech in what is arguably a limited public forum, accomplished by casting aside an erroneous misattribution claim.

By the time the next case in this line was decided, the Court had firmed up its public forum categories (traditional, designated, and limited or nonpublic) and its rule for the latter (reasonableness test plus no viewpoint restrictions). Thus, the correct outcome in *Lamb's Chapel v. Center Moriches Union Free School District* was fairly clear.<sup>63</sup> The school district opened public school classroom space for various after-school activities by student and community groups, but denied the space for religious purposes.<sup>64</sup> In this case, the district rejected the space for use by a religious group for expression on child-rearing and family values.<sup>65</sup> The Court said it didn't have to decide whether the space was a designated or nonpublic forum.<sup>66</sup> Even if the more deferential rules of the latter apply, the restriction was impermissibly viewpoint based, not rescued by an erroneous Establishment Clause attribution argument.<sup>67</sup>

The third of the viewpoint-discrimination/limited public forum cases is *Rosenberger v. Rector & Visitors of the University of Virginia*.<sup>68</sup> It's a tricky case for several reasons, but if one accepts the predicates the Court accepted, it fits with *Widmar* and *Lamb's Chapel*. The University of Virginia exacted fees from its students to pay for various activities, including publications, but it barred such fees for religious, philanthropic, and political publications.<sup>69</sup> The Court held that Virginia had opened a limited public forum (of the funding rather than physical space variety), and that the restriction on religious speech was impermissibly viewpoint based.<sup>70</sup> An Establishment Clause argument could not rescue the day because the funded speech was not that of the state, nor would it be proper to attribute or associate the speech with the state.<sup>71</sup> So far, this is in line with *Widmar* and *Lamb's Chapel*. What makes *Rosenberger* harder is that the state arguably wanted to avoid funding controversy through exacted fees (the religious and political speech bars), and that makes the case look like *Lehman*, *Greer*, and *Cornelius*. Those cases in part turned on a problematic misattribution argument, but as I'll discuss further in Part VI, they may be seen as upholding as reasonable the government's wish to not

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63. 508 U.S. 384 (1993).

64. *See id.* at 386–87.

65. *Id.* at 387–89.

66. *See id.* at 391–92.

67. *See id.* at 394–95.

68. 515 U.S. 819 (1995).

69. *Id.* at 824–25.

70. *Id.* at 828–37.

71. *See id.* at 840–42.

set up a platform, with taxpayer dollars, for potential controversy. These may not be wise governmental decisions, but they fit with a capacious government speech/government-as-patron model, in which it's appropriate to defer to the state in wanting taxpayer dollars (or exacted student activity fees) to be used for more mainstream ends. *Rosenberger* is also hard because exacted fees used for evangelizing ends (the facts of the case) is problematic per the early Establishment Clause paradigm of not funding the ministry (key to *Locke v. Davey*<sup>72</sup>). Putting these critiques of *Rosenberger* aside, its core is the same as *Widmar*'s and *Lamb's Chapel*'s: viewpoint restriction of religious speech invalidated in a limited public forum; Establishment Clause attribution argument properly rejected.

The final case of the quartet is *Good News Club v. Milford Central School*,<sup>73</sup> in which a public school opened its classrooms for after-school meetings held by a wide variety of community groups, but not for religious purposes. Deeming the space a limited public forum, the Court struck down the policy as unconstitutionally viewpoint discriminatory against religious speech.<sup>74</sup> In the clearest terms of these four cases, the Court rejected possible misattribution of the religious speech to the state, even if one focuses on possible error by the schoolchildren themselves (a group one might think is more prone to make such a mistake).<sup>75</sup> If the school must permit religious along with a wide variety of other speech, then it's improper to attribute the religious speech to the state, there's no Establishment Clause problem, and the risk of mistake of fact isn't a proper ground for holding otherwise.

So how ought we think about limited public forums? What are they? They are not traditional places for people to assemble to engage in expressive activity. Although they may be used for that purpose, they don't have the same cultural/historical roots as do streets and parks, nor does the right of assembly fit easily with most limited public forum settings. We can have the best of both worlds<sup>76</sup>—a world of relatively unfettered exchange

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72. 540 U.S. 712 (2004).

73. 533 U.S. 98 (2001).

74. *Id.* at 120.

75. *See id.* at 112–19.

76. This analysis shares some ground with Robert Post's theory of dividing territory between state governance (normal free speech rules apply) and state management (more deference). *See* POST, *supra* note 21; *see also* Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953 (1998); Schauer, *supra* note 33, at 99 (if access not mandatory, "[w]hat is not superfluous is the question whether this is one of the government enterprises which may control for content or viewpoint, and as to this question public forum doctrine offers no assistance"). For a fascinating discussion of the difference between management via government speech or subsidies and governance via coordinating a kind of property interest, *see In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (en banc) (deeming federal trademark law to be



of ideas, in which the state opens up space otherwise dedicated for other purposes (transportation, recreation), and a world in which the government speech model is the more appropriate analogue, even if the state is not itself speaking. In the former setting, we appropriately don't defer to the state's claim of purpose, reducing the settings to transportation and recreation or using those primary purposes to allow plenary or near-plenary state control of other ends for the space. Because such traditional public forums exist, with the same protective rules as for regulation of private speech outside of government-owned property, in the limited public forum setting we can be more deferential (with limits, to be discussed) to state purpose. That is, we can see limited public forums as speech platforms that the state erects with some care, to provide speech opportunities while paying attention to expression deemed harmful, in which the state itself would not want to engage and for which it does not want to provide a platform. Moving in this direction doctrinally would not require a big shift from current Court holdings. The only viewpoint restriction invalidations in limited public forums have come in the setting of religious speech, where a misreading of Establishment Clause attribution animated the restrictions to begin with. The *Widmar* quartet of holdings does not ground a broader rule against viewpoint selectivity in limited public forums, and the rest of the case law in this area is repeated dicta.

## II. GOVERNMENT SPEECH

“Congress shall make no law . . . abridging the freedom of speech”<sup>77</sup> forbids state action that “limits or curtails”<sup>78</sup> the expression of persons. Criminal or civil regulation of expression is subject to a complex body of Court doctrine determining which laws count as abridgment of the “freedom of” speech. But government speech is non-regulatory; it doesn't impose sanctions on persons. When the state speaks, it's hard to see how the freedom of speech is implicated. In several holdings, dicta, and concurring and dissenting opinions, the Court and its members have said as much.<sup>79</sup>

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the latter and invalidating on First Amendment grounds the statutory provision that prohibits registration of disparaging trademarks), *cert. granted sub nom.*, *Lee v. Tam*, 2016 WL 157871 (2016).

77. U.S. CONST. amend. I.

78. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 6 (5th ed. 2011) (definition of “abridge”).

79. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”); *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (“[P]lacement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”); *id.* at 467–68 (citations omitted) (“The Free

Furthermore, government speech has several virtues.<sup>80</sup> It is needed to execute laws and regulations. A legislator or executive officer might give a speech outlining a new law; an agency might issue guidance on how a law or regulation is to be understood or enforced. Some state speech fills gaps in the marketplace of ideas, supplementing private speech that might be skewed toward profit or other not publicly regarding ends. Consider government agency provision of information regarding the environment, or public health. Governmental actors or entities might reach conclusions about matters of public concern that ought to be shared just as anyone's ideas ought to be shared—because perhaps we have a duty to share with others what we believe to be true or good. The state may have distinctive views and an obligation as fiduciary to say what it believes to be true. Its speech may be distinctive in various ways, providing points of view not otherwise available, or aggregating views of different persons or providing a centralized perspective.

The virtues of government speech are not diminished in settings of public controversy.<sup>81</sup> Many issues on which the government speaks—either through elected officials, appointed agency personnel, or hired contractors—will be contested, with the state's position being not only one among many but also subject to sharp disagreement. Although the state

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Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to 'speak for itself.' '[I]t is entitled to say what it wishes,' and to select the views that it wants to express.'"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) ("Compelled support of government' . . . is of course perfectly constitutional . . . . And some government programs involve, or entirely consist of, advocating a position."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment) (distinguishing compelled support of private speech from compelled support for government; regarding the latter, "a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent"); see also Schauer, *supra* note 33, at 95–96. For general support of the distinction between the state's expressive and coercive capacities, see COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* (2012).

80. See Greene, *supra* note 18, at 8–10. For elaboration of my views on state speech, see Abner S. Greene, *State Speech and Political Liberalism*, 28 CONST. COMMENT. 421 (2013); Abner S. Greene, *Government Endorsement: A Reply to Nelson Tebbe's Government Nonendorsement*, 98 MINN. L. REV. HEADNOTES 87 (2013); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001).

81. See *Finley*, 524 U.S. at 585 (content-based considerations necessary for public arts funding); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 572 (1975) (Rehnquist, J., dissenting) ("[I]f it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think the policy can be described as arbitrary or unreasonable.").

often may have an important role to play in less controversial areas—perhaps where science or health is involved (although even here we see contest)—that doesn't exhaust the contribution state actors may make.

Opposition comes from those who believe the state should stay out of ideas promotion entirely (no public schools, no publicly funded art, etc.), or from those who say the state may do so only by providing seed money for private speech. These theories may be based in a particular understanding of government neutrality toward conceptions of the good, or a halfway position supporting what we might call a thin perfectionism, whereas my stronger support for state speech might be dubbed thick perfectionism. I have defended that view elsewhere,<sup>82</sup> and it is one predicate for this Article: the state has a legitimate, constitutional, and important role to play in advancing conceptions of the good.

There are three ways in which government speech might run afoul of the Free Speech Clause or push the edge of it. First, apparently nonregulatory state speech might become or be considered coercive.<sup>83</sup> We should not, though, assume state speech will overwhelm the public or be given too much weight.<sup>84</sup> Free speech doctrine assumes people can assess arguments, accounting for speaker identity, and weigh them accordingly. The Court has, though, expressed concern with “leveraging,” i.e., when the state attaches conditions to government funds to advance a government message, in a way not reasonably enough connected to the purposes of the government program.<sup>85</sup> The principal conceptual difficulty with the anti-leveraging rule is that government generally has broad discretion in defining its programs and appropriate speech appurtenant to its programs.<sup>86</sup> For example, Congress may establish a National Endowment for

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82. See Greene, *supra* note 18, at 18–26; see also ALEXANDER, *supra* note 9, at 147 (“Liberal government cannot help but be partisan . . .”); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 89–90 (1990).

83. See Greene, *supra* note 18, at 41–49.

84. See *id.* at 45; see also Frederick Schauer, *Is Government Speech a Problem?*, 35 *STAN. L. REV.* 373, 377 (1983) (“People are not simply brainwashed by the state, but very often exercise choice and reach conclusions contrary to those that the government desires.”).

85. See *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (noting a problem if conditions “seek to leverage funding to regulate speech outside the contours of the program itself”); *Finley*, 524 U.S. at 587 (“If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.”); *Rust*, 500 U.S. at 197 (“[O]ur ‘unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”); see also Schauer, *supra* note 33, at 103 (unconstitutional conditions doctrine in this setting “serves well enough for conditions unrelated to the program at issue”).

86. See *Rust*, 500 U.S. at 194 (“[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”).

Democracy and authorize speech and publications promoting a certain conception of our constitutional order, forbidding in that program advancement of competing ideas (such as communism).<sup>87</sup> The hard questions are whether there are Free Speech Clause limits to how such programs may be defined and whether the state may change the nature of a program once it's established, excluding more speech than previously excluded.<sup>88</sup> There is no natural way of understanding the proper scope of a government program, and thus the baseline against which we determine when inappropriate leveraging has occurred may frequently be contested.

Second, if the state were to monopolize a market for a certain type of speech, the virtues of the state as offering just one point of view in a public debate would diminish or be eliminated.<sup>89</sup> If this happens, but without coercion, it's hard to say it abridges the freedom of speech. Perhaps monopolization in this setting is more a policy or political theoretic concern, and less one of constitutional magnitude.

Finally, the state should be transparent about its role in speech acts.<sup>90</sup> Often this is not a problem; when a state official or agency speaks or issues a publication, it's clearly the view of the official or the agency. But when the state hires someone to speak for it, or is part of a public-private speech act, things can get murky. The concern here is with ventriloquism, i.e., that the public might hear a message and attribute it to the dummy, as it were, ignorant of the true speaker. This can implicate the right against compelled speech. The Court has adopted a strong reading of the Free Speech Clause in this regard—one has a right against being compelled to utter the state's or another person's message, and in some settings not to be compelled to use one's property to foster the state's or another person's message.<sup>91</sup>

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87. *See id.*

88. *See* Greene, *supra* note 18, at 52–67; *see also* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1407 (2001) (a tough unanswered question is when the Court will see the government as having changed from setting up an opportunity for private speech to speaking itself).

89. *See* Greene, *supra* note 18, at 27–40; *see also* Schauer, *supra* note 84, at 380. There might be some tension between this concern and my point in note 6, *supra*, that state-provided speech platforms may serve a distinctive niche in the speech market. But there's a lot of room between offering something distinctive and becoming a monopolist.

90. *See* Greene, *supra* note 18, at 49–52; *see also* Bezanson & Buss, *supra* note 88, at 1384, 1431; Corbin, *supra* note 34, at 664; Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 56–57 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 596, 599 (2008) [hereinafter Norton, *Measure*]; Helen Norton, *Not For Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1334 (2004) [hereinafter Norton, *Not for Attribution*].

91. *See* Greene, *(Mis)Attribution*, *supra* note 7, at 839–44; Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

Although there is no First Amendment right against being compelled to fund state speech (e.g., tax dollars supporting the Department of Agriculture's "Beef. It's What's for Dinner" ads),<sup>92</sup> if the government is working in partnership with beef producers and viewers would reasonably attribute the ads to the beef producers, the producers might now have a claim sounding in the right against compelled speech.<sup>93</sup> And although the Court didn't so hold, the doctors who were subject to the abortion counseling gag rule, and thus required to mouth the government's and not their own views about abortion as an option, might have had a free speech claim.<sup>94</sup>

Any misattribution claim from state speech that masks the governmental source would be a claim of the private person. In the limited public forum setting, the Court and commentators sometimes maintain that the state has a right (or interest) to avoid private speech being misattributed to it. This concern is used to support more leeway for government content-based choices, either by defending such choices in a limited public forum, or by reconceptualizing the matter as government speech rather than limited public forum regulation. I will explore in Part IV whether the state has a legitimate interest in avoiding this kind of misattribution, if it really is occurring, and how answering these questions helps us better understand what's at stake with state provision of speech opportunities for others.

Apart from a possible free speech claim by a private person stemming from government speech ventriloquism, there are sound arguments of constitutional structure and liberal political theory backing a transparency condition for state speech.<sup>95</sup> Such speech is valuable and justifiable as the speech of the state, in the ways it contributes to public debate. For this value to obtain, we must know it's the state speaking; this helps us evaluate the message and enables us to throw the bastards out if we don't like what

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92. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 554 (2005).

93. See *id.* at 565–67; *id.* at 577–79 (Souter, J., dissenting).

94. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

95. This condition can sometimes be met by appropriate claimers or disclaimers. For cases discussing such, see *Johanns*, 544 U.S. at 564–65, 577–79 (debating whether government properly claimed speech as its own); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 784 (1995) (Souter, J., concurring in part and in the judgment) (possibility that state could disclaim KKK cross as not state speech); *id.* at 817–18 (Ginsburg, J., dissenting) (insufficient disclaimer); *Rust*, 500 U.S. at 200, 214, 217 (1991) (debating whether government properly claimed speech as its own); see also *Bezanson & Buss*, *supra* note 88, at 1432 (government disclaimer can kick matter out of government speech category); *id.* at 1483 (disclaimers can help in various settings); Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 452 (2001) (important for government to "acknowledge a government agent's speech as its own"); Jacobs, *supra* note 90, at 57–60 (no government speech if state disclaims the speech); Norton, *Not for Attribution*, *supra* note 90, at 1339 (importance of government disclaimers in some settings).

they're saying. The absence of transparency wouldn't give rise to a free speech claim, but rather to sound criticism of the masking.

It's possible for state speech to run afoul of constitutional provisions other than the Free Speech Clause. The Court has three times held that state-sponsored religious displays violate the Establishment Clause.<sup>96</sup> And although there are no cases so holding, there's a good argument that state speech could violate the Equal Protection Clause, for example, if a town pronounced itself the "White Persons Only" refuge or made similar clear, purposive, derogatory proclamations based on race or other suspect or otherwise protected characteristics.<sup>97</sup>

For the most part, though, government speech does not run afoul of the coercion, monopolization,<sup>98</sup> or ventriloquism problems, and does not implicate the Establishment Clause or Equal Protection Clause. Rather, it is playing a role in public debate, helping advance a sometimes contested view of the good. The Court has made clear that such viewpoint selectivity in government speech is acceptable.<sup>99</sup> In such settings, the state chooses what to say and we properly attribute the speech to it.<sup>100</sup> When the state opens space for private speech—say, a new town park with a performance bandshell—it operates on the other end of the spectrum from the government speech model and is properly limited by normal free speech

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96. See *McCreary Cty. v. ACLU*, 545 U.S. 844 (2005) (county display of Ten Commandments at courthouse violates Establishment Clause); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (county display of crèche on grand staircase of county courthouse violates Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (posting of Ten Commandments on public school classroom walls violates Establishment Clause); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (Establishment Clause limit on government speech); *Pinette*, 515 U.S. at 777, 799, 817 (O'Connor, J., concurring in part and in the judgment; Stevens, J., dissenting; Ginsburg, J., dissenting) (majority of Justices would find Establishment Clause violation if reasonable observer would deem private religious display on government property endorsement by the state).

97. See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 651, 658–68 (2013).

98. See Schauer, *supra* note 84, at 377, 381.

99. See *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (“[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.”); *Summum*, 555 U.S. at 468 (government is entitled to “select the views that it wants to express”); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citation omitted) (“[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances . . . in which the government ‘used private speakers to transmit specific information pertaining to its own program.’”) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)); see also *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (Scalia, J., dissenting) (“The First Amendment does not mandate a viewpoint-neutral government. . . . [T]he government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas.”).

100. See *Bezanson & Buss*, *supra* note 88, at 1384 (“[G]overnment speech should be limited to purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government’s message.”).

rules.<sup>101</sup> But it is the in-between case that interests me here: when the state sets up a forum for certain speech only, with limits that track the state's interest in promoting some notions of the good and avoiding promotion of other notions. Those settings—sometimes deemed limited public forums—sit uneasily between the normal free speech rules that apply in traditional public forums and the fairly open territory for the state's own speech. As I will argue below, we should borrow from government speech doctrine in allowing some leeway in how states set up limited public forums. To make clear that this would involve a doctrinal shift, and to achieve a more accurate branding, we should call these settings “speech platforms.”

### III. WALKER

If you own a motor vehicle in Texas, you may choose a standard license plate, a “vanity” license plate with letters and numbers you select (subject to restrictions),<sup>102</sup> or one of many specialty license plates either created by the state legislature or approved by the Texas Department of Motor Vehicles Board (the Board).<sup>103</sup> TEXAS appears atop every plate.<sup>104</sup> The Sons of Confederate Veterans, Texas Division (SCV), proposed a specialty plate that would include the image of a rectangular Confederate battle flag on the left side, with the identifying numbers and letters in the middle and right side. The words “Sons of Confederate Veterans” would appear around the flag, and also at the bottom of the plate.<sup>105</sup> More than 350 specialty plate messages have been approved<sup>106</sup> (via a few different administrative methods), but the Board denied the SCV application pursuant to a statutory provision that permits rejection “if the design might

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101. For the Court's expression of this distinction between the broad latitude given to government speech and the normal rules applicable in traditional or designated public forums, see *Rosenberger*, 515 U.S. 819. The Court observed that in *Rust v. Sullivan*, 500 U.S. 173 (1991), it allowed the government to expend funds to promote its own message and not an opposing message, and that there's dicta in *Widmar v. Vincent*, 454 U.S. 263 (1981) giving public universities the power to make content-based academic decisions. See *Rosenberger*, 515 U.S. at 833. The Court continued:

It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

*Id.* at 834.

102. See 43 TEX. ADMIN. CODE § 217.45(c)(7) (2015).

103. See *Walker*, 135 S. Ct. at 2244–45.

104. See *id.* at 2248.

105. *Id.* at 2245.

106. See *id.* at 2255 (Alito, J., dissenting).

be offensive to any member of the public.”<sup>107</sup> The Board concluded that “public comments ha[d] shown that many members of the general public find the design offensive, and . . . such comments are reasonable.”<sup>108</sup>

In an unusual voting arrangement—Justice Thomas joining the four “liberal” Justices—the Court held the specialty plate denial constitutional.<sup>109</sup> There were only two opinions—Justice Breyer for the majority and Justice Alito for the dissent. The majority didn’t dispute Justice Alito’s conclusion that the denial represented “blatant viewpoint discrimination.”<sup>110</sup> As far as one can tell, all nine Justices thought they had two choices—deem the specialty plate messages government speech, thus permitting the state to reject the Confederate flag design because of the offensive, disfavored viewpoint; or deem the specialty plate program a limited public forum, established by the state for private speech, and hold the denial unconstitutional, because viewpoint restrictions in such a forum are invalid. No Justice tried to create a new category of “mixed speech”; none criticized the no-viewpoint-restrictions rule in limited public forums. Doctrine exerted a powerful pull—valid government speech or unconstitutional viewpoint denial in a limited public forum appear to be the only two options the Justices considered.

The majority structured its discussion around the analysis from *Pleasant Grove City, Utah v. Summum*.<sup>111</sup> In *Summum*, the Court unanimously deemed a city’s choice of permanent monuments for its public park to be government speech, not subject to First Amendment Free Speech Clause restrictions, even though the monuments were mostly donated by private groups or individuals.<sup>112</sup> Justice Alito’s majority opinion reasoned that property owners don’t usually install monuments with which they don’t want to be associated and that observers generally believe monuments convey messages for the property owners.<sup>113</sup> “The monuments that are accepted . . . are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”<sup>114</sup>

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107. TEX. TRANSP. CODE ANN. § 504.801(c) (West 2013 & Supp. 2016); *Walker*, 135 S. Ct. at 2245.

108. *Walker*, 135 S. Ct. at 2245 (alteration in original).

109. *Id.* at 2244. For scholarship presaging this result, see Norton, *Measure*, *supra* note 90, at 618–22; Norton, *Not for Attribution*, *supra* note 90, at 1342–43.

110. 135 S. Ct. at 2256 (Alito, J., dissenting); *see also id.* at 2251 (majority opinion) (alteration in original) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009)) (state may “exercise [its] freedom to express its views”).

111. 555 U.S. 460 (2009).

112. *See id.* at 464.

113. *See id.* at 471.

114. *Id.* at 472.



Justice Breyer relied on *Sumnum* to make three points. First, states have long used license plates to convey messages.<sup>115</sup> Second, “Texas license plate designs ‘are often closely identified in the public mind with the [State].’”<sup>116</sup> The word TEXAS appears on all the plates; the state requires car owners to display plates on their cars; the state issues the plates, owns all plate designs, and dictates how plates may be disposed.<sup>117</sup> “Texas license plates are, essentially, government IDs,”<sup>118</sup> and issuers of IDs don’t usually permit messages on the IDs with which they don’t wish to be associated.<sup>119</sup> “Consequently, ‘persons who observe’ designs on IDs ‘routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.’”<sup>120</sup> Moreover, because car owners could affix their own bumper stickers, perhaps they want specialty plates to convey government endorsement of the messages on such plates.<sup>121</sup> Third, “Texas maintains direct control over the messages conveyed on its specialty plates. . . . This final approval authority allows Texas to choose how to present itself and its constituency.”<sup>122</sup>

Finally, Justice Breyer rejected the argument that Texas has established some kind of public forum subject to a rule against viewpoint restrictions. First, he explained that this isn’t a designated public forum.<sup>123</sup> He restated that Texas maintains final authority over specialty plate designs, that it owns the designs, that plates have often been used for government speech, and that as a form of government ID they bear the state’s name.<sup>124</sup> “These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.”<sup>125</sup> Second, he explained that this isn’t a nonpublic forum.<sup>126</sup> He distinguished *Perry*, *Lehman*, and *Cornelius* by showing that in each case private persons were speaking, and not the state.<sup>127</sup> The Court decided each of those cases in favor of the government, so Breyer wasn’t distinguishing them because of their holdings; the

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115. See *Walker*, 135 S. Ct. at 2248.

116. *Id.* (alteration in original) (quoting *Sumnum*, 555 U.S. at 472).

117. *Id.*

118. *Id.* at 2249.

119. *Id.*

120. *Id.* (alteration in original) (quoting *Sumnum*, 555 U.S. at 471).

121. *Id.*

122. *Id.*

123. *Id.* at 2250. He also briefly discussed traditional public forums, but no one had argued the specialty plates are such a forum. *Id.* He also rejected the argument that this is a “limited public forum,” *id.*, which he used to refer to a designated public forum for certain groups or topics.

124. *Id.* at 2251.

125. *Id.*

126. *Id.*

127. See *id.* at 2252.

concern was that their dicta says “no viewpoint restrictions even in nonpublic forums,” and Breyer was cordoning them off for that reason.

Justice Alito’s dissent was straightforward.<sup>128</sup> Although government speech is present on part of the plates, “the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages.”<sup>129</sup> As the author of *Summum*, Alito then took issue with the majority’s reliance on *Summum*. He made three points. First, although there is a tradition of government using permanent monuments to express a message, there’s no such tradition regarding the over 350 specialty plate messages Texas has permitted; at some point in the last 20 years, it moved from using the plates to promote state programs to allowing “private entities to secure plates conveying their own messages.”<sup>130</sup> Second, although property owners generally don’t permit permanent monuments to express messages with which the owners disagree, Texas starts from a different baseline with its specialty plates program: “it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some who viewed them.”<sup>131</sup> That people might want a state seal of approval through specialty plates argues not for the plates being state speech, maintained Alito, but rather for seeing specialty plates as “governmental blessing (or condemnation) of private speech.”<sup>132</sup> Third, although permanent monuments in public parks are limited in number, there are a limitless number of possible specialty plate designs.<sup>133</sup> Alito concluded:

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i.e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. But that is exactly what Texas did here.<sup>134</sup>

The majority, understandably, was squeamish about insisting that states open specialty plates to all viewpoints. Whether the Confederate flag represents racism or is a symbol of a certain heritage may be debated, but about plenty of other symbols or words there would be no doubt. Consider

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128. For scholarship anticipating Alito’s position, see Corbin, *supra* note 34, at 684; Jacobs, *supra* note 95, at 423, 453–54, 461; Jacobs, *supra* note 90, at 98.

129. 135 S. Ct. at 2256 (Alito, J., dissenting).

130. *Id.* at 2260.

131. *Id.* at 2261.

132. *Id.*

133. *Id.*

134. *Id.* at 2262 (citations omitted).

your own favorite (i.e., least liked) epithet based on race, ethnicity, religion, gender, or sexual orientation. If the state must permit the Confederate flag as a specialty plate, it must permit every viewpoint, no matter how odious. In an effort to avoid this outcome, though, Justice Breyer made three mistakes.<sup>135</sup> The first is the most obvious, and Alito nailed it: It's one thing for us to see TEXAS as state speech; it's another to say a plethora of private designs are state speech. Throughout his opinion, Breyer moved from the former to the latter, without much of an argument.<sup>136</sup> Second, that the Texas Board exerts control over the specialty plate messages doesn't help resolve the question in the case—whether the resulting messages are state or private speech. Thus, while Breyer wrote “this final approval authority allows Texas to choose how to present itself and its constituency,”<sup>137</sup> we still must determine whether the “itself” is “state as speaker” or “state as granter/denier of private speech opportunities.” The latter as well as the former represents something about the state's values, but approving or disapproving someone else's speech is not the same as speaking oneself. Third, Breyer ran into similar difficulties with his point about association/endorsement, i.e., attribution. He moved from a point with which I agree—issuers of IDs don't permit messages on the IDs “with which they do not wish to be associated”<sup>138</sup>—to the key conclusion that observers of such messages “interpret them as conveying some message on the [issuer's] behalf.”<sup>139</sup> The state may be associated with a message it permits on the plates in two different ways: as speaker or as authorizer of someone else's speech. Either way there is an association with the state; if a state citizen doesn't like the message, in the former instance one should say “state, stop advancing this idea as yours (i.e., ours),” but in the latter instance one should say “state, stop giving others an opportunity to advance this message.” Because there are two ways in which the state may be associated with a message in this setting, one can't simply conclude, as Breyer did, that those who see specialty plates assume the messages are conveying state speech. Although I suppose this is ultimately

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135. My critique here is a change from a briefly stated view in Greene, (*Mis*)*Attribution*, *supra* note 7, at 849.

136. See 135 S. Ct. at 2248 (moving from examples of graphics and slogans that are clearly the state's speech to concluding that all messages on specialty plates are); *id.* (moving from TEXAS and the numbers on a license plate to the specialty plate designs when arguing that the public identifies all that's on license plates with the state); *id.* at 2250 (fact of plate being government-issued ID with the word TEXAS argues for the specialty plates as a whole being state speech); *id.* at 2251 (moving from Texas license plates traditionally being used for government speech, used as a form of government ID, and bearing the state's name, to conclusion that the specialty plate messages are state speech).

137. *Id.* at 2249.

138. *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)).

139. *Id.* (quoting *Summum*, 555 U.S. at 471).

an empirical question (about which neither Breyer nor Alito offers any evidence), Alito's take on this seems more plausible: the average viewer of the many specialty plate messages would assume that the state has permitted the speech, thus helping to convey the car owner's message, and thus that the state is associated with the speech in this way.<sup>140</sup> But not as speaker itself.

So it's hard to say that the SCV's Confederate flag, were it part of a specialty plate message, would best be understood as speech of the state of Texas, i.e., as the state advancing whatever message the Confederate flag advances. But is there a way, consistent with the best understanding of the First Amendment, to avoid the opposite outcome—specialty plates open to any odious hateful vitriolic message a car owner desires? Some scholars, also uneasy with the choice between the government speech and limited public forum models, have advanced a “mixed speech” idea. They claim that some speech is best seen as both the state's and a private person's and that doctrine needs a mix of the deference we give to government speech, the measured deference we apply in limited public forums, and the mostly hands-off approach we insist on for traditional and designated public forums. These scholars suggest that some version of intermediate scrutiny is best. I agree that in some settings the state and private persons are speaking jointly, and those cases present some tricky problems. But the mixed speech idea doesn't properly capture what's going on in settings such as specialty or vanity license plates, transit ads, and after-school classroom usage. Before turning to an elucidation and critique of the mixed speech idea in Part V, first it's important, in Part IV, to explore the oft-expressed concern that there's a misattribution problem in these settings, i.e., that the state's provision of speech opportunities might lead viewers to believe erroneously that the state has endorsed the resulting messages. This concern buttresses arguments for more state control either as a predicate for concluding the speech is that of the state or as a ground for giving the state significant content-based authority in limited public forums. It's usually wrong, though, to reach the former conclusion, and although I agree many of these settings are limited public forums, the misattribution grounding for that conclusion is usually wrong and a distraction from understanding the settings for what they are—state-provided platforms for private speech. This discussion of misattribution will aid in critiquing the mixed speech idea, which relies in part on mistaken conclusions about attribution, and also help lay the groundwork for the speech platforms concept in Part VI.

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140. *See id.* at 2261 (Alito, J., dissenting).

## IV. (MIS)ATTRIBUTION

In several cases, the Court has focused on government's interest in not wanting to be perceived as endorsing certain messages. This concern with unwanted attribution has contributed to two different but related doctrinal outcomes. Sometimes it helps the Court conclude that the speech is that of the government and thus that broad content-based discretion is appropriate. Other times it helps the Court conclude that the government has made a reasonable content-based (but not viewpoint-based) judgment of inclusion and exclusion in a limited public forum. First I will show where and how this happens in the case law and how some scholars have supported it. Next I will contend that the concern is often misplaced, that there is usually not a reasonable concern with unwanted attribution of expression to the state. To the extent there is a *misattribution* concern, it's not clear the state may rely on that to make otherwise constitutionally forbidden speech content restrictions.<sup>141</sup> Even though private persons probably have a constitutionally based interest in avoiding misattribution (and avoiding having to speak to dispel misattribution), the state isn't a rights bearer in this way. (Although the state has a legitimate interest in avoiding violating the Constitution via its own expression, it's not clear if this interest extends to instances of mistaken attribution to the state.) In any event, in some settings the state can cure the problem with appropriate disclaimers. Finally I will contend there still might be a good reason to allow content (and even viewpoint) restrictions when the state provides speech opportunities, but not because of a concern with misattribution. Rather, it's because we should understand the First Amendment as permitting the state to make some viewpoint-based and some subject-matter-based restrictions in limited public forums, either to avoid fostering odious or vulgar speech or to foster speech while avoiding controversy. This sets the stage for the speech platforms concept fleshed out in Part VI.

As discussed in Part III, in *Summum* and *Walker* the Court grounded its government speech holdings partly in the state interest in avoiding unwanted attribution. In *Summum*, Justice Alito reasoned that property owners don't generally "open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated."<sup>142</sup> Because of that, "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some

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141. Throughout this Part, I discuss both attribution and misattribution. When speech is properly deemed that of the state, virtually complete deference is due, even to viewpoint-based choices, as per the discussion in Part II. But most of what I cover involves the state wishing to avoid misattribution to it of what is in fact private speech in a state-created speech platform.

142. 555 U.S. at 471.

message on the property owner's behalf."<sup>143</sup> In *Walker*, Justice Breyer, relying on *Sumnum* (much to Justice Alito's chagrin!), maintained that states usually don't allow placement on government IDs of "message[s] with which they do not wish to be associated."<sup>144</sup> Because of that, people who see license plates with specialty designs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf."<sup>145</sup> These attribution concerns, and resulting determinations that the speech is the state's, permit not only subject matter-based content decisions but also viewpoint-based content decisions. This is critical to the holding in *Walker*; it was less clear in *Sumnum* that viewpoint-based speech selection was occurring.

As discussed in Part I, in a trio of limited public forum cases the Court deferred to the government's subject-matter-based speech restrictions in part because of the endorsement/attribution concern. Thus, it upheld a city's exclusion of political advertising from its public transit vehicles, citing "lurking doubts about favoritism" otherwise.<sup>146</sup> It validated the Army's refusal to allow political speeches on its Fort Dix, New Jersey base to ensure that the "the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates."<sup>147</sup> And it permitted the federal government to host a charity drive for its employees while excluding legal defense and political advocacy organizations to "avoid[] the appearance of political favoritism."<sup>148</sup>

Several scholars have supported the Court's concern with people attributing speech in state-created speech settings to the state itself. Citing to the SCV's specialty license plate, Helen Norton explains that "[p]ublic entities increasingly maintain that the First Amendment permits them to ensure that private speakers' views are not mistakenly attributed to the government."<sup>149</sup> In this setting and others, "government has a significant interest in protecting the integrity of its own expression—i.e., in ensuring

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143. *Id.*

144. *Walker*, 135 S. Ct. at 2249 (quoting *Sumnum*, 555 U.S. at 471).

145. *Id.* (quoting *Sumnum*, 555 U.S. at 471).

146. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion); *see also id.* (holding limited access okay to "minimize . . . the appearance of favoritism").

147. *Greer v. Spock*, 424 U.S. 828, 839 (1976); *see also id.* at 846 (Powell, J., concurring) (asserting that policy furthers "both the appearance and the reality of political neutrality on the part of the military").

148. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985) (citing *Greer*, 424 U.S. at 839; *Lehman*, 418 U.S. at 304); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)) (holding that "a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself'" from speech deemed inappropriate for the audience).

149. Norton, *Not for Attribution*, *supra* note 90, at 1318.

that its own views and messages are not distorted by others.”<sup>150</sup> It’s important to distinguish, Norton argues, between improper state censorship and “a sincere and reasonable concern that others’ speech will be mistakenly understood as the government’s own.”<sup>151</sup> After discussing some factors to consider in making this distinction, Norton concludes that the state may protect against misattribution by making viewpoint-based judgments in the specialty-plates setting and that this is state speech.<sup>152</sup> To the contrary, she concludes that we should apply limited public forum analysis in the setting of public transit ads.<sup>153</sup>

Caroline Mala Corbin has advanced a conception of mixed speech.<sup>154</sup> I will discuss this more in Part V, but for now consider Corbin’s support for the (mis)attribution concern. Focusing on specialty plates, she maintains that “the government may be seen as approving views it does not condone,” that it “will likely be viewed as endorsing or, at a minimum, tolerating [the specialty plate] messages.”<sup>155</sup> We should not force the state to “associate itself with messages that it would not voluntarily endorse or tolerate,”<sup>156</sup> she claims. The concern with approving or endorsing a message is different, though, from whether the state is seen as tolerating a message—the latter is true when we disallow state regulation of speech based on, say, offensiveness (consider “Fuck the Draft” in *Cohen*<sup>157</sup> or flag burning in *Johnson*<sup>158</sup>), as well as when the state opens space for private speech in traditional or limited public forums. In these settings as well as in our private lives, tolerating another’s speech indicates nothing about our support or nonsupport for the ideas contained therein. It takes something more to reach approval or endorsement. “Associating” speech with the state falls somewhere in between the concerns of approval/endorsement and the different matter of toleration; one might associate speech with the state when one concludes it’s the state’s own point of view, or one might associate speech with the state when the state is merely providing a platform for private speech. To keep matters sharp, I’ll focus on Corbin’s arguments about approval and endorsement, i.e., about (mis)attribution.

Finally, Corey Brettschneider and Nelson Tebbe argue for significant governmental discretion in the specialty-plates setting in part to avoid

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150. *Id.* at 1320.

151. *Id.* at 1326.

152. *See id.* at 1342–43.

153. *See id.* at 1347–48.

154. Corbin, *supra* note 34.

155. *Id.* at 647, 655.

156. *Id.* at 656.

157. *See Cohen v. California*, 403 U.S. 15, 16 (1971).

158. *See Texas v. Johnson*, 491 U.S. 397 (1989).

speech being attributed to the state.<sup>159</sup> (This is part of their advancing a mixed speech model, which I'll discuss in Part V.) They support Texas's denial of the SCV specialty plate in part because otherwise the state would risk "seeming complicit" in the Confederate flag message, because reasonable persons, especially if "not familiar with the specialty license plate system, could reasonably think that the flag was displayed with the state's imprimatur."<sup>160</sup> They maintain similarly that "Texas has an interest of constitutional magnitude in avoiding the reasonable perception that it is endorsing what many citizens would take to be racist speech."<sup>161</sup> They also refer to the risk that specialty plate messages "will be associated with the state."<sup>162</sup> Writing for himself, Tebbe refers to the state's "legitimate interest in avoiding the impression that it is endorsing a message of racial bias."<sup>163</sup> Michael Dorf similarly writes of the "substantial risk that Texas . . . will convey some level of government endorsement of the private speech on the specialty plates," adding that "the government does have a real interest in avoiding being seen by the public to endorse offensive messages."<sup>164</sup>

In many of the settings in which the state provides private speech opportunities, there is no reasonable risk of attributing—or misattributing—the resulting speech to the state, because of the vast array of messages the state permits. This debunking of the misattribution concern is a principal lesson from the quartet of cases involving state exclusion of religious speech from physical or funding forums. *Widmar*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* hold that if the state opens a physical or funding forum for a wide variety of speakers, it does not violate the Establishment Clause to include religious speech as well.<sup>165</sup> We do not

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159. See Corey Brettschneider & Nelson Tebbe, *A License to Say Anything?*, N.Y. TIMES (Jan. 9, 2015), [http://www.nytimes.com/2015/01/10/opinion/a-license-to-say-anything.html?\\_r=0](http://www.nytimes.com/2015/01/10/opinion/a-license-to-say-anything.html?_r=0).

160. *Id.*

161. Corey Brettschneider & Nelson Tebbe, *Clearing Up the Court's Confusion About License Plates*, BALKINIZATION (Mar. 31, 2015), <http://balkin.blogspot.com/2015/03/clearing-up-courts-confusion-about.html>.

162. *Id.* Similarly, Brettschneider argues that if a state law school includes the Christian Legal Society (CLS) among the many student groups it subsidizes, and the CLS doesn't give equal membership rights to openly gay and lesbian students, this "would raise the problem of complicity. The state's financial support for the CLS would make it complicit in the group's message of discrimination." Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and its Implications for the State Speech and Limited Public Forum Doctrines*, 107 NW. U. L. REV. 603, 633 (2013); see also BRETTSCHEIDER, *supra* note 79, at 119.

163. Nelson Tebbe, *Neither Side Got it Right In The Texas License Plate Case* (June 19, 2015), <http://balkin.blogspot.com/2015/06/neither-side-got-it-right-in-texas.html>.

164. Michael Dorf, *No Middle Ground in Confederate License Plate Case* (June 18, 2015), <http://dorfonlaw.org/2015/06/no-middle-ground-in-confederate-license.html>.

165. See *supra* text accompanying notes 58–75; see also Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) (asserting a similar idea in setting of federal law compelling equal access for all student groups, including religious, to use public school space during



properly see the government as endorsing religious speech in this setting, but rather as opening speech opportunities broadly, endorsing none of the resulting messages. This principle applies easily to a state that permits more than 350 specialty plate messages, as Texas does, and knocks out one of the pillars of Justice Breyer's argument in *Walker*. It would apply similarly to public transit vehicles that display a wide variety of commercial and noncommercial messages. This principle suggests that the Court was wrong in *Lehman*, *Greer*, and *Cornelius* to focus on attribution/endorsement in upholding the subject-matter restrictions in those cases.<sup>166</sup> If a city permits political ads as well as commercial ones, the reasonable viewer response would be not that the city is endorsing any particular ad but rather that it is endorsing none.<sup>167</sup> If the Army permits political speakers on its base along with various other speakers and entertainers, the reasonable response would be not that the Army is endorsing any particular speaker but instead that it is endorsing none. If the federal government permits legal defense and political advocacy organizations along with a bevy of other groups to raise funds from federal employees at their workplaces, the same analysis applies: no reasonable perception of endorsement of any of the groups involved.

This principle—that endorsement or attribution does not follow when the government opens the door to all sorts of messages—has a direct analogue in two other areas of First Amendment law.<sup>168</sup> In the Establishment Clause setting, when government supports both secular and religious schools with vouchers or other taxpayer money, the Court has refused to see endorsement of the religious recipients.<sup>169</sup> And in the compelled speech setting, when the state requires a private actor to host or support a cornucopia of messages, the normal rule against compelled speech is suspended, in part because the attribution/endorsement concern drops away.<sup>170</sup>

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noninstructional time); Corbin, *supra* note 34, at 635 (“Arguably, if the government is constitutionally bound to allow all viewpoints in a forum, no viewpoint . . . should be attributable to the government.”).

166. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985); *Greer v. Spock*, 424 U.S. 828 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *supra* text accompanying notes 35–53.

167. Here I depart from a briefly stated different approach in Greene, *Speech Platforms*, *supra* note 7, at 1257.

168. For a discussion of these areas of First Amendment law in the setting of determining what should count as a “substantial burden” on religious exercise for purposes of the Religious Freedom Restoration Act, see Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161, 185–90 (2015).

169. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

170. See *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

Although there might be some settings with more limited speech opportunities in which it is appropriate to attribute the resulting messages to the state (perhaps *Sumnum* is a good example), the *Widmar* principle should have applied to *Walker*. Norton, Corbin, Brettschneider, Tebbe, and Dorf are right to think the state should have some content-based control over specialty plate messages—indeed, some viewpoint-based control—but not because otherwise people will believe the state has endorsed the odious messages. Rather, the state should be permitted to erect speech platforms without being required to foster racist and other hateful or even vulgar speech.<sup>171</sup>

My argument assumes that in many of the settings discussed here, the reasonable person would understand that the state is opening a forum for private speech and not speaking itself. But what if people make mistakes of fact? Part of the scholarly response to these cases turns on that. The mistakes could be based on incomplete information, e.g., seeing one car with a specialty license plate and not knowing other cars have different specialty license plates.<sup>172</sup> Or they could be based on incomplete information of a different sort, e.g., not appreciating that a school district has a written and applied policy of allowing all student groups to meet in classrooms after school. The mistakes could also be based on erroneous reasoning: even if one knows the state has opened a forum for a wide array of messages, one might incorrectly conclude that the state is endorsing (rather than merely tolerating) all the messages it permits. How should free speech doctrine respond to the possibility of mistake in these settings?

Individuals probably have a First Amendment right against misattribution by the state.<sup>173</sup> This might be grounded in the Free Speech Clause or more generally in the unenumerated but widely recognized right of expressive association. The right against compelled speech is best understood as a right not to foster a message one does not wish to foster, but sometimes the Court focuses on the concern with being improperly tagged with a message with which one does not want to be associated.<sup>174</sup> Furthermore, in an important compelled subsidy case, *Johanns v. Livestock Marketing Ass'n*, the Court held that generic ads funded by compelled fees

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171. See Norton, *Not for Attribution*, *supra* note 90, at 1323 (referring to the state's "negative expressive interests").

172. Even if this were true in *Walker*, and even if this misattribution to the state of what is in fact a private message permitted by the state were a ground for deeming the specialty plates state speech, this kind of misattribution would be less likely to occur in other speech platforms (such as vanity plates, transit ads, and public school classrooms for after-school activity).

173. For my prior treatment of this, see Greene, *(Mis)Attribution*, *supra* note 7, at 833–44.

174. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575–77 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15–16 (1986).

from beef producers are government speech not subject to First Amendment attack.<sup>175</sup> In dissent, Justice Souter contended that a reasonable person would see the ads as the speech of the private parties and that this misattribution should be sufficient for a successful compelled speech claim.<sup>176</sup> Justice Scalia's majority opinion left open the possibility of an as-applied challenge "if it were established . . . that individual beef advertisements were attributed to [the plaintiffs]."<sup>177</sup> In both the straight-on compelled speech cases (where law requires one to speak or carry a message) and in the *Johanns*-type setting (compelled subsidy could become a compelled speech claim as-applied), the possibility that the individual could escape misattribution by disclaiming the message is problematic because that would require the individual to speak when she might prefer to remain silent.<sup>178</sup> The Court needs to flesh this out, but there's good groundwork for concluding that individuals have a right against misattribution by the state.

There's no similar ground, though, for concluding that the state has a right or interest in avoiding messages being misattributed to it. Remember that what's at stake here is allowing the state to restrict private speech opportunities either by deeming the speech governmental (thus allowing broad content-based choices) or by providing the predicate for fairly broad content-based choices in limiting a public forum. If there is a weighty enough state interest in avoiding faulty attribution of messages, the result is more state control and fewer private messages. But the government isn't a rights bearer. It has interests in protecting the public, interests that weigh into various constitutional calculations. But it's a stretch to say the government has an interest in protecting the public from erroneous attribution of a message to the government itself. Moreover, although individuals shouldn't be forced to disclaim unwanted speech attributed to them by the state, if states can issue appropriate disclaimers to ward off misattribution, they should be required to do so, rather than relying on the misattribution to close off private speech opportunities.<sup>179</sup> The state does have an interest—indeed, an obligation—to avoid violating the Constitution, so it must steer clear of expression that endorses religion

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175. 544 U.S. 550 (2005).

176. *See id.* at 577–79 (Souter, J., dissenting).

177. *Id.* at 565.

178. *See* Greene, *(Mis)Attribution*, *supra* note 7, at 844, 850; *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 99 (1980) (Powell, J., concurring in part and in the judgment).

179. For an instructive exchange regarding disclaimers to ensure viewers will see religious speech in a traditional public forum as private and not the government's, see *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995). For scholarship discussing governmental disclaimers to avoid misattribution, see Bezanson & Buss, *supra* note 88, at 1483; Jacobs, *supra* note 90, at 57–60; Norton, *Not for Attribution*, *supra* note 90, at 1339–40.

(thus violating the Establishment Clause). Even here, there's an unresolved question whether mistaken attribution of religious speech to the state should ground an Establishment Clause claim or whether only speech that is in fact that of the government should qualify.<sup>180</sup> Although it is less clear from doctrine, government may also have an obligation to avoid violating the Equal Protection Clause by denigrating persons based on race and other protected characteristics.<sup>181</sup> Here, too, we need to think more about whether mistaken attribution of denigrating speech to the state violates the Equal Protection Clause or whether only speech that is in fact that of the government should qualify. Except when necessary to avoid violating the Constitution, however, the state should not be able to reduce otherwise available private speech opportunities by invoking the need to avoid misattribution to itself.<sup>182</sup>

Thus, the misattribution argument, central to many of these cases at the borderline of government speech and limited public forum doctrine, is (mostly) mistaken. Without the misattribution argument, the holdings in *Walker*, *Lehman*, *Greer*, and *Cornelius* are on shaky ground. Perhaps *Sumnum* survives because the selectivity is tighter and because the city didn't open a platform for private speakers. The demise of the misattribution argument in many of these cases helps refocus our attention on what the state is actually doing. In *Walker*, in cases involving public transit ads, and in cases involving limits on the use of public school classrooms for after-school meetings, the government is seeking to set up platforms for private speech without being forced by First Amendment doctrine to foster racist and other hateful messages as well as vulgarity. In *Lehman*, *Greer*, and *Cornelius*, the government was after something

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180. In *Pinette*, speaking for a four-Justice plurality, Justice Scalia ruled out mistaken attribution as the ground for an Establishment Clause claim, see 515 U.S. at 764–66, but the other five Justices—in concurrences and dissents—left the door open to such a claim. See *id.* at 777 (O'Connor, J., concurring in part and in the judgment) (not calling it mistaken attribution, but the better view might be that she's referring to reasonable mistake of fact); *id.* at 785 (Souter, J., concurring in part and in the judgment) (open to mistake of fact here); *id.* at 799, 807 (Stevens, J., dissenting) (same); *id.* at 817 (Ginsburg, J., dissenting) (opinion implies same). In *Good News Club v. Milford Central School*, though, six Justices refused to accept possible mistaken attribution—at least by schoolchildren, in the setting of classrooms opened for after-school meetings—as the ground for an Establishment Clause claim. See 533 U.S. 98, 112–19 (2001); see also *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (“We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”).

181. See Tebbe, *supra* note 97, at 651, 658–68.

182. See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1399 (2001). Misattribution to the state might disrupt our ability to hold it accountable for its speech, but as I have argued in the text, deeming what is in fact private speech to be government speech because of misattribution would reduce private speech opportunities, and the state can restore a true line of accountability through disclaimers (even if not always at the site of the speech).

different (and perhaps less defensible), best put as avoiding having to host controversial speech. Justice Breyer was onto something important when, at the end of his *Walker* opinion, he wrote, “just as Texas cannot require SCV to convey ‘the State’s ideological message,’ SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.”<sup>183</sup> He was referring to *Wooley v. Maynard*, which awarded a compelled-speech-based opt out from displaying the New Hampshire state motto “Live Free or Die” on one’s license plate.<sup>184</sup> The best understanding of *Wooley* is that it gives one a right to avoid having one’s property be the medium for fostering the state’s (or any other person’s) message. Conversely (and this is the elegance of Breyer’s point), the state should be permitted to provide specialty plate speech opportunities without being compelled to foster or host all manner of odious messages. But—contra the rest of Breyer’s opinion—this is not to avoid misattribution of message to the state, and it’s not because the message is in fact state speech. Perhaps blinded by the strong “no viewpoint restrictions in limited public forums” holdings of the *Widmar* set of cases (and without paying sufficient attention to the correct rejection of the misattribution argument in those cases), the Court wasn’t able to reach the appropriate conclusion in *Walker*: Texas should win, but only if we develop a new understanding of limited public forums as speech platforms subject to some content-based state discretion, including, sometimes, viewpoint restrictions.

#### V. MIXED SPEECH

The government speech and limited public forum models are outcome determinative in cases such as *Walker*. Under the former, the state may accept or reject specialty plates even for viewpoint-based reasons (with some limits based in constitutional provisions outside the Free Speech Clause). Under the latter, the state may not make viewpoint-based judgments of inclusion and exclusion. But neither model is satisfactory. Government speech doesn’t accurately describe the various messages that appear on specialty license plates and similarly doesn’t capture what’s going on with vanity plates, public transit ads, or after-school public classroom meetings. And although “limited public forum” is a fair enough description of the speech opportunities in these settings, the strict no-viewpoint-discrimination rule that the doctrine appears to require leaves

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183. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (citation omitted) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

184. 430 U.S. 705, at 714–15.

government with a tough choice. Either it must allow hateful and vulgar speech in these forums or it must shut them down.

Responding to this dilemma, some scholars have proposed a “mixed speech” model, according to which in some of these settings we consider the expression to be both the state’s and the private person’s. Caroline Mala Corbin appears to have coined the phrase mixed speech.<sup>185</sup> Helen Norton has described it as “joint speech.”<sup>186</sup> Also using the term mixed speech,<sup>187</sup> Corey Brettschneider and Nelson Tebbe have referred to speech “blending”<sup>188</sup> state and private messages. I will set forth Corbin’s basic argument and then explain why it usually doesn’t capture what’s going on as a descriptive matter. Partly the problem is an improper reliance on the misattribution concern. Corbin is right, though, to insist on some form of elevated scrutiny for viewpoint restrictions in speech platforms.

Corbin says the “mixed nature of the speech is apparent” in settings such as public transit ads and specialty plates.<sup>189</sup> She also refers to government funding of private speech, although she recognizes that is less obviously mixed.<sup>190</sup> She proposes “five interrelated factors”<sup>191</sup> to determine if speech is the state’s, a private party’s, or mixed: who is the literal speaker; who controls the message; who pays for the message; what is the context of the speech; and to whom would a reasonable person attribute the speech?<sup>192</sup> “[U]nless all factors point exclusively to private speech or exclusively to government speech, the speech is mixed.”<sup>193</sup> Taking specialty plates as her main example, Corbin contends that all factors point in both directions: the literal speaker is both state and private person; both control the message to some extent; although private persons pay extra for the specialty plate, the state’s funding plays a role; context is tricky here, the state’s goal being a mix of opening but not fully opening a speech opportunity; and attribution would be to the state and the private person.<sup>194</sup>

Because the factors point in both directions, we can’t treat specialty plates just as private speech, argues Corbin.<sup>195</sup> Much of her discussion on

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185. See Corbin, *supra* note 34.

186. See Norton, *Measure*, *supra* note 90, at 621; see also Norton, *Not for Attribution*, *supra* note 90, at 1320.

187. See Brettschneider & Tebbe, *supra* note 161; Brettschneider & Tebbe, *supra* note 159; Tebbe, *supra* note 163.

188. Brettschneider & Tebbe, *supra* note 159.

189. Corbin, *supra* note 34, at 607.

190. See *id.*

191. *Id.* at 627.

192. See *id.*

193. *Id.* at 628.

194. See *id.* at 640–47.

195. See *id.* at 647–62.

this point is about (mis)attribution. “[B]ecause of the undeniably strong government component, the government may be seen as approving views it does not condone”<sup>196</sup> and “will likely be viewed as endorsing or, at a minimum, tolerating [the] messages.”<sup>197</sup> Requiring strict viewpoint neutrality would “force the government to associate itself with messages that it would not voluntarily endorse or tolerate.”<sup>198</sup> This endorsement/attribution problem also exists in the public transit ads setting, maintains Corbin.<sup>199</sup> On the other hand, she observes, we can’t treat specialty plates just as state speech.<sup>200</sup> There’s often a lack of transparency about the state’s role, and the viewer might think the state is tolerating but not endorsing the speech. One might add that the large number of messages that appear on specialty plates in many states makes it harder to treat them as the messages of the government.

Corbin concludes that we should treat specialty plates (and other settings in which the government provides private speech opportunities) as mixed speech and that we should apply intermediate scrutiny.<sup>201</sup> This scrutiny is meant to be rigorous<sup>202</sup> but to permit the state to reject messages that are harmful (perhaps tracking constitutional harms, such as to equality), in part to protect citizens from such harm<sup>203</sup> and in part to avoid endorsement of or association with such messages.<sup>204</sup> The case for limiting vulgar speech is weaker because the harm is less and there’s a risk of targeting unpopular viewpoints.<sup>205</sup>

Corbin is appropriately responding to the dilemma posed by state-created speech opportunities that come with content-based restrictions that leave courts to the unsatisfying government speech or limited public forum doctrinal options. But mixed speech doesn’t accurately capture what’s going on in many of these settings. The mixed speech concept makes sense when it’s hard to disentangle the state’s role from the private person’s role. *Johanns*<sup>206</sup> may be a good example of this; although the Court held that the generic beef ads are formally government speech, the speech appears mixed because of the private funding of the ads and the lack of clear attribution to the government. (In that setting, the mixed speech label leads

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196. *Id.* at 647.

197. *Id.* at 655.

198. *Id.* at 656.

199. *See id.* at 658–59.

200. *See id.* at 662–70.

201. *See id.* at 671–88.

202. *See id.* at 675.

203. *See id.* at 686.

204. *See id.* at 673, 683, 686.

205. *See id.* at 688.

206. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

to a legitimate concern about compelled speech.) *Rust v. Sullivan*<sup>207</sup> may be another good example of mixed speech; although the Court held that the restriction on abortion referral and counseling was government speech,<sup>208</sup> there was a concern that the indigent women patients would be confused as to the source of the advice they were getting, because of the lack of clear attribution to the government in what is typically a private doctor-patient setting. (That concern underpins a serious claim of undue burden on abortion rights.) But specialty plates are different. What's mixed about the speech on specialty plates is that part is the state's (the ID number and the name TEXAS) and part is the private person's (the separate "special" message). Private ads on public transit vehicles are similar: the vehicles are the state's, and there are plenty of state messages on them, but the advertising is the private parties'. Ditto for public school classrooms for after-school activities: the space is the state's, and there are plenty of messages from the faculty and staff in the classrooms, but the student group meetings after school hours constitute private speech.

These last observations about specialty plates, public transit ads, and public school classroom after-school student meetings go straight to the misattribution concern to which Corbin returns several times in her argument. Although she sometimes acknowledges that viewers might appreciate that the state is simply tolerating the private messages it is permitting, often she focuses on the state's concern with being tagged with the messages, with viewers thinking the state is endorsing the messages. But as I argued in Part IV, in most of the speech platforms I discuss, the reasonable person should not conclude that the state is endorsing the wide variety of messages it permits. If Texas opened the door to the SCV specialty plate and all sorts of other messages, both hateful and not, the reasonable response would not be to attribute the messages to the state but rather to see the state as provider of speech opportunities for many. Yes, the state is tolerating the messages, but it is not endorsing them. When we combine that point with the point that the speech on specialty plates, public transit ads, and in student after-school meetings in public school classrooms is mixed only in that some of it is the state's and some the private person's, the case for a "mixed speech" category is significantly diminished.

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207. 500 U.S. 173 (1991).

208. The Court held that the government may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 193. See also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (although *Rust* "did not place explicit reliance on the rationale that the counseling activities of the doctors . . . amounted to governmental speech," the Court has since "explained *Rust* on this understanding").



Once we see these settings as platforms for private speech, we can take Corbin's instinct—that the state should not be strictly limited by the no-viewpoint-restriction rule—and expand upon it. States should be permitted some viewpoint-based restrictions in speech platforms, specifically for hateful/demeaning or vulgar speech, because government has a substantial interest in not fostering, not hosting, not providing a platform for such instances of private speech. This is the way out of the government speech/limited public forums doctrinal dilemma, not the mixed speech model.

## VI. THE CONCEPT OF THE SPEECH PLATFORM

The case law and the scholarship have left us at an impasse. Government often wants to set up speech opportunities for private persons but doesn't want to open the door to every type of message. The state's interest here isn't as regulator, and it isn't as speaker. It's something different, and the closest the doctrine has come to recognizing that difference is the concept of the limited public forum. But even there, the Court balks at permitting viewpoint restrictions. The scholars in this area have tried to work within the contours of the government speech and public forum doctrines, or they have sought a new concept, of "mixed speech." That concept, though, is too indebted to mistakes about mistakes (misattribution of private speech to the state), and in any event too often describes as mixed or joint or blended speech that is better seen as an opportunity provided by the government for private persons. *Walker* is a stark example of the impasse—a majority opinion that doesn't ring true descriptively and a dissent that doesn't ring true normatively. A Confederate flag specialty plate wouldn't be (and wouldn't be reasonably seen as) the speech of the state of Texas, but to require Texas to allow its display would force the state to provide a platform for racist and other hateful speech when it opens speech platforms at all.

Here is how this Part will proceed. Limited public forum doctrine is based on one sturdy leg, one shaky one. The sturdy leg is deference to state purpose. The shaky leg is concern about misattribution; fixing this will permit us to see more clearly that the state is often seeking to provide a platform for a wide variety of private expression while maintaining some control over harmful messages, even if the control is viewpoint based. To make the case for relaxing the rule against viewpoint restrictions in limited public forums, I will focus on the strongest argument for that rule: distrust of the state to draw principled lines, i.e., "negative theory." I will summarize scholarship developing the government distrust model of free speech law and will explore how the Court has used that model to hold legislatures and administrative actors in check. But just as negative theory makes sense to buttress free speech law regarding regulation and traditional

public forums, it doesn't apply to government speech, and it should similarly not apply to state restriction of messages in limited public forums. To help signal this doctrinal shift, and to use a more accurate term, we should call limited public forums "speech platforms." We will still apply the reasonableness test developed for limited public forums to subject-matter restrictions, which usually are justified under such a test, although this can sometimes be surprisingly difficult. We should, though, apply elevated scrutiny to viewpoint restrictions in speech platforms; although this will block the state from merely taking sides in a contested debate, it will permit government to forbid hateful or vulgar messages, even if those restrictions are viewpoint based.

The principal Court grounding for limited public forum doctrine with which I agree is the acceptance of state purpose in setting the contours of the forum. This doesn't mean complete deference, but it distinguishes how the Court treats traditional public forums. As discussed in Part I, the state could claim that since the main purpose of parks and streets is for recreation and transportation, it has the power to establish broad restrictions on expression in those places. Our doctrine has resisted this because of a cultural/legal commitment to parks and streets being open to speech. As we do for state speech, though, it makes sense to adopt a more deferential approach to governmental claims of purpose in establishing limited public forums. There is less need to rein in state claims of limited purpose, because we have the relatively unregulated arenas of pure private speech and traditional public forums, and because the government speech model, discussed in Part II, is a better (though not perfect) fit for the state's goals with limited public forums. Just as the state has affirmative messages to convey with its own speech, so does it want to provide platforms for private persons to convey such messages. And just as the state does not want to express certain messages, so does it not want to provide platforms for such messages. We can see speech platforms as aiding in the state's promotion of specific values in a nonregulatory way.

Limited public forum doctrine is also deferential to the state because of a concern with people attributing private messages in such forums to the state. As explored in Parts I and IV, this misattribution concern was important to the Court in *Lehman*, *Greer*, and *Cornelius*. That the Court thought people might misattribute private political speech to the government in those cases, however, is inconsistent with the Court's correct reasoning in the *Widmar* line of cases that reasonable persons do not misattribute speech to the state when it opens space for a wide array of expression. Removing the misattribution concern from the Court's limited public forum reasoning doesn't undermine my case for more deference to the state in such forums. Instead, it helps us see more clearly that the state interest isn't avoiding unwanted attribution but rather to not provide a

platform for harmful speech. The same is true with *Walker*: as discussed in Parts III and IV, once we remove the misattribution concern, we can more clearly see that Texas has not itself spoken, but rather has set up a platform for private speech while wanting to avoid fostering racist and other harmful messages.

Our stringent First Amendment protection for expression is based in several affirmative values and also in what Frederick Schauer has called the “argument from negative implication,”<sup>209</sup> which I am referring to as “negative theory.” These values and arguments can be fully realized in our doctrine regarding criminal and civil regulation of expression and regarding traditional (and designated) public forums. The affirmative values of expression, and negative theory, are not part of government speech doctrine, where a different argument for value takes over—for the value of the state itself advancing its conceptions of the good, even if contested. The question I have been addressing in this Article is where limited public forums ought to fit in this matrix. The Court has, to some extent, allowed state discretion regarding such forums, borrowing some from the deference it gives to state speech, but it has stopped at viewpoint restrictions. Something about those, it seems, requires standard, strict, First Amendment treatment.

Promoting the affirmative values of expression seems an unlikely reason to be overly concerned about viewpoint restrictions in limited public forums. Whatever value one focuses on—finding true or right answers, democratic participation and checking of government, and individual liberty or autonomy—may be advanced by not imposing criminal or civil sanctions based on viewpoint and by a rule against viewpoint restrictions in traditional public forums. These values could be advanced as well in limited public forums, but given the richness of our free speech protection in the regulatory and traditional public forum settings, there are many ways to communicate all sorts of messages (including hateful or vulgar), supported by whatever affirmative value one’s theory favors. The strongest and most salient justification for the rule against viewpoint restrictions in limited public forums is the argument from negative theory: We can’t trust the state to pick and choose among messages to determine which are inappropriately hateful or vulgar; the risk that the powers-that-be will help their friends and harm their enemies is too strong; an otherwise valid ideal—refusing to provide speech platforms for truly harmful speech—is, in the cauldron of politics, too likely to be the occasion for political favoritism and correctness of one sort or another. Thus, the argument goes, even if we’re okay with some subject-matter restrictions in limited public

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209. SCHAUER, *supra* note 8, at 80.

forums, which we wouldn't accept elsewhere, the negative theory concern with viewpoint restrictions remains.

In his book *Free Speech: A Philosophical Enquiry*, Schauer writes, "We believe there is something special about free speech, for otherwise we would not refer to it as we do."<sup>210</sup> The question is whether a free speech principle can be justified; whether, despite the fact that speech can cause harm, there is "a reason for tolerating speech . . . distinct from arguments for toleration in general."<sup>211</sup> After setting forth some arguments for and against the standard affirmative arguments for a free speech principle, Schauer writes a chapter called "[t]he utility of suppression."<sup>212</sup> He refers to the "argument from negative implication."<sup>213</sup> Even if we can't derive a free speech principle from an affirmative argument or arguments, "the state may have less ability to regulate speech than it has to regulate other forms of conduct, or the attempt to regulate speech may entail special harms or special dangers not present in regulation of other conduct."<sup>214</sup> Government may be "particularly bad at censorship," and "[o]ne reason may be the bias or self-interest of those entrusted with the task of regulating speech."<sup>215</sup> In sum,

[f]reedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.<sup>216</sup>

This may be seen as "the argument from governmental incompetence."<sup>217</sup> In later work Schauer adds that "official discretion to determine the value of speech content has long been understood to be incompatible with the principle of free speech itself, one of whose central themes is distrust of government."<sup>218</sup>

In his book *Is There a Right of Freedom of Expression?*, Larry Alexander contends that the core of any conception of freedom of

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210. *Id.* at 6.

211. *Id.* at 12.

212. *Id.* at 73.

213. *Id.* at 80.

214. *Id.* at 81.

215. *Id.*

216. *Id.* at 86.

217. *Id.*

218. Schauer, *supra* note 33, at 111; see also ALEXANDER, *supra* note 9, at 145 (concern is either that the state "is unduly error-prone in assessing expression's harms and benefits" or that "it has motives for regulating—notably, self-protection—that render it untrustworthy in doing so").

expression is the principle of “evaluative neutrality,” which “requires regulators to abstain from acting on the basis of their own assessments of a message’s truth or value.”<sup>219</sup> This is similar to Schauer’s negative theory, but where Schauer has some faith in the ability of free speech doctrine to cordon off the problem, Alexander is a skeptic, arguing that “[f]reedom of expression is paradoxical within *any* plausible normative theory. That is because the requirement of evaluative neutrality is the core of any right of freedom of expression, but evaluative neutrality cannot coexist with *any* normative theory.”<sup>220</sup> Alexander’s predicate is too strong, though, and if one relaxes it, the ways in which our free speech doctrine accounts for expression’s value would seem less paradoxical. The tests the Court has developed to permit content-based regulation by category are best understood as a rough balance between value and harm. As the Court put it,

it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.<sup>221</sup>

When the Court engages in ad hoc strict scrutiny it is also balancing value against harm,<sup>222</sup> and such a balance is especially obvious in the many time, place, and manner cases in which the Court engages in true intermediate scrutiny—the state wins about half the time.<sup>223</sup> Although the balance in

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219. ALEXANDER, *supra* note 9, at 11.

220. *Id.* at 177; *see also id.* at 81 (“Paradoxically, finding a right of freedom of expression that feels ‘just right’ in terms of its scope requires the very evaluations of messages that any conception of freedom of expression would view as its central evil.”).

221. *New York v. Ferber*, 458 U.S. 747, 763–64 (1982); *see also* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2231 (2015) (“[C]ourts have no recourse but to engage in the difficult task of judging constitutional value.”); SHIFFRIN, *supra* note 82, at 22 (“[I]n determining what speech is or is not protected, right or wrong, the Court regularly makes judgments as to the value of types of speech.”).

222. For example, the best understanding of *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), is that although the speech involved was political and of high value, the potential harm of support to terrorist organizations was also high, and deferring to the legislative and executive assessment of that risk, the Court struck the balance in favor of the government.

223. For time, place, and manner cases in which the state loses, *see*, for example, *Watchtower Bible and Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150 (2002); *Lee v. Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. New Jersey*, 308 U.S. 147 (1939). For time, place, and manner cases in which the state wins, *see*, for example, *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

those cases doesn't involve assessment of speech content, nonetheless the Court is assessing the value of expression against its harms.

Although our constitutional order is constantly engaged in weighing the value of speech against the harm it causes, Alexander is correct to share Schauer's concern that allowing the state to assess speech value runs a risk of message discrimination and inappropriate bias. Our way of avoiding this has been by insisting on categories and rules and by not erecting a free speech doctrine that turns too much on ad hoc assessments. As Schauer puts it, "the First Amendment operates . . . by the entrenchment of categories whose breadth prevents the consideration of some number of relevant factors, and prevents the free speech decision maker from 'thinking small.'"<sup>224</sup> Sometimes the negative theory concern arises when legislatures enact content-based statutes and try to expand the categories of regulable speech or win on ad hoc strict scrutiny. Two good examples are *Texas v. Johnson*<sup>225</sup> and *United States v. Alvarez*.<sup>226</sup> In *Johnson*, the Court addressed a Texas law that banned, among other things, the "desecration" of the national flag.<sup>227</sup> As applied to Johnson's clearly politically expressive act of flag burning, the Court held the statute unconstitutional, in part because the statute required proof that Johnson knew the act would "seriously offend one or more persons likely to observe or discover his action."<sup>228</sup> Offense isn't a constitutionally valid ground for regulating expression (particularly high-value, political expression). In so holding, the Court rejected the argument that the American flag is distinctive in a way that overrides standard free speech protection.<sup>229</sup> The rejection turned in part on negative theory:

[T]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own

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224. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 408 (1989); see also *United States v. Stevens*, 559 U.S. 460, 468–72 (2010) (rejecting ad hoc cost-benefit analysis in free speech law).

225. 491 U.S. 397 (1989).

226. 132 S. Ct. 2537 (2012) (plurality opinion).

227. 491 U.S. at 400 n.1 (citing TEX. PENAL CODE ANN. § 42.09 (West 1989)).

228. *Id.* (citing TEX. PENAL CODE ANN. § 42.09(b)).

229. *Id.* at 417–18.

political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.<sup>230</sup>

The Stolen Valor Act criminalizes false representations about receipt of military honors.<sup>231</sup> We can assume it requires scienter, i.e., that the statement be knowingly false.<sup>232</sup> The *Alvarez* Court invalidated the statute under the First Amendment.<sup>233</sup> The principal opinions don't have much good to say about such lies; the opinions turn on the lack of harm from the lies and thus the low government interest in punishing them. The plurality opinion added this: "Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle."<sup>234</sup>

The negative theory portions of *Johnson* and *Alvarez* are concerned with the legislature's and the Court's inability to draw constitutionally acceptable lines between regulable and nonregulable speech. I have some doubts about this version of negative theory for reasons similar to why slippery slope arguments are overused.<sup>235</sup> The Court's concern is that even if it recognized (say) burning the American flag and lying about military honors as sufficiently and distinctively harmful, outweighing any value from the speech, both the legislature and it would be unable to distinguish other claims for distinctive expressive harm in the future, either because such lines are too hard to draw or because of the fear they can't be drawn without politics and ideology entering into the mix. If, though, the Court (or legislatures, with the Court as a backstop) can reason carefully enough to draw acceptable, ideology-neutral lines, then the negative theory claim of the statutory slippery slope variety isn't as strong.

Whatever one thinks about this matter, the Court's negative theory concern with permitting administrative officials or juries to make case-by-case determinations of expressive harm is sound.<sup>236</sup> Two good examples are

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230. *Id.* at 417.

231. *See Alvarez*, 132 S. Ct. at 2543 (plurality opinion) (citing 18 U.S.C. § 704(b) (2012)).

232. *See id.* at 2555 (Breyer, J., concurring in the judgment).

233. *Id.* at 2551.

234. *Id.* at 2547 (plurality opinion).

235. *See, e.g.*, Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

236. One might say the Court or courts sit as backstops to review such discretion according to principles similar to those used in sorting statutes that regulate expression, so why is the negative theory concern greater here than with statutes? One answer is that sorting statutes can still occur at a sufficiently high level of generality to protect against core bias concerns of negative theory. Another answer is that administrative officials and juries make scores of fact-nuanced decisions with little

*Cohen v. California*<sup>237</sup> and *Snyder v. Phelps*.<sup>238</sup> The California statute in *Cohen* required police officers (and then prosecutors and juries) to determine whether one has disturbed the peace by offensive conduct.<sup>239</sup> This is a law of general applicability; all laws should be general, of course, but in free speech discourse this means the law doesn't on its face regulate expression. But it might sometimes be applied to expression, and the concern is that officials will make content-based—and perhaps viewpoint-based—judgments in deciding whether the law applies. Cohen was arrested, prosecuted, and convicted for wearing a jacket in a courthouse corridor with the words “Fuck the Draft” plainly visible.<sup>240</sup> Although the state appellate court had construed “offensive conduct” to mean “behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace,”<sup>241</sup> the facts of the case revealed nothing that could support a conviction on fighting words or hostile audience grounds.<sup>242</sup> The question remained whether California could punish Cohen because of the offensiveness of the epithet. Although some of Justice Harlan's opinion for the Court turned on the affirmative virtues of Cohen's speech, Harlan also relied on negative theory: “the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?”<sup>243</sup> Moreover, “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>244</sup> This is classic negative theory: a distrust of state actors to draw principled lines (i.e., not biased regarding the message itself).

In *Snyder*, members of the Westboro Baptist Church picketed the funeral of Matthew Snyder, a U.S. Marine killed in the line of duty.<sup>245</sup> “The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military.”<sup>246</sup> Although the picketing was 1,000 feet from the church,

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chance for judicial review, either because we can't recover the reasoning behind, say, an arrest or a damages judgment or because there are too many instances of such and not enough judicial bandwidth.

237. 403 U.S. 15 (1971).

238. 562 U.S. 443 (2011).

239. See 403 U.S. at 16.

240. See *id.* at 16–17.

241. *Id.* at 17.

242. See *id.* at 20, 23.

243. *Id.* at 25.

244. *Id.* at 26.

245. See *Snyder v. Phelps*, 562 U.S. 443, 448 (2011).

246. *Id.*



Snyder's father was aware of the picketing.<sup>247</sup> He sued the church on various Maryland state law grounds; the Court focused on his intentional infliction of emotional distress tort claim. "To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress."<sup>248</sup> Although this is not a statute, it is still law of general applicability: it applies to conduct generally, not on its face to expression, although it sometimes might be applied to expression. Much of Chief Justice Roberts' opinion upholding the Church's First Amendment right to engage in the picketing focused on the speech being a matter of public concern<sup>249</sup> and occurring in a public setting, "on public land next to a public street."<sup>250</sup> But Roberts also included a paragraph turning on negative theory. He wrote that

[t]he jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]'" expression."<sup>251</sup>

This danger of bias could exist even if the speech were on a matter of private concern in a private setting; perhaps there the negative theory concern would give way to the state interest in protecting the victim of the intentionally inflicted emotional distress.

The rule against viewpoint restrictions in limited public forums turns on concerns similar to those expressed in *Cohen* and *Snyder*. We can't trust government administrators to pick and choose among the messages people wish to display on specialty or vanity license plates, on public transit ads, or in public school classrooms for after-school meetings. Even if

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247. *See id.* at 448–49.

248. *Id.* at 451.

249. *See id.* at 452–54.

250. *Id.* at 454.

251. *Id.* at 458 (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984)).

administrators are trying in good faith to apply neutral principles focused on restricting only speech that is sufficiently harmful (itself hard to do), inevitably message bias will creep in and the administrators will find some messages to be harmful (or not) because of political or other sympathies. Furthermore, allowing administrative discretion in these settings will open the door to bad-faith, knowingly biased message selection.

The negative theory concern is apt for limited public forums, however, only if such forums are sufficiently similar to the regulatory or traditional public forum settings. This analogy fails though. Negative theory in free speech law helps to explain why we have a free speech principle, why we treat expression with special care even though it causes real harm. That explanation—distrust of the state to draw sufficiently principled lines when it comes to speech, more so than when it comes to non-speech-related conduct—is linked to the state as regulator, as the entity with the legitimate power to impose criminal or civil sanctions. We extend this argument to traditional public forums not by analytic necessity; we could see parks and streets as government-owned space subject to less First Amendment protection. We extend it, rather, because of a constitutional cultural commitment to protecting some non-privately owned space for robust expression.

When the state speaks, we operate with the opposite principle from the regulatory or traditional public forum settings. We want the state to promote its vision of the good, even if that is sometimes contested, i.e., not viewpoint neutral. Or so I have argued in prior work and believe the doctrine strongly supports.<sup>252</sup> Whether upholding the abortion counseling gag rule,<sup>253</sup> or permitting the NEA to consider (in)decency in awarding arts grants,<sup>254</sup> or allowing a small town to pick and choose public monuments with virtually no constitutional restriction,<sup>255</sup> the Court has endorsed this broad vision of government speech.

We should do something similar for limited public forums, and to help make that doctrinal shift, we should call them speech platforms. “Public

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252. For a contrary view, see ALEXANDER, *supra* note 9, at 82–102. Alexander argues that it’s hard to distinguish state selectivity in speech regulation from state selectivity in setting up forums for private speech or in funding private speech or even in speaking itself. Alexander maintains we can’t distinguish a law that regulates some but not other groups because of what the various groups stand for from the state granting funds only to groups that will help advance the state’s message. *See id.* at 87. He seems to be rejecting the difference between state action that imposes criminal or civil sanctions and state action that selectively grants funds. I accept this distinction, *see* Greene, *supra* note 18 and articles cited in note 80, *supra*, as does the Court. *See, e.g.,* Locke v. Davey, 540 U.S. 712, 720–21 (2004); Rust v. Sullivan, 500 U.S. 173, 193 (1991).

253. *See Rust*, 500 U.S. at 203.

254. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 590 (1998).

255. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009).

forum” tracks too closely to *traditional* public forums—streets and parks—and thus starts with a rhetorical presumption in favor of standard free speech rules. The Court has backed away from that in permitting reasonable content-based restrictions in limited public forums, but has maintained the no-viewpoint-restrictions rule (albeit largely in dicta). The term “speech platforms” can describe the opportunities the state is providing private citizens, while allowing us to reconsider the viewpoint restrictions issue. When government provides speech platforms but doesn’t want to foster hateful or vulgar speech, it is acting as participant in, not regulator of, the speech market.<sup>256</sup> Because the hit to a private speaker from denial of access to a speech platform is just that—denial of access—and not criminal or civil sanctions, we should permit viewpoint restrictions of the sort I’ve been discussing, as we do with the state’s own speech. And we should be no more concerned about the effect on the marketplace of ideas than we are about the effect on the denied speaker, for that marketplace is open for all manner of horrible speech, but without the state’s contribution via its speech or platforms, physical or financial. In sum, we should overcome our negative theory concerns in the setting of speech platforms because criminal and civil sanctions are not involved, access to streets and parks is not involved, and we want the state to provide space for a wide variety of private speech while permitting it to avoid fostering certain types of harmful messages.

Given that speech platforms occupy a conceptual space between regulation of private speech and government speech, the standard of judicial review for content-based restrictions in such platforms should similarly rest somewhere between the strict scrutiny of the former and the virtually *carte blanche* deference of the latter. The Court’s reasonableness standard for subject-matter restrictions in limited public forums (speech

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256. A few commenters on a draft of this Article have expressed doubt about the line I’m drawing between imposing a penalty and withholding a benefit or privilege. The parade of horrors is easy to state, e.g., would I allow tax exemptions or third-class mailing privileges to track the viewpoint restrictions I want to allow in speech platforms? No, I would not. Much of the work here can be done by recalling the anti-leveraging principle discussed at *supra* text accompanying notes 85–88. Many examples in the parade of horrors will flunk this principle; the state may not set up a program for X policy and then impose a speech condition unrelated to the policy, and similarly it may not establish a general benefit/privilege that has nothing to do with expression and then impose a speech condition of the kind discussed in this Article. But speech platforms are different. They are not general benefits or privileges, and they are not programs with specific messages to be advanced. They are platforms for private speech generally, with a restriction on specific kinds of harmful speech. This is not a leveraging problem, and unless one adopts a position similar to Larry Alexander’s—that we can’t distinguish among different types of state action, *see supra* note 252—then my fairly commonplace reliance on a distinction between government as regulator and government as provider of benefit/privilege—here, speech opportunities—is, at least formally, a sensible distinction. That leaves us with the admittedly hard question of whether negative theory concerns should still apply here; after all, it’s still the state making speech content decisions. I leave the reader to my discussion in the text on that.

platforms) makes sense. But its rule against viewpoint restrictions is too strict. To give government the leeway for which I have argued to impose certain types of viewpoint restrictions in speech platforms, courts should apply some form of elevated scrutiny short of strict. It doesn't matter to my analysis whether we call this enhanced reasonableness or intermediate scrutiny or something else. Even if we recognize the state isn't itself speaking but rather is opening (and limiting) opportunities for private speech, we should still permit some viewpoint restrictions, if we have strong enough reasons for doing so (about which I will say more below). This is so even though if regulation of private speech were involved, negative theory would forbid the viewpoint restrictions under consideration here.

I have focused on restricting speech platforms to avoid hateful or vulgar speech. The former was at issue in *Walker*. My approach would permit the state to forbid speech platform messages that would reasonably be seen as disparaging persons on the basis of race, ethnicity, religion, gender, sexual orientation, or any similar characteristic. If it would violate the Equal Protection Clause for the state to disparage persons on one of the grounds mentioned here, does that mean the state *must* forbid similarly disparaging private speech in speech platforms? That is a hard question, requiring assessment of the scope of harms the Equal Protection Clause addresses and the complicated state action issue when the state is providing a forum for private speech but not itself speaking. I don't have an answer to it now, so I will just say that the state may forbid such privately disparaging speech in speech platforms, and leave for another day the question whether it must do so.

Restrictions on speech platform messages that are demeaning or disparaging based on race, etc. are clearly viewpoint based; after all, the pro-racial equality message would be permitted.<sup>257</sup> Whether speech platform restrictions on vulgar speech are viewpoint based is a harder

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257. See, e.g., *In re Tam*, 808 F.3d 1321, 1334–37 (Fed. Cir. 2015) (en banc) (invalidating federal prohibition of registering disparaging trademarks as unconstitutionally viewpoint based), *cert. granted sub nom.*, *Lee v. Tam*, 2016 WL 1587871 (2016). But see, e.g., *Wandering Dago, Inc. v. Destito*, No. 1:13-CV-1053, 2016 WL 843374 (N.D.N.Y. March 1, 2016) (state denied application of food truck for nonpublic forum because name of truck contained offensive ethnic slur; court holds this viewpoint neutral), *appeal filed sub nom.* *Wandering Dago, Inc. v. N.Y. Office of Gen. Servs.*, No. 16-622 (2d. Cir. Mar. 3, 2016); *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571 (1st Cir. 2015) (denial of demeaning or disparaging transit ads not seen as viewpoint based). For discussion of recent anti-Muslim transit ads, see Engy Abdelkader, “Savagery” in the Subways: *Anti-Muslim Ads, the First Amendment, and the Efficacy of Counterspeech*, 21 *ASIAN AM. L.J.* 43 (2014); see also Jack Cheevers, *Vanity Plates: One Man’s Slur is Another Man’s Badge*, *L.A. TIMES*, (Aug. 21, 1990), [http://articles.latimes.com/1990-08-21/news/mn-1132\\_1\\_license-plate](http://articles.latimes.com/1990-08-21/news/mn-1132_1_license-plate) (discussing California’s recall of vanity plates that many viewers saw as disparaging Italian-Americans).

question. In *National Endowment for the Arts v. Finley*,<sup>258</sup> the Justices debated a similar issue. The issue was whether federal law requiring “general standards of decency” to be part of federal arts funding decisions violated the First Amendment.<sup>259</sup> In the course of a majority opinion answering no, Justice O’Connor concluded that “the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face.”<sup>260</sup> Justice Scalia, concurring in the judgment, and Justice Souter, dissenting, concluded that the law requires viewpoint considerations in arts funding. As Scalia said, an arts proposal giving good regard for standards of decency gets favored over one that doesn’t, and that is a viewpoint-based consideration, even though not as obvious as, say, favoring Democrats over Republicans.<sup>261</sup> As Souter put it, the point of the law was to protect taxpayers from offense stemming from federally funded indecent art.<sup>262</sup> Indecent speech—and vulgar speech—is meant to shake people up, to counter the mainstream and decorous,<sup>263</sup> and restricting such speech is restriction on dissent just as the more obvious favoring of the ins over the outs would be. I’m inclined to agree with Scalia and Souter that a restriction on vulgarity is viewpoint based.<sup>264</sup> Nonetheless, states should be permitted to keep vulgar speech out of speech platforms. Admittedly, the harm is not the same as the more directed harm from hateful speech. It is more diffuse, to public sensibilities and decorum. But in the speech platform setting, government should be permitted to forbid vulgarity by recognizing its value as low and the harm to public discourse as sufficiently substantial.

The *Widmar* quartet of cases, in which state actors excluded religious speech from forums otherwise open to student group speech, need not be overruled. These are the only cases in which the Court has set aside viewpoint restrictions in limited public forums. As previewed in Part I, we can deem the restrictions invalid viewpoint discrimination. Once we jettison the erroneous Establishment Clause concern about misattribution of

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258. 524 U.S. 569.

259. *Id.* at 572–73.

260. *Id.* at 583.

261. *See id.* at 590–95 (Scalia, J., concurring in the judgment).

262. *See id.* at 603–07 (Souter, J., dissenting).

263. *See id.* at 605 (Souter, J., dissenting) (restrictions based on decency “require discrimination on the basis of conformity with mainstream mores”).

264. *But see, e.g.,* *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) (rejection of “SHTHPNS” vanity license plate deemed viewpoint neutral); *Mitchell v. Md. Motor Vehicle Admin.*, 126 A.3d 165 (Md. Ct. Spec. App. 2015), *cert. granted*, 135 A. 3d 416 (2016) (rejection of “MIERDA” [Spanish for “shit”] vanity license plate considered viewpoint neutral).

private religious speech to the state, there's no good reason left to exclude religious speech from the forums in question.

What to do about *Lehman*, *Greer*, and *Cornelius* is a tough question. Recall that each of those decisions upheld a limited public forum restriction on speech in significant part because of a concern about misattribution.<sup>265</sup> *Lehman* permitted a city to reject political ads on public transit vehicles—although the city allowed other ads—because of the “appearance of favoritism,” i.e., that people would mistakenly think the city was endorsing candidates whose ads were shown on the vehicles (or was backing ads on political issues).<sup>266</sup> Likewise, bowing to a concern about appearance of neutrality, *Greer* deferred to the military's exclusion of organized political speech from an Army base, although other speakers and organized speech activity had been allowed.<sup>267</sup> *Cornelius* similarly relied on the appearance of favoritism when it permitted the federal government to exclude legal defense and political advocacy organizations from soliciting funds during the federal employee charity drive, which allowed other groups to raise money.<sup>268</sup> If one shares my view from Part IV that the misattribution concern in these cases was misplaced, one is left searching for a justification for these subject-matter exclusions of high-value speech from limited public forums. The best answer is that the government in these cases was seeking to avoid sparking controversy, seeking to avoid being the agent, through being the speech platform provider, of conversational conflict on the issues of the day.<sup>269</sup> This flies in the face of a core First Amendment commitment to a robust public sphere of debate. But just as the state may choose with its own speech not to engage on tough, contested issues,<sup>270</sup> so may we accept its desire not to provide speech platforms for such matters. Hot debate will still occur among private speakers generally and in traditional public forums, but in some instances government will want speech platforms to be the ground for matters less subject to dispute. Although a limitation on controversial speech by subject matter in speech platforms is itself controversial, such a restriction is reasonable enough to be upheld in this setting.

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265. See *supra* text accompanying notes 35–45, 50–53.

266. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion).

267. *Greer v. Spock*, 424 U.S. 828 (1976).

268. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985).

269. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 805 (1995) (Stevens, J., dissenting) (“our ‘public forum’ cases do not foreclose public entities from . . . possibly . . . limiting the use of [unattended displays in public parks] to the communication of noncontroversial messages.”).

270. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 579–80 (1998) (upholding standards of decency as a factor in federal arts funding; even if this isn't state speech, it's the government as patron, which is a close analogue).

For similar reasons, the state should be permitted to exclude from speech platforms all messages about a particular subject matter of public debate. For example, it could exclude all specialty or vanity license plates with messages on the abortion debate.<sup>271</sup> Or all transit ads on the conflict in the Middle East. The reason for these exclusions would not be fear of misattribution to the state but rather not wanting to provide a platform for speech on certain controversial topics.

I have argued that the state should be permitted to set up speech platforms for private speech but impose some viewpoint-based restrictions. In so doing, I have focused on hateful, demeaning speech based on race and other characteristics that we protect in various ways through equality doctrine, either constitutional or statutory.<sup>272</sup> This raises the question whether we should permit viewpoint-based restrictions more broadly in speech platforms. My answer is generally no, and here is why. Even if one adopts my approach in this Article—that in limited public forums, i.e., speech platforms, we should relax our normal negative theory/distrust of government approach to viewpoint-based restrictions—such restrictions on private speech are still problematic and should be subject to careful scrutiny. The harm the state is seeking to prevent should not be just anything the state considers harmful but instead should track understandings of harm that are deeply and widely enough rooted in our constitutional order to stand strong against the free expression value on the other side. Although I am not taking a position on whether state racist speech would violate the Equal Protection Clause or whether states must restrict hate speech in speech platforms to avoid aiding and abetting private speech that is inconsistent with equality norms, the value of equal citizenship and personhood regardless of race, ethnicity, religion, gender, or sexual orientation has been hard-won and is now well established. Although there is “another side” when hate speech happens—the hateful side—there is something like a consensus that that other side is wrong. Furthermore, hate speech is itself harmful; the state restricts it not because

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271. See, e.g., *Children First Found., Inc. v. Fiala*, 790 F.3d 328 (2d Cir. 2015) (rejection of “Choose Life” specialty license plate valid because rejection based on subject matter and not viewpoint), *withdrawn*, 611 F. App’x. 741 (2d Cir. 2015) (withdrawing in light of *Walker* and remanding to District Court); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008) (same as the initial *Fiala* holding).

272. I have also argued that the state should be permitted to forbid vulgarity in speech platforms. I won’t say more about that here, other than to reiterate that there’s an interesting threshold question about whether such restrictions are viewpoint based (I have argued that they are, see *supra* text accompanying notes 258–64), and that the harm is to public sensibilities generally, as compared with the more directed harm of demeaning or disparaging speech. Limits on vulgarity satisfy the elevated scrutiny courts should apply to viewpoint-based restrictions in speech platforms because we can recognize such speech as low value in a way we might not if regulation of private speech were involved and because we can accept as significant or substantial a state interest in not fostering vulgar speech.

it thinks the idea behind it is wrong (although it does think that) but because the demeaning/disparaging nature of the speech inflicts direct harm. There is of course a well-vetted debate about whether that fact should permit regulation of hate speech. My point here is that one can answer no to that question but yes to recognizing that direct harm as a key part of the argument for upholding hate speech restrictions in speech platforms.<sup>273</sup>

Now consider two other possible viewpoint-based restrictions in speech platforms. Say a state wants to permit a “Right to Life” specialty license plate but not a “Pro Choice” plate.<sup>274</sup> This is a viewpoint-based restriction, but not a permissible one on my argument. The state is not seeking to protect a widely and deeply rooted constitutional value. In fact, it is intervening in a situation where a constitutional right is at stake—to choose whether or not to carry a fetus to term. And perhaps most importantly, the harm the state would be seeking to protect against is not direct harm from the speech itself. The state isn’t maintaining that the message “Pro Choice” causes direct harm in the way a racist message does. Rather, the state is maintaining that the position in the abortion debate reflected by the message “Pro Choice” is wrong (and that the underlying action of abortion is itself harmful). On elevated scrutiny, the harm the state is seeking to prevent from restricting the message is neither a widely, deeply accepted injury in our constitutional culture nor a direct harm from the message itself. And on the other side of the scrutiny calculus a constitutional liberty interest/right is at stake. Even without that latter factor in play, the state should still not be able to make viewpoint-based restrictions in speech platforms when it is merely taking sides in a currently contested debate and not seeking to prevent direct harm from the expression itself. Thus, permitting a “Pro Israel” but not a “Pro Palestine” specialty plate would be impermissible. The harm from the latter message may or may not be real, but it is not harm inflicted on a viewer from the mere consumption of the message, as would be a racial epithet demeaning Palestinians (or Israelis). And it is not harm based in a widely accepted constitutional norm such as the equality of citizens and persons.

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273. Corey Brettschneider has argued that the state need not be viewpoint neutral when subsidizing speech. It may (and should) not fund speech that “is directly at odds with the ideal of free and equal citizenship.” Brettschneider, *supra* note 162, at 629; *see also* BRETTSCHEIDER, *supra* note 79, at 116. He suggests that this idea might apply to limited public forums as well. Brettschneider, *supra* note 162, at 635 n.79.

274. *See, e.g.*, *ACLU of N.C. v. Tennyson*, 815 F.3d 183 (4th Cir. 2016) (post-*Walker*; authorization of pro-life but not pro-choice specialty license plate permissible viewpoint-based government speech); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (pre-*Walker*; authorization of pro-life but not pro-choice specialty license plate unconstitutional viewpoint discrimination).



I recognize that these lines are difficult conceptually and in practice. For regulation of private speech, negative theory concerns are sufficient to forbid all of the viewpoint restrictions just discussed (hate speech, abortion speech, Israeli-Palestinian speech). But speech platforms occupy a space closer to (though not identical with) state speech, and we should permit some viewpoint restrictions, subject to the kind of close scrutiny and factors discussed in the preceding two paragraphs.<sup>275</sup>

## CONCLUSION

When the government provides opportunities for private persons to speak, it should be able to forbid hateful or vulgar messages. Unfortunately, current First Amendment doctrine doesn't allow this. It either converts these settings into state speech, thus permitting message discrimination, or it insists they are limited public forums, subject to a rule against viewpoint restrictions. The Court and commentators have started down this path through a mistake about misattribution; they have incorrectly assumed that people will improperly attribute private expression to the state. In *Walker*, this mistake contributed to the Court's holding that a private group's Confederate flag specialty license plate should be seen as state speech and thus that Texas may refuse to authorize it.<sup>276</sup> But if we see the specialty plate setting for what it is—a forum for a myriad of private messages, not reasonably attributable to the state as speaker—then doctrine leaves us with the *Walker* dissent's conclusion that forbidding the Confederate flag plate would be unconstitutional viewpoint discrimination. States, though, should have discretion to reject hateful or vulgar messages in forums they create for private speech. Just as we permit government speech that favors some viewpoints over others, so should we permit some viewpoint restrictions in limited public forums. To signal this shift, and to more accurately describe what's happening in these settings, we should call them speech platforms. These might include specialty or vanity license

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275. Leslie Gielow Jacobs also seeks to reconceptualize some of the limited public forum doctrine to account for public sensibilities. See Jacobs, *supra* note 182. She would grant more discretion when the state is “exercising a significant didactic role in a special enclave,” *id.* at 1403, or when it is protecting truly captive audiences. See *id.* at 1404–06. Limiting subject matter and mode of communication are okay, says Jacobs, but not viewpoint restrictions, generally speaking. See *id.* at 1408; see also *id.* at 1376. She would permit exclusion of vulgar speech in what I am calling speech platforms, but she deems this a mode or subject matter restriction. See *id.* at 1414–17. She also would permit exclusion of hate speech, but wants to avoid viewpoint discrimination by insisting on specific rules (perhaps even a list of disallowed words). See *id.* at 1421–23; see also *id.* at 1414. Jacobs mostly advances the standard concern with viewpoint restrictions, even in speech platforms; I have argued in the text that we should relax that concern in this setting. We can't restrict racist hate speech and deny that we are restricting a viewpoint.

276. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

plates, ads on public transit vehicles, or public school classrooms used for after-school activities. The state should be able to set up such platforms but not be forced by the First Amendment to help foster all messages. We can relax our concern with the politics of line drawing here as we do with state speech, while we hold on to it in defending robust free speech protection regarding state regulation of private speech or rules in traditional public forums. Accepting the concept of the speech platform would have allowed the Court to decide *Walker* the same way but for the right reason: Texas may exclude racist viewpoints from the private speech platforms it establishes.