NOTE

TO ALITO, OR NOT TO ALITO: AN ANALYSIS OF GOVERNMENT SPEECH IN A POST-WALKER WORLD*

I. INTRODUCTION

To be, or not to be, that is the question. . .[1]

In the Supreme Court's landmark *Citizens United v. FEC*[2] decision, the Court stated that the First Amendment of the United States Constitution[3] "is written in terms of 'speech,' not speakers."[4] Therefore, the protection of "speech" extended to political speech espoused by corporations, nonprofits, and other associations of people.[5] Why, then, in the case of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[6] is speech seemingly espoused by the Sons of Confederate Veterans (SCV) struck down on First Amendment principles?[7] What turns the free expression of an

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1. WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1.

2. Citizens United v. FEC, 558 U.S. 310 (2010) (holding that associations of people are protected under the First Amendment). This Note will not offer criticism of the *Citizens United* decision directly, but it will discuss scenarios wherein the speech of associations of people—such as the Texas Division of the Sons of Confederate Veterans, in the context of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*—can be limited through the government speech doctrine. For an analysis of the *Citizens United* decision, see Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 W. ST. U. L. REV. 203 (2012).

3. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

4. 558 U.S. at 392.

5. *See Citizens United*, 558 U.S. at 355.

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

7. *See id.* at 2253. The First Amendment "principle" I am referring to here is the doctrine of government speech. In the case of *Walker*, the Court ultimately holds that the "speech" involved belongs to the government, therefore rendering the rejection of the SCV's specialty plate design constitutional. *See id.*

association of private citizens into "government speech?"[8]

The answer lies largely in the *Walker* majority's comparison of Texas's specialty license plate process with the erection of monuments in city parks in *Pleasant Grove City v. Summum*.[9] In *Summum*, a municipality rejected a religious organization's request to erect "the Seven Aphorisms of Summum" in one of its parks, which the organization claimed was a violation of the Free Speech Clause of the First Amendment.[10] The Supreme Court ruled the municipality's rejection of the monument constitutional.[11]

The Breyer majority in *Walker*, like the *Summum* Court, was correct in holding that the speech at issue was government speech. However, the government speech doctrine remains an oftentimes befuddling area of law,[12] leading some commentators to advocate for its outright abandonment and others to extol its virtues.[13]

II. CASE RECITATION

A. Background

1. Facts. The State of Texas requires its motorists to display state-issued license plates.[14] Nonprofit organizations may design a unique specialty plate and submit it to the Texas Department of Motor Vehicles ("Department") for approval.[15]

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8. *See* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009), for a thorough history of the government speech doctrine. In this article, the author describes the "government speech doctrine" as the notion that "[t]he government is . . . allowed to express its own viewpoint, even if it enlists the aid of private parties to get the message out, as long as the communication does not violate some separate legal restriction." *Id.* at 365.

9. Pleasant Grove City v. Summum, 555 U.S. 460 (2009). *See infra* Part III for discussion of *Summum* and its significance to both the majority and dissenting opinions in *Walker*.

10. *Id.* at 466.

11. *See id.* at 464 ("[T]he placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.").

12. *See* Olree, *supra* note 8, at 369 (noting the difficulty of identifying government speech as governments become increasingly involved in "facilitating private speech")*; see also* David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. REV. 389, 392 (2012) (discussing the "problematic" doctrine of government speech).

13. *Compare* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1314 (2010) (concluding that the government speech doctrine is unnecessary as it pertains to the government's ability to convey its messages), *and* Steven H. Goldberg, *Government May Not Speak Out-of-Turn*, 57 S.D. L. REV. 401, 409 (2012) (criticizing Justice Alito's *Summum* majority opinion as resting upon a "shaky legal foundation"), *with* Alyssa Graham, Note, *The Government Speech Doctrine and its Effect on the Democratic Process*, 44 SUFFOLK U. L. REV. 703, 704 (2011) ("Without the protection of the government speech doctrine, the government would run the risk of being continually accused of violating the First Amendment rights of other private speakers.").

14. *See* TEX. TRANSP. CODE § 504.943.

15. TRANSP. § 504.801(b).

However, the Department, through its Board,[16] may reject a proposed design if the design "might be offensive to any member of the public."[17]

The Sons of Confederate Veterans, Texas Division applied to sponsor a specialty plate the organization had designed, which included an image of the Confederate battle flag framed by the words "Sons of Confederate Veterans 1896."[18] The Department's Board rejected the SCV's initial application in 2009 and, a year later, the SCV reapplied.[19] The Board voted unanimously against issuing the plate, explaining that "public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable."[20]

2. Procedural History. The SCV and two of its officers initiated a lawsuit in 2012 against the chairman and members of the Board, alleging that the rejection of their specialty plate application violated the First Amendment's protection of free speech, and seeking an injunction requiring the Board to approve the proposed plate design.[21] The District Court upheld the Board's rejection of the plate design.[22] However, in a divided panel, the Fifth Circuit Court of Appeals reversed the District Court's judgment, holding that "the Board engaged in impermissible viewpoint discrimination and violated Texas SCV's rights under the First Amendment."[23] The dissenting circuit judge on the Fifth Circuit acknowledged that viewpoint discrimination was present, but found that the Board's rejection of the SCV's specialty plate design was a form of government speech, thus entitling the Board to reject the application without violating the SCV's First Amendment rights.[24] The Supreme Court granted the Board's petition for certiorari.[25]

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16. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2244 (2015).

17. TRANSP. § 504.801(c).

18. 135 S. Ct. at 2245.

19. *Id.*

20. *Id.* (citation omitted).

21. *Id.*

22. *Id.*

23. Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388, 397-98 (2014), *rev'd*, 135 S. Ct. 2239 (2015).

24. *See id.* at 401 (Smith, J., dissenting).

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

B. The Supreme Court

1. Justice Breyer's Majority Opinion. With a 5-4 majority,[26] a decision in which Justice Thomas broke from traditional ideological lines,[27] the Supreme Court reversed the judgment of the Fifth Circuit, holding that "Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design."[28] The Board's decision to reject the SCV's specialty plate design was therefore not in violation of the Free Speech Clause of the First Amendment.[29]

Justice Breyer began his analysis by stating that government statements "do not normally trigger the First Amendment rules designed to protect the marketplace of ideas."[30] Because the "government can speak for itself,"[31] it is allowed to promote programs, espouse policies, and take positions.[32] In ultimately concluding that the specialty license plates "convey government speech,"[33] Justice Breyer relied significantly on the Supreme Court's analysis in *Pleasant Grove City v. Summum*.[34] Justice Breyer reasoned that, analogous to the erection of monuments in a city-owned park,[35] state license plates communicate messages from the states.[36] Further, the majority expressed that license plates "are often closely identified in the public mind with the [State]."[37] Finally, Justice Breyer reasoned that the State of Texas has "direct control over the messages

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26. *Id.* at 2243. Justices Ginsburg, Kagan, Sotomayor, and Thomas joined Justice Breyer's majority opinion. Justice Alito authored the dissenting opinion, which Chief Justice Roberts, Justice Kennedy, and Justice Scalia joined. *Id.*

27. For an analysis of Justice Thomas's jurisprudence in race-related cases, *compare* Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43 (1997) (discussing Critical Race Theorists' dissatisfaction with Justice Thomas's jurisprudence), *with* Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 124 (2014) (observing that Justice Thomas is less committed to originalism when addressing constitutional questions dealing with race, often in "passionate and personal terms").

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

29. *See id.* at 2244.

30. *Id.* at 2245-46 (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005)).

31. *Id.* at 2246 (quoting *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000)).

32. *Id.*

33. *Id.*

34. Pleasant Grove City v. Summum, 555 U.S. 460 (2009). For a brief recitation of *Summum*'s facts and holding, see *supra* Part I.

35. *Cf. id.* at 470 ("Governments have long used monuments to speak to the public.").

36. *Walker*, 135 S. Ct. at 2248 (citation omitted).

37. *Id.* (quoting *Summum*, 555 U.S. at 472).

conveyed in its specialty plates"[38] such that approval or rejection of a specialty plate design renders the "speech" governmental in nature.[39] The specialty license plates were therefore "similar enough to the monuments in *Summum* to call for the same result."[40]

2. Justice Alito's Dissenting Opinion. In his dissent, Justice Alito categorized the speech at issue in the context of Walker as private speech and expressed his fear of future erosion of private speech that federal or state governments find objectionable.[41] While Justice Alito recognized that "all license plates unquestionably contain some government speech,"[42] he asserted that it would be more accurate to define such "speech" as private.[43]

As private speech, the Board's rejection of the SCV's proposed specialty plate design thus constituted "blatant viewpoint discrimination,"[44] an impermissible violation of the First Amendment.[45] In concluding that the speech at issue was private rather than government speech, Justice Alito claimed that the majority "badly misunderstands *Summum*."[46]

III. ANALYSIS

A. Government Speech in Walker & Beyond

1. Why Justice Alito Loses the Summum Debate. Justice Alito articulates three points of departure between the government speech at hand in Summum and what he perceives as private speech in the context of Walker: first, that governments have long used monuments as a means of

38. *Id.* at 2249.

39. *See id.*

40. *Id.*

41. *See id.* at 2254 (Alito, J., dissenting).

42. *Id.* at 2255.

43. *See id.* at 2255-56.

44. *Id.* at 2256 ("[W]hat Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought many of its citizens would find the message offensive."). When Justice Alito references "billboards," he is referring to the potential for license plates to display the messages of their owners, similar to the manner in which billboards convey messages to drivers. *Id.*

45. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (citing *Carey v. Brown*, 447 U.S. 455, 463 (1980)) (observing that viewpoint discrimination is prohibited under the First Amendment); Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000) ("The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.").

46. *Walker*, 135 S. Ct. at 2258 (Alito, J., dissenting)*; see also infra* Part III.A.

expressing a government message;[47] second, the presence of "selective receptivity" in Summum, absent, in his mind, from Walker;[48] and third, the limited space to erect monuments in a public park as opposed to the theoretically unlimited number of specialty license plates that could be issued by a State.[49]

Justice Alito fails to persuasively articulate how the stark contrast[50] between the history of public monuments and the history of Texas license plates distinguishes the two cases. First, the fact that public monuments have existed for centuries, whereas license plates obviously have not, cannot in and of itself negate the argument that license plates are a form of government speech. Were that the case, seemingly any form of government speech would have to pass the "Has it existed for centuries?" test, a test ungrounded in any legal precedent.[51] Further, while Justice Alito concedes that license plates may have originally been a form of government speech, he argues that the allowing of private parties to implement their own designs rendered specialty license plates private speech.[52] This argument neglects the direct and broadly held oversight authority of the State of Texas in deciding to approve or reject proposed specialty plate designs. Not to mention, this argument contradicts *Summum*, wherein private parties submitted their own monuments for erection in the municipal park.[53] By this same line of argument, privately owned, and potentially even privately *sculpted* monuments, must be considered private speech.

Justice Alito's second argument involves the "selective receptivity" present in *Summum*, yet absent in *Walker*: because the Board rarely exercises the authority to reject proposed specialty plate designs, the selectiveness of the overseeing local governmental authority existing in *Summum* therefore does not exist in *Walker*.[54] This argument again neglects the Board's

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47. *Id.* at 2258.

48. *Id.* at 2260.

49. *See id.* at 2261.

50. *See id.* at 2260.

51. For a discussion of the justification of "tradition" for preserving laws, see Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281 (2011). While the author focuses primarily on the "tradition justification" as it pertains to same-sex marriage laws, the author argues that "certain circumstances warrant skepticism toward the use of tradition when offered to justify a discriminatory law." *Id.* at 341. For example, when a law explicitly or implicitly antagonizes a historically stigmatized group based on former beliefs that have become repudiated, "tradition may serve as a convenient justification for the discrimination in question," making tradition "manipulable" for nefarious purposes. *Id.*

52. *See Walker*, 135 S. Ct. at 2260 (Alito, J., dissenting).

53. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464-65 (2009).

54. *See Walker*, 135 S. Ct. at 2260 (Alito, J., dissenting).

authority to reject proposed designs, authority which grants the Board the ability to reject designs that are found offensive.[55] Just because the Board rejects fewer propositions for specialty plate designs than the local government did monuments in *Summum* does not erase the fact that, in both cases, a governmental authority wielded the discretion to select which proposals it did and did not wish to have associated with it. In addition, Justice Alito claims that "[t]here is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech."[56] While this may be facially true,[57] it cannot be said that the government speech at work in *Summum* was meant to further a government program. In both cases, a government entity exercised its proper authority to reject a message with which it would rather not associate itself.

Justice Alito's final distinguishing factor regards spatial limitation.[58] He asserts that "[a] park can accommodate only so many permanent monuments," whereas license plates are only seemingly limited by the "number of registered vehicles" in Texas.[59] While he is correct that the limiting factor of displaying license plates is the number of vehicles on which those plates can be displayed, he unnecessarily limits the erection of monuments to public parks. In reality, monuments are erected in a variety of public spaces—whether in a public park,[60] on the side of a public street,[61] or on a college campus.[62] The "spatial limitation" of erecting monuments in public spaces is no less a limitation for monuments than it is for specialty license plates.

The State of Texas simply bears too great an authority in the approval of specialty plate designs, such that a specialty plate—notwithstanding the fact that the word "Texas" is imprinted on each and every state-issued license plate[63]—is not definitively private speech. Because the rejection of a privately donated

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55. *See* TEX. TRANSP. CODE § 504.801(c).

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

57. *See infra* Part III-C for a comparison of government-endorsed speech and government speech.

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

59. *Id.*

60. As is the case in *Summum*. *See id.*

61. *See* Stephen Clowney, *Landscape Fairness: Removing Discrimination From the Built Environment*, 2013 UTAH L. REV. 1, 17 (2013) ("The Confederate statues that abut Main Street proclaim, quite loudly, the subordinate position of local African Americans.").

62. *See* David Courtney, *Jefferson Davis is Back at UT*, TEXAS MONTHLY (April 17, 2017), http://www.texasmonthly.com/the-daily-post/jefferson-davis-back-ut/ ("In 1925, the statue was moved up the street to the Capitol and stayed there until 1933, when it made its way to the [University of Texas campus].").

63. *See Walker*, 135 S. Ct. at 2250.

monument for placement on government-owned property was deemed the expression of the city rather than the expression of the private religious organization in *Summum*,[64] so too must the rejection of a privately designed specialty license plate suffice as government speech.

2. A New Standard for Government Speech. Although it can be argued that there is nothing viewpoint-discriminative about the Board's rejection of the SCV's Confederate flag-imbued specialty plate design,[65] Justice Breyer implies that viewpoint discrimination is tolerable when government is the entity exercising its right to expression.[66] And yet, the Court has repeatedly stated that viewpoint discrimination is an impermissible violation of private citizens' free speech rights under the First Amendment.[67] To provide a guiding principle for the government speech doctrine, I would propose the following standard: a local, state, or federal government entity may advocate for a certain message so long as the message is reasonable, and so long as the entity, in advocating its message, does not chill the exercise of speech by opposing viewpoints.

Inherent to the exercise of speech is the capability to advocate, endorse, or disparage a certain viewpoint, issue, or belief.[68] Whether the speaker is a private citizen or an association of citizens,[69] the ability to advocate for a certain viewpoint is protected under the First Amendment. It is no different for the federal government, as Justice Scalia once wrote

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

65. The Board may reject a proposed specialty plate design that is found to be offensive to the general public. TEX. TRANSP. CODE § 504.801(c). The "offensiveness" standard does not inherently discriminate on the basis of viewpoint, as the propensity to cause offense does not discriminate along party or ideological lines. Therefore, the "offensiveness" standard is a neutral standard, and the Supreme Court has stated that neutrally-administered standards, even if such a standard results in advocating (or disparaging) one viewpoint over another, are permissible. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000) ("The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.").

66. *See Walker*, 135 S. Ct. at 2246 ("But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.").

67. *See supra* note 46. *See generally* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011) (analyzing the paradoxical, oftentimes conflicting nature of the impermissibility of viewpoint discrimination with the government speech doctrine).

68. *See generally* ERIC BARENDT, FREEDOM OF SPEECH 75 (2d ed. 2005) ("[A]ssertions of fact and statements of value or feelings are covered, because, for instance, they express an individual's beliefs or identity, or contribute to the formation of public opinion . . . .").

69. *See generally* Imtanes, *supra* note 2.

that "[i]t is the very business of government to favor and disfavor points of view."[70] The standard I have articulated cements the government's role as a speaker, and affords it the same substantive rights afforded to private citizens and associations of citizens, with two important caveats.[71]

First, the government's ability to advocate for or against a certain viewpoint should be limited by an objective, "reasonableness" standard. In *Walker*, the government speech at issue would pass this first test, for the Board found through a period of public comment that an image of the Confederate battle flag was likely to offend.[72] Even in the absence of public comment, however, a state's disavowal of pro-Confederate sentiments may be found reasonable.[73]

The second limitation is that a government entity's ability to advocate for or against a certain viewpoint must not have the effect of chilling free expression. In the case of *Walker*, the Board's decision to reject the SCV's proposed design would pass muster. While the SCV cannot bear a Confederate flag on a state license plate, they are still free to continue advocating Confederate-sympathetic viewpoints through other means, such as attaching pro-Confederate bumper stickers to their cars, right next to their license plates. Their ability to convey their position or to participate in the marketplace of ideas is not substantially

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70. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (Scalia, J., concurring).

71. I would therefore concur with the viewpoint of one scholar who asserts the need for a "limiting principle" in the context of constitutional protection of government speech. David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1663 (2006). Just as private citizens do not possess an absolute right to free expression, such as in the context of libel and obscenity, government entities should also be subject to reasonable limitations on the free exercise of speech. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (holding that the First Amendment does not protect against false statements made about private citizens); Miller v. California, 413 U.S. 15, 36 (1973) (holding that the State of California may regulate the distribution of "patently offensive 'hard core' materials" without violating the First Amendment).

72. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

73. *See* Charles M. Blow, *Confederate Flags and Institutional Racism*, N.Y. TIMES (June 24, 2015), https://www.nytimes.com/2015/06/25/opinion/charles-blow-confederate-flags-and-institutional-racism.html ("In the wake of the Charleston massacre, there is a rapidly growing consensus sweeping the country to remove the Confederate flag, a relic of racial divisiveness, from civic spaces."); Ta-Nehisi Coates, *Take Down the Confederate Flag—Now*, THE ATLANTIC (June 18, 2015), https://www.theatlantic.com/politics/archive/2015/06/take-down-the-confederate-flag-now/396290/ ("The flag that [Dylan] Roof embraced, which many South Carolinians embrace, does not stand in opposition to this act—it endorses it."). *But see* Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411, 1433-34 (1992) ("Those who wave the Confederate flag as a celebration of regional pride have the right to express their viewpoint.").

hampered by the Board's decision to reject their specialty plate design.

While the standard I have proposed is malleable and far from a bright-line rule, it is effective in demystifying the viewpoint discrimination/government speech paradox. At the same time, it provides limitations that will disallow government entities from advocating viewpoints so strongly as to chill the expression of opposing viewpoints.

B. The Chilling Absolutism of Justice Alito's Private Speech[74]

Justice Alito's "private speech" designation[75] would have had a reverse chilling effect on free expression if it had become binding precedent.[76] Justice Alito contends that the State of Texas has created a limited public forum by allowing state property to be used by private speakers according to rules that the State prescribes.[77] As private speech within a limited public forum, "government regulation may not favor one viewpoint over another."[78] Such an interpretation of the speech at hand would so broadly elevate both the meaning of a "limited public forum" and viewpoint discrimination that government entities—whether a governmental agency, a college campus, or something else—would be rendered effectively voiceless. In the context of *Walker*, for example, the State of Texas would impermissibly discriminate on the basis of viewpoint if it rejected a private organization's "Join ISIS" or "Texas Nazis" specialty plate design. Further, a college campus would be forbidden to erect seemingly any privately donated monument whatsoever, as Justice Alito himself expresses the view that many images or messages that are

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74. According to one scholar, Justice Alito is "the Roberts Court's most consistent critic of expanding First Amendment free speech rights." Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 440 (2013). While I will not cast judgment as to the extent of Justice Alito's First Amendment absolutism as it pertains to his entire jurisprudential body of work, I will argue in this section that Justice Alito's *Walker* dissent veers dangerously toward an absolutist view of private speech, one that would substantially chill a government entity's capacity to express itself.

75. *Walker*, 135 S. Ct. at 2254 (Alito, J., dissenting).

76. I use the phrase "reverse chilling effect" to refer to the chilling effect such a result would have on a government entity's ability to express itself or espouse an opinion, rather than on a private citizen.

77. *Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001)). For an analysis of the muddy doctrine of the "limited public forum," see Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009); Ronnie J. Fischer, Comment, *"What's in a Name?": An Attempt to Resolve the "Analytical Ambiguity" of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639 (2003).

78. *Walker*, 135 S. Ct. at 2261 (Alito, J., dissenting) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)).

viewed as innocuous by most could foreseeably be viewed as offensive to others,[79] and to reject offensive messages would thus amount to viewpoint discrimination.[80] A government entity must possess some input in the messages with which it wishes to associate.

Ironically, such a holding would overturn *Summum*. Under his definition of a limited public forum, the city government in *Summum*, by allowing private citizens to erect monuments "according to rules that the [city government] prescribes,"[81] created a limited public forum. Thus, by rejecting the religious organization's monument,[82] the government has discriminated on the basis of viewpoint, rendering such a "regulation of private speech"[83] unconstitutional.

Because Justice Alito's definitions of both a limited public forum and viewpoint discrimination would foreseeably result in a great number of instances of "government speech" being rendered the regulation of private speech in a limited public forum, his opinion would prove farther-reaching than he considers, and far more corrosive to a government entity's free speech rights than the majority opinion's alleged corrosive effect on private speech.

C. The Appeal (and Shortcomings) of a Quasi-Government Speech Doctrine

However, Justice Alito's suspicion that the "speech" at issue in *Walker* is not *really* the government's is largely warranted. When the State of Texas issues a "Rather Be Golfing" specialty license plate, it cannot be said that Texas is furthering an official state policy promoting golf over other sports.[84] And yet, due to the State of Texas's direct and sole authority to approve or reject proposed specialty plate designs,[85] it cannot be said that the speech is solely private.[86]

Arguably, the most accurate characterization of the speech at issue in *Walker* is that of government-endorsed speech, a category herein referred to as "quasi-government speech." Justice Stevens has indicated support for this categorization of speech in

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79. *See id.* at 2262.

80. *See id.* at 2262-63.

81. *Id.* at 2262 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001)).

82. Pleasant Grove City v. Summum, 555 U.S. 460, 465 (2009).

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

84. *Id.* at 2255.

85. *See* TEX. TRANSP. CODE § 504.801(c).

86. *See supra* Part III-A.

the past,[87] but such a categorization, while appealing from a logical standpoint, would prove an unworkable doctrine.

Such a categorization could feasibly elevate any form of speech with the explicit or tacit acquiescence of the government quasi-government speech. On one hand, the categorization of speech in *Walker* as quasi-government speech would yield the same result: the State-rejected license plate would be a constitutional exercise of the government's ability to express itself. On the other hand, one might argue that protecting quasi-government speech as if it were government speech would wade far too deep into *Shelley v. Kraemer* waters,[88] rendering nearly everything a form of quasi-government speech. If this were the case, would the hate speech spewed at a protest taking place in a city park be considered quasi-government speech? Would alleged police misconduct[89] suddenly garner the protection of government speech? Would political advertisements amount to government speech?[90] In each of these examples, some form of government acquiescence is at work: a government-allowed protest in a public park; a government employee (police officer); and FEC-approved electioneering. Not to mention, any potential recourse sought against these private citizens would amass further government facilitation, like in *Shelley*, in a state or federal court.

For these reasons, a quasi-government speech doctrine would only muddy the waters in an already muddy area of the law.[91] It is unclear whether quasi-government speech would garner the same kind of defense allotted to the government speech doctrine, or if yet another exception would require the carving out of yet another rule. The potential not only for confusion but also for contradiction in rolling out a quasi-government speech doctrine is unnecessary considering the standard proposed in Part III-A.

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87. *See Summum*, 555 U.S. 460, 481 (Stevens, J., concurring) ("While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if acceptance of the monument, instead of being characterized 'government speech,' had merely been deemed an implicit endorsement of the donor's message.") (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 801-802 (1995)) (Stevens, J., dissenting).

88. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that, because racially restrictive covenants must be enforced in state courts, racially restrictive covenants were a violation of the Fourteenth Amendment).

89. *See generally* Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1423-24 (2016) ("In sum, the Ferguson Report described the Ferguson police department as a racist organization that consistently used excessive violence against African-Americans.").

90. *See generally* Imtanes, *supra* note 2.

91. *See* Helen Norton, *Government Speech in Transition*, 57 S.D. L. REV. 421 (2012); Olree, *supra* note 8.

IV. CONCLUSION

The government speech doctrine as it exists post-*Walker* is an admittedly blunt instrument. However, it has proved a workable doctrine, one that rightly allows for government entities to express themselves. I have proposed a standard[92] for determining the extent to which a government entity may exercise its free speech rights before it wades impermissibly into chilling the exercise of free speech by opposing viewpoints in the marketplace of ideas. This standard would allow government to disassociate itself with disfavored viewpoints, and would free the government from the restrictive reins of Justice Alito's private speech. The freedom to express oneself through speech is undoubtedly one of the most fundamental rights to a functioning democracy. It would be absurd to disallow a government entity the exercise of that right simply because it is wishes to endorse a reasonable viewpoint.

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92. A local, state, or federal government entity may advocate for a certain message so long as the message is reasonable, and so long as the entity, in advocating its message, does not chill the exercise of speech by opposing viewpoints. *See supra* Part III-A. For further discussion regarding the need for a "limiting principle" as it pertains to the constitutional protection of government speech, see Fagundes, *supra* note 72.