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GOVERNMENT SPEECH AND POLITICAL COURAGE

Helen Norton*

Among the most prominent examples of government speech is a state's choice to fly—or not to fly—the Confederate flag above or adjacent to its capitol. The recent vigorous public debates in South Carolina and elsewhere across the country reveal the potential power of governments' expressive choices, including their power to inform, celebrate, cajole, wound, and disparage. Indeed, any government's expressive choices expose a great deal about its values, principles, and priorities—which in turn generate important public conversations. For these reasons, the Supreme Court has held that political accountability (rather than the Free Speech Clause) remains our recourse when the government makes expressive choices with which we disagree: “When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech.”¹

Of course, the public can only hold government accountable for its expressive choices when the public can attribute contested speech *to* the government. Usually we have no problem identifying speech as the government's. For example, consider not only South Carolina's longstanding choice to display the Confederate flag (as well as its more recent decision to take it down), but also the Surgeon General's warning about the dangers of tobacco—the public can tell that the speech is the government's just by looking at or reading it.

Harder cases arise, however, when the expression's governmental source is less apparent. Indeed, the circumstances surrounding the speech at issue in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* illustrate how certain factors can sometimes obscure expression's source.² In *Walker*, a divided Court upheld Texas's rejection of the Sons of Confederate Veterans' request for a specialty license plate that would feature the Confederate flag; a 5-4 majority agreed with Texas that the words and images displayed on such plates

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

2. *Id.* at 2248-52 (describing contested factors bearing on whether license plates are considered government speech); *id.* at 2255-63 (Alito, J., dissenting) (same).

reflected the state's own expression, which it remained free to control without running afoul of the First Amendment.³

Although I agree with the majority that specialty license plates can—and often do—reflect the government's own expression, the Court in *Walker* again missed an important opportunity to clarify and refine its government speech doctrine to require that the government make clear when it is speaking before it can assert the government speech defense to Free Speech Clause challenges. Not only has the Court yet to settle on a test for distinguishing governmental from private speech, but to date it has been far too quick to defer to government's claim that the speech at issue is its own and thus immune from Free Speech Clause scrutiny.⁴

As I have urged in detail elsewhere, the Court should instead require a government entity that asserts the government speech defense to establish that it expressly claimed the speech as its own when it initially authorized the communication (i.e., that it established the message's governmental source as a *formal* matter) and that onlookers understood the speech to be the government's at the time of its eventual delivery (i.e., that it established the message's governmental source as a *functional* matter).⁵ This approach increases opportunities for meaningful political accountability by identifying two points at which government must expose its expressive choices to the public: when it chooses to express a certain idea and when it actually delivers that message. Such an approach would, at long last, recognize both that the value of government expression springs primarily from its capacity to inform the public of its government's principles and priorities, and that the public can assess its government's positions *only* when the public can tell that the government is speaking. This requires the government to exercise the political courage to make its expressive choices transparent to its public.

More specifically, requiring that government transparently identify itself as the source of a message as a *formal* matter forces government to articulate, and thus think carefully about, its expressive decisions up front—that is, at the time that it makes them. In this manner, government affirmatively assumes political responsibility for its expressive choices in exchange for its ability to successful-

3. *Id.* at 2253 (majority opinion).

4. For a brief history of the Court's government speech doctrine leading up to *Walker*, see Helen Norton & Danielle Keats Citron, *Government Speech 2.0.*, 87 DENV. U. L. REV. 899, 904-17, 916 n.87 (2010) ("In the four decisions characterized to date by the Court as involving competing governmental and private claims to the same speech—*Rust*, *Johanns*, *Garcetti*, and *Sumnum*—the Court held that contested speech was actually the government's own speech so that government could control its content free from First Amendment scrutiny.").

5. See, e.g., Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 27-28, 27 n.103 (2009); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 599-600 (2008) [hereinafter Norton, *The Measure of Government Speech*].

ly assert the government speech defense to Free Speech Clause claims.⁶ Such an approach also helps address the “legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”⁷

In *Walker*, Texas complicated its government speech defense (and triggered concerns about possible subterfuge) when it failed clearly to claim the contested speech as its own at the time that it decided to reject the Sons of Confederate Veterans’ proposed plate. More specifically, the Texas Board of Motor Vehicles explained its decision on the grounds that “public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable” and “a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.”⁸ This description sounds as if Texas sought to protect onlookers from offensive or unpopular viewpoints, rather than claim the plates’ messages as its own for which it took political responsibility. The difference is key for First Amendment purposes: government cannot punish unpopular or offensive speech,⁹ but it can refuse to utter or join such expression itself. But not until it faced a First Amendment challenge in court did Texas clearly lay claim to the specialty plates as its own speech: “Texas is not willing to propagate the confederate battle flag by etching that image onto state-issued license plates that bear the State’s name.”¹⁰

But even if government expressly announces its intent to claim authorship of, and thus responsibility for, a certain message at the time of the message’s authorization, much of the public may remain unaware of this decision until—and perhaps even when—that message is ultimately delivered, which under-

6. On the other hand, government remains free to decline to claim certain speech as its own as a formal matter. It does this, for example, when it sells to private parties advertising space on, or the rights to name, its own property rather than claiming those expressive spaces for its own messages. Of course, government’s release of its claim to such expressive opportunities means that any regulation of what is then private expression remains subject to traditional free speech principles, including the ban on viewpoint discrimination against private speakers. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995) (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, . . . 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.” (citation omitted)).

7. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

8. *Walker*, 135 S. Ct. at 2245 (alteration in original) (quoting Joint Appendix at 64-65, *Walker*, 135 S. Ct. 2239 (No. 14-144), 2014 WL 7498018).

9. *E.g.*, *Cohen v. California*, 403 U.S. 15, 22-26 (1971) (holding that the First Amendment protects offensive speech).

10. Brief for the Petitioners at 1, *Walker*, 135 S. Ct. 2239 (No. 14-144), 2014 WL 7497991.

mines opportunities for meaningful political accountability. The Court should thus additionally require the government to show that the expression is transparently governmental as a *functional* matter—that is, that reasonable onlookers will realize that such expression is the government’s upon delivery or dissemination.

Although such an assessment is inevitably contextual, many areas of the law require judges and juries to make similarly contextual determinations when assessing reasonable individuals’ perceptions and judgments.¹¹ Moreover, one can draw additional guidance from a variety of specific triggers, or “source cues,” upon which individuals frequently rely to determine a message’s origins.¹²

Express source cues—in which the message expressly signals its origins at the time of its delivery—are the most helpful. Obvious examples include government press statements or reports where the government expressly identifies itself as the author or that are otherwise expressly attributed to a government source. Because they are so clear, such express cues are especially helpful in communicating a message’s governmental origins to the public and thus facilitating meaningful political accountability. For this reason, governments seeking to protect their expressive choices from Free Speech Clause scrutiny should design their communications to enhance transparency by employing express cues whenever possible. As a functional matter, specialty license plates’ prominent display of the state’s name provides an express cue to their governmental source: “The governmental nature of the plates is clear from their faces: The State places the name ‘TEXAS’ in large letters at the top of every plate.”¹³

A message’s location also serves as a cue to its source. As the Court has observed in several contexts, viewers often attribute messages to the owner of

11. For example, trademark infringement law requires courts to evaluate onlookers’ perceptions of a message’s source. *See, e.g.*, Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1589-90 (describing courts’ multifactor assessment of whether a defendant’s use of a trademark is likely to confuse onlookers about the product’s actual source). In addition, the Court’s Establishment Clause doctrine sometimes requires courts to assess onlookers’ likely perceptions of a religious display’s source and meaning. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989) (“[T]he crèche sits on the Grand Staircase, the ‘main’ and ‘most beautiful part’ of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government.” (citation omitted) (quoting Joint Appendix at 157, *Cnty. of Allegheny*, 492 U.S. 573 (Nos. 87-2050, 88-90, 88-96))).

12. For an extensive discussion of the possible cues that onlookers and courts may use to determine a message’s source, see Norton, *The Measure of Government Speech*, *supra* note 5, at 603-18.

13. *Walker*, 135 S. Ct. at 2248; *see also id.* at 2250 (“Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying ‘TEXAS’ as the issuer of the IDs.”).

the property on which they are displayed.¹⁴ For this reason, a state's expressive choice to display the Confederate (or some other) flag on its own property strongly signals its governmental source to the public.

To be sure, although specialty license plates prominently feature the state's name—and are generally manufactured, issued, and owned by the state—several dynamics may obscure their governmental origin as a functional matter. First, states (including Texas) often invite private speakers to propose specialty license plate messages for the state's consideration and approval; this, in turn, often results in a large and diverse number of plates and messages. Some argue that private speakers' input into the messages' development frustrates the public's ability to ascertain their governmental source—especially when that input results in the production of a wide variety of messages.¹⁵ But because many speakers draw from others' input when making their own expressive choices (and also may have different things to say on many different issues), the government's decision to encourage and select from a large number and variety of messages does not necessarily undermine its expressive claim to the choices that it ultimately makes. This is especially the case when the government ensures that express or similarly strong cues transparently signal the message's governmental source.

For an illustration, consider the United States Postal Service's Citizens' Stamp Advisory Committee. Although the Committee invites suggestions from the public as to who or what might be honored with a postage stamp, the Postal Service expressly maintains control over the ultimate decision to issue multiple stamps that express a variety of messages.¹⁶ The Postal Service's 2015 slate of commemorative stamps demonstrates this point, as it celebrates a diverse collection that includes the Special Olympics, Flannery O'Connor, the Civil War, and penguins.¹⁷ The government remains the source of these multiple messages as both a formal and functional matter: not only did the Postal Service make clear its intent to speak for itself in choosing who and what to feature on postage stamps (even while it invited public input), but express source cues—namely, the identifier "USA" on the stamps themselves—ensure that onlookers understand the message's source as governmental.

14. See, e.g., *Sumnum*, 555 U.S. at 470-72 (explaining how the messages communicated by monuments in public parks are generally attributed to the government as owner); *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 54-56 (1994) (striking down a city ban on homeowners' posting of signs on free speech grounds and observing that the city had foreclosed a commonplace and effective means of signaling a message's speaker).

15. See, e.g., *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 798-99 (4th Cir. 2004) ("The array of choices makes the license plate forum appear increasingly like a forum for private speech. As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished.").

16. See *Process*, U.S. POSTAL SERV. CITIZENS' STAMP ADVISORY COMM., <https://about.usps.com/who-we-are/csac/process.htm> (last visited Oct. 30, 2015).

17. *Currently for Sale*, U.S. POSTAL SERV. STAMPS, <http://uspsstamps.com/stamps> (last visited Oct. 30, 2015).

A more important confounding factor is that specialty license plates are displayed on drivers' own property—their cars—even though they are produced (and generally owned) by the government. As discussed above, onlookers often rely on a message's location as a cue to its source, concluding that it reflects the view of the property owner. For this reason, as I have urged elsewhere in detail, we should recognize specialty license plates as the joint speech of both the government and those private parties who choose to display those plates.¹⁸ In other words, sometimes speech may most accurately be described as simultaneously reflecting the views of speakers—both public and private—who have chosen to share a message. Examples include situations where a public actor offers private speakers the choice to join and display the government's own speech—a choice that may be especially attractive when it signals the government's imprimatur. Such a concept of “joint speech” values both speakers' expressive choices: those who agree with the government's view may choose to buy and display those messages, but government may not compel anyone to do so, nor prevent anyone from expressing their own differing views.

Longstanding doctrine in other free speech settings lends support to this conception of joint expression. For example, in *West Virginia State Board of Education v. Barnette*, the Court did not contest the state's expressive power to decide to start the public school day with the Pledge of Allegiance, even though it held that the First Amendment did not permit the state to compel dissenting schoolchildren to join that expression by saluting the flag.¹⁹ Similarly, in *Wooley v. Maynard*, the Court did not challenge New Hampshire's expressive choice to feature its motto “Live Free or Die” on the state's license plates, but it denied government the power to require a private speaker to display this message against his will.²⁰ In neither case did the Court suggest that the objectors could force the government to deliver a message more to their liking.

Recognizing that joint speech requires the consent of both parties simultaneously accommodates individual autonomy as well as government's interest in protecting its own expressive choices. States that choose to claim specialty license plates as reflecting their own views and thus exempt themselves from Free Speech Clause scrutiny should be able to do so, as long as they design the program to ensure formal as well as functional transparency, and thus meaningful political accountability. As a practical matter, this requires government transparently to claim the expression as its own up front as well as to design its communications to enhance, rather than obscure, transparency upon delivery, ideally by employing express cues whenever possible.

As *Walker* demonstrates, the most difficult government speech cases involve various forms of interaction or collaboration between government and private speakers in contexts that create doubt about the source of contested expression. Because government's growing use of blogs, social media platforms,

18. Norton, *The Measure of Government Speech*, *supra* note 5, at 618-22.

19. 319 U.S. 624, 640-42 (1943).

20. 430 U.S. 705, 713 (1977).

virtual worlds, and other online platforms greatly enhances such opportunities for interaction and collaboration, these controversies will continue to increase in number. Here too, attention to formal and functional transparency can and should inform government's approach to new expressive technologies.²¹ Government should take the time and trouble to ask and answer these key questions: Does the government seek to engage in its own expression for which it is willing to be held politically accountable in exchange for insulation from First Amendment scrutiny? Or is the government instead providing some sort of opportunity for private speech, for which it disclaims political responsibility? The consequences of this choice are significant: If the former, the government should take steps to affirmatively identify itself as the source of this message. If the latter, the First Amendment requires that the government refrain from regulating such speech on the basis of viewpoint.

In short, the Court should demand transparency from the government as a condition of recognizing the government speech defense to Free Speech Clause challenges to the government's expressive choices. Transparency, in turn, requires a bit of planning and some political courage. That's not too much to ask.

21. For a more detailed discussion of the government speech challenges raised by government's increasing reliance on emerging communicative technologies, see Norton & Citron, *supra* note 4, at 920-35.