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## What is "Government" "Speech"? The Case of Confederate Monuments

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# WHAT IS “GOVERNMENT” “SPEECH”? THE CASE OF CONFEDERATE MONUMENTS

*Richard C. Schragger\**

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## INTRODUCTION

Controversies over Confederate monuments and other Confederate iconography have roiled the country in recent years. Perhaps most well-known, in August 2017, violent white supremacists, ostensibly rallying to protest the proposed removal of statues of two Confederate generals, Robert E. Lee and Thomas J. “Stonewall” Jackson, took over the center of Charlottesville, Virginia.<sup>2</sup> One of their fellow travelers murdered a counter-protestor, Heather Heyer.<sup>3</sup> The legal and political fights over Confederate iconography have resulted in literal fights over the content of the public square.

In the parlance of constitutional law, publicly owned and maintained Confederate monuments are “government speech.”<sup>4</sup> That moniker is more than a factual statement identifying the title holder of a monument or the provenance of an expressive act. “Government speech” is a conclusion that does a great deal of work in insulating Confederate monuments from constitutional review.

But what is “government speech” exactly? This Article explores this question through the lens of recent legal challenges involving Confederate monuments. Those challenges help illustrate three distinctions on which the concept of “government speech” is built: the distinctions between “speech” and “conduct,” between “public” and “private,” and between “coerced” and “non-coerced” speech.

These distinctions should be familiar. They have often invited skepticism. In arguing that such distinctions are unstable (and perhaps untenable), my view is not so different from that of others who have previously trod this ground.<sup>5</sup>

Conflicts over Confederate monuments, however, are useful in illustrating these points. The first distinction—between speech and conduct—prevents courts from

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<sup>2</sup> Benjamin Wallace-Wells, *The Fight Over Virginia's Confederate Monuments*, NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/magazine/2017/12/04/the-fight-over-virginias-confederate-monuments> [https://perma.cc/PZM9-SJJG].

<sup>3</sup> John Edwin Mason, *History, Mine and Ours: Charlottesville's Blue Ribbon Commission and the Terror Attacks of August 2017*, in CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 19, 19 (Louis P. Nelson & Claudrena N. Harold eds., 2018); see also Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> [https://perma.cc/3DBW-V2BJ].

<sup>4</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68, 470 (2009) (“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. Indeed, it is not easy to imagine how government could function if it lacked this freedom.” (citations omitted)).

<sup>5</sup> On the speech/conduct distinction, see STANLEY FISH, THERE IS NO SUCH THING AS FREE SPEECH (AND IT'S A GOOD THING, TOO) 105–06 (1994); Frederick Schauer, *Must Speech be Special?*, 78 NW. U. L. REV. 1284, 1284 (1983) [hereinafter Schauer, *Must Speech*]; Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427–28 (2015) [hereinafter Schauer, *On the Distinction*]. On the public/private distinction, see ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER vii–viii (1952); Louis L. Jaffe, *Law Making by Private Governments*, 51 HARV. L. REV. 201 (1937); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). On the coercion/non-coercion distinction, see J. Roland Pennock, *Coercion: An Overview*, in COERCION 1, 1 (J. Roland Pennock & John W. Chapman eds., 1972); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

appropriately weighing the discriminatory harms of Confederate iconography, in large part because of the assumption that most constitutional restraints on government apply to conduct and not to “mere” speech. The second distinction—between public and private speech—also tends to insulate the government’s expressive conduct. If the government is speaking, it need not abide by the neutrality requirements of the First Amendment; there is no necessity for the government to be even-handed in its pronouncements. The public/private distinction may also stand in the way of local governments that seek to remove their own Confederate monuments but are barred by state laws that restrict such removal. In these cases, are cities “private” or “public” speakers? Do they enjoy the same rights as individuals and corporations to speak, or can the state dictate what the cities say?

The question of who is speaking when states and cities disagree also implicates the third distinction—between coerced and non-coerced speech. Are local citizens being coerced to speak by state laws mandating that cities maintain their Confederate monuments? Taxpayers normally do not have the ability to contest the government’s myriad expressive activities; if they could, it has often been observed, government could not function.<sup>6</sup> Thus, coerced or “compelled” speech is a narrow category when the government is funding or sponsoring it or when local governments are forced to engage in it. But under recent Supreme Court precedent, compelled speech is a quite capacious category when the government seeks to regulate “private” speech, even if that regulation is incidental to some important government interest.<sup>7</sup>

This Article begins by describing the ways that government speech doctrine erects obstacles to the application of free speech and equal protection principles to local Confederate monuments. It then proceeds to raise questions about the speech/conduct, public/private, and coerced/non-coerced distinctions, showing how these lines are drawn to achieve certain ends. Those ends are substantive; they reflect judgements about value, not acknowledgements of some pre-existing intuitive schema. The legal challenges to Confederate monuments help illustrate the arbitrariness of these doctrinal fault lines.

The final part of the Article observes how the proliferation of doctrine sometimes occludes the obvious interests at stake. The Confederate monuments that dot the landscape are symbols of a treasonous, slave-holding regime erected to memorialize and celebrate an imagined romantic past—the Lost Cause.<sup>8</sup> They have more recently become touchstones for a rising white, Christian nationalism, fostered in part by a President pursuing a politics of racial division and demonization.<sup>9</sup> That monuments,

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<sup>6</sup> See e.g., *Pleasant Grove City*, 555 U.S. at 467–68 (“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. Indeed, it is not easy to imagine how government could function if it lacked this freedom.” (citations omitted)).

<sup>7</sup> See *Janus v. Am. Fed’n of State, Cty., and Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2486 (2018).

<sup>8</sup> See Amanda Lineberry, *Standing to Challenge the Lost Cause*, 105 VA. L. REV. 1177, 1181 (2019).

<sup>9</sup> See Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://nyti.ms/2EzkeQe> [<https://perma.cc/86L3-527E>] (describing Haiti and some African nations as “shithole countries”); Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://nyti.ms/2DCJqPP> [<https://perma.cc/3U96-3V8S>] (declaring that immigrants to the United States from Haiti “all have AIDS” and warning that as soon as Nigerian immigrants saw the United States, “they would never ‘go back to their huts’ in Africa”); Donald J. Trump (@realDonaldTrump), TWITTER (July

flags, and signs are expressive acts should not lead us to understate their power and effects. There is no reason not to apply conventional approaches to discriminatory government conduct to Confederate symbols, even though the “government speech” doctrine serves to minimize and contain their constitutional import.

### I. CONFEDERATE MONUMENTS AS GOVERNMENT SPEECH

More than a thousand Confederate monuments dot the landscape across the United States, mostly (but not exclusively) in the South and Southwest.<sup>10</sup> Those monuments vary in design. In some places, an anonymous Confederate soldier—“Johnny Reb”—stands with a rifle or flag.<sup>11</sup> In other places, a plain obelisk is inscribed with the names of Confederate dead.<sup>12</sup> More often, a Confederate general or official is honored with a statue: Robert E. Lee, Thomas J. “Stonewall” Jackson, and Jefferson Davis are popular. Monument Avenue in Richmond, Virginia—the former capital of the Confederacy—includes statues of Lee, Jackson, Davis, and J.E.B. Stuart.<sup>13</sup> In the center of Charlottesville, Virginia, the site of the violent Unite the Right rally that led to the death of a counter-demonstrator,<sup>14</sup> there are three statues: Lee, Jackson, and an anonymous Confederate soldier.<sup>15</sup> The latter two sit in

14, 2019, 8:27 AM), <https://twitter.com/realDonaldTrump/status/1150381395078000643> [<https://perma.cc/VAG3-V4K2>] (telling four minority congresswomen, all of whom are United States citizens and only one of whom was born abroad, to “go back and help fix the totally broken and crime infested places from which they came”); *Full Transcript and Video: Trump’s News Conference in New York*, N.Y. TIMES (Aug. 15, 2017), <https://nyti.ms/2vBs7wD> [<https://perma.cc/NKL8-87D7>] (declaring that, as concerned the violence perpetrated by white supremacists and neo-Nazis against counter protesters in Charlottesville, Virginia, there were “very fine people on both sides”).

<sup>10</sup> Beth D. Jacob, *Confederate Monuments that Remain*, 44 A.B.A. HUM. RTS. MAG., no. 1, 2019, at 9, 9, <https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/hr-v44n1.pdf> [<https://perma.cc/Z8CG-5TEH>].

<sup>11</sup> See, e.g., Ben Finley, *City Sues to Remove Confederate Monument, Citing Free Speech*, ASSOCIATED PRESS (Aug. 20, 2019), <https://apnews.com/86c3fb6e348c46fe90f25349a2c635a1> [<https://perma.cc/UK7M-SRZA>] (describing Norfolk, Virginia’s “Johnny Reb” statue); Jeff Weiner, *‘Johnny Reb’ Confederate Statue Rebuilt at Greenwood Cemetery*, ORLANDO SENTINEL (Dec. 6, 2017, 4:45 PM), <https://www.orlandosentinel.com/politics/os-johnny-reb-statue-rebuilt-greenwood-cemetery-20171206-story.html> [<https://perma.cc/DC4R-VG8G>] (describing the relocation of Orlando, Florida’s “Johnny Reb” statue).

<sup>12</sup> See, e.g., Braktkton Booker, *Confederate Monument Law Upheld by Alabama Supreme Court*, NPR (Nov. 27, 2019, 4:46 PM), <https://www.npr.org/2019/11/27/783376085/confederate-monument-law-upheld-by-alabama-supreme-court> [<https://perma.cc/V3PM-WY79>] (describing Birmingham, Alabama’s Confederate soldier and sailor’s obelisk); *Conway Confederate Monument*, ARK., <https://www.arkansas.com/conway/points-of-interest/conway-confederate-monument> [<https://perma.cc/K8X9-9MWD>] (identifying a ten-foot obelisk in Conway, Arkansas).

<sup>13</sup> *Monument Avenue Historic District*, NAT’L PARK SERV., <https://www.nps.gov/nr/travel/richmond/monumentavehd.html> [<https://perma.cc/WX6W-VZ8G>].

<sup>14</sup> Stolberg & Rosenthal, *supra* note 3.

<sup>15</sup> Louis P. Nelson, *Object Lesson: Monuments and Memory in Charlottesville*, BUILDINGS & LANDSCAPES, Fall 2018, at 17, 18, 32. The Lee and Jackson statues may be removed in the near future, however. While this Article was going to press, the Virginia General Assembly voted to lift a state ban on removing war memorials. See Ned Oliver, *A “Huge Step”: General Assembly Says Local Governments Can Remove Confederate Monuments*, VA. MERCURY (March 8, 2020), <https://www.virginiamercury.com/2020/03/08/a-huge-step-general-assembly-says-local-governments-can-vote-to-remove-confederate-monuments/>.

Courthouse Square, greeting citizens as they come to conduct official government business.<sup>16</sup> The Lee statue sits in a formerly segregated park also originally named for the Confederate general.<sup>17</sup> His statue faces the city’s old library—now the local historical society—and the city’s new library, which used to be a federal courthouse and post office.<sup>18</sup>

Confederate iconography has been a staple of the American landscape since the Civil War. Most monuments were constructed between 1900 and the late 1920s, however, as Southern states marked symbolically what they had been permitted to achieve legally through Jim Crow.<sup>19</sup> It is helpful to remember that *Plessy v. Ferguson*, in which the Supreme Court legitimated de jure racial segregation, was decided in 1896.<sup>20</sup>

More recently, and especially after the election of Donald J. Trump, Confederate symbols have become flashpoints in larger political and cultural struggles over race and religion, white and non-white America, diversity, immigration, exclusion, and inclusion. These debates have been accompanied by rising white supremacist violence and an increasingly divisive and racialized political discourse.<sup>21</sup>

In the aftermath of a number of violent episodes incited by white supremacists who laid claim to Confederate iconography, some cities voted to remove their Confederate monuments.<sup>22</sup> Many more remain, however, and many former Confederate states have adopted laws that prevent local governments from disturbing them.<sup>23</sup> The ostensible reason that white supremacists targeted Charlottesville in August 2017 is that the city council voted to remove its Robert E. Lee statue.<sup>24</sup> That vote has been the subject of an over two-year legal challenge,<sup>25</sup> as Virginia’s “statue statute” permits individuals to bring a private right of action against local governments that would seek to remove war memorials.<sup>26</sup>

<sup>16</sup> *Nelson*, *supra* note 15, at 18, 20, 32.

<sup>17</sup> *See id.* at 28–29.

<sup>18</sup> *Id.* at 28–33.

<sup>19</sup> *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019) [hereinafter *Whose Heritage?*], <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [https://perma.cc/GFE4-LGN7].

<sup>20</sup> *See generally* 163 U.S. 537 (1896).

<sup>21</sup> *See sources cited supra* note 9.

<sup>22</sup> *E.g.*, Corbett Smith, *Dallas City Council Votes to Take Down Confederate War Memorial*, DALL. MORNING NEWS (Feb. 13, 2019, 8:32 PM), <https://www.dallasnews.com/news/dallas-city-hall/2019/02/13/dallas-city-council-votes-take-confederate-war-memorial> [https://perma.cc/QW64-7EH4]; Chris Suarez, *Charlottesville City Council Votes to Remove Statue from Lee Park*, DAILY PROGRESS (Feb. 6, 2017), [https://www.dailyprogress.com/news/local/charlottesville-city-council-votes-to-remove-statue-from-lee-park/article\\_2c4844ca-ecc3-11e6-a7bc-b7d28027df28.html](https://www.dailyprogress.com/news/local/charlottesville-city-council-votes-to-remove-statue-from-lee-park/article_2c4844ca-ecc3-11e6-a7bc-b7d28027df28.html) [https://perma.cc/W9PY-CCB2]; Daniel Victor, *New Orleans City Council Votes to Remove Confederate Monuments*, N.Y. TIMES (Dec. 17, 2015), <https://nyti.ms/1NVVwEo> [https://perma.cc/QS9J-PPSD].

<sup>23</sup> *See, e.g.*, Alabama Memorial Preservation Act of 2017, ALA. CODE §§ 41-9-230–41-9-237 (LexisNexis 2019); N.C. GEN. STAT. § 100-2.1 (2019).

<sup>24</sup> Stolberg & Rosenthal, *supra* note 3.

<sup>25</sup> Nolan Stout, *City of Charlottesville to Appeal Decision in Confederate Statues Suit*, DAILY PROGRESS (Oct. 7, 2019), [https://www.dailyprogress.com/news/local/city-of-charlottesville-to-appeal-decision-in-confederate-statues-suit/article\\_6ec65034-7abc-57e7-a258-73bc6603ff8f.html](https://www.dailyprogress.com/news/local/city-of-charlottesville-to-appeal-decision-in-confederate-statues-suit/article_6ec65034-7abc-57e7-a258-73bc6603ff8f.html) [https://perma.cc/3DSK-JL9R].

<sup>26</sup> VA. CODE ANN. § 15.2-1812.1 (2019). That statute has recently been amended by the Virginia General Assembly to permit local governments to remove Confederate monuments, though the new

Other legal challenges have proliferated. In *Perry-Bey v. City of Norfolk*, a state trial court rejected an equal protection challenge brought against the City of Norfolk, Virginia for its Confederate monument<sup>27</sup>—an enormous column capped by a Confederate soldier.<sup>28</sup>

Immediately thereafter, the City of Norfolk itself brought a First Amendment challenge in federal district court to the Virginia statute that requires the City to maintain its monument.<sup>29</sup> A state trial court vindicated a similar First Amendment claim brought in an Alabama circuit court challenging the state statute that prevented Birmingham from removing its Confederate memorial.<sup>30</sup> The Alabama court held that the statute violated the city's speech and due process rights,<sup>31</sup> a decision that the Alabama Supreme Court later reversed in a 9-0 decision.<sup>32</sup>

These legal challenges raise questions about the reach of equal protection and free speech doctrine in the context of government symbols. In the language of First Amendment law, Confederate monuments are “government speech”<sup>33</sup>—reflecting the basic fact that they are generally owned and maintained by the government, in most cases by cities, counties, and towns. This doctrinal category, however, does not simply identify the title holder of a monument or the origins of an expressive act. Instead, “government speech” represents a conclusion about the nature of the constitutional constraints on certain forms of expressive activity. “Government speech” is not a fact but a doctrinal tool, and it is used mainly to constrain constitutional review of certain kinds of expressive acts.<sup>34</sup>

The doctrinal category of “government speech” does three kinds of work. First, denoting government communicative activity as “speech” mostly insulates it from challenges under constitutional doctrines that apply to “conduct.” The Establishment Clause has been read to limit government speech that does not have a secular purpose

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language will not take effect until July 1, 2020. See Oliver, *supra* note 15. Other states still retain restrictions on local removal. See Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes,”* 91 TEMP. L. REV. 1, 10 (2018).

<sup>27</sup> See Order Sustaining Demurrers at 5–6, *Perry-Bey v. City of Norfolk*, No. CL19-3928 (Va. Cir. Ct. Jul. 22, 2019).

<sup>28</sup> Finley, *supra* note 11.

<sup>29</sup> Complaint at 2, *City of Norfolk v. Virginia*, No. 2:19-cv-00436 (E.D. Va. Aug. 19, 2019).

<sup>30</sup> Order on Cross Motions for Summary Judgment at 9, *State v. City of Birmingham*, No. CV-17-903426-MGG (Ala. Cir. Ct. Jan. 14, 2019).

<sup>31</sup> See *id.*

<sup>32</sup> *State v. City of Birmingham*, No. 1180342, 2019 Ala. LEXIS 132, at \*37–38 (Ala. Nov. 27, 2019).

<sup>33</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

<sup>34</sup> For a recent extensive treatment of government speech, see HELEN NORTON, *THE GOVERNMENT'S SPEECH AND THE CONSTITUTION* (2019). For a classic source discussing government speech, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983). An older literature addresses questions of the limits of government's political speech. See, e.g., Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1113 (1979); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 570, 606 (1980); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 L. & CONTEMP. PROBS. 530, 540 (1966); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 581 (1980). For a more recent discussion of government speech, see Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 Sup. Ct. Rev. 265. On monuments and memorials, see SANFORD LEVINSON, *WRITTEN IN STONE* 66 (1998).

or that advances religious favoritism, but that constraint has been narrowed substantially in recent years.<sup>35</sup> Equal protection or other constitutional challenges to government symbols outside of the Establishment Clause have generally been unsuccessful on the grounds that citizens do not have standing or a cognizable injury to complain about government speech.<sup>36</sup> Mere “offense,” it is sometimes asserted, is not constitutionally actionable.<sup>37</sup>

Second, denoting speech as “governmental” means that the government can speak without abiding by the strictures of free speech neutrality.<sup>38</sup> The government cannot engage in viewpoint discrimination when it regulates private speech.<sup>39</sup> But when engaged in government speech, it may take a viewpoint and discriminate against all others.<sup>40</sup> Aside from the minimal side constraints of the Establishment Clause, the government generally is permitted to say what it wants.<sup>41</sup>

Third, categorizing an act as “government speech” permits the government to engage in certain kinds of coercive expressive conduct but not in other kinds. The government can compel citizens to pay for “government” speech with which they disagree, though it cannot in some cases compel citizens to pay for other citizens’ “private” speech.<sup>42</sup> So, too, the government can selectively fund favored speech and

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<sup>35</sup> Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 3 AM. CONST. SOC’Y SUP. CT. REV. 21, 24 (2019); see *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019).

<sup>36</sup> Two Circuits have considered constitutional challenges to the Confederate battle flag. The Fifth Circuit held that the plaintiffs lacked sufficient tangible injury to establish standing. See *Moore v. Bryant*, 853 F.3d 245, 248, 250 (5th Cir. 2017). On two occasions, the Eleventh Circuit has held that plaintiffs did not provide evidence of racially discriminatory effect or intent sufficient to survive summary judgment. See *Coleman v. Miller*, 117 F.3d 527, 528, 530 (11th Cir. 1997) (per curiam); *NAACP v. Hunt*, 891 F.2d 1555, 1565–66 (11th Cir. 1990). Helen Norton notes two cases in which the Equal Protection Clause was violated by government “expressive conduct.” See NORTON, *supra* note 34, at 107–09. In *Lombard v. Louisiana*, the Court held that New Orleans city officials’ statements that they would enforce the trespass laws against sit-in demonstrators was akin to an ordinance enforcing segregation and, thus, unconstitutional. *Lombard v. Louisiana*, 373 U.S. 267, 273–274 (1963). In *Anderson v. Martin*, the Court struck down a state law that required candidates on the ballot to be identified by race. *Anderson v. Martin*, 375 U.S. 399, 401–02, 404 (1964).

<sup>37</sup> See *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring).

<sup>38</sup> See *Pleasant Grove City*, 555 U.S. at 467.

<sup>39</sup> *Id.* at 467, 469.

<sup>40</sup> See *id.* at 467–68; see also *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view . . .”).

<sup>41</sup> This is somewhat overstated. As Helen Norton argues, government conduct that is expressive has been found on occasion to violate the Equal Protection Clause, see NORTON, *supra* note 34, at 106–10, and officials’ statements or communications can be grounds for other kinds of constitutional violations, as in the context of police encounters.

<sup>42</sup> See *Pleasant Grove City*, 555 U.S. at 467–68.



impose speech-related limitations on private actors who receive government funding,<sup>43</sup> but it cannot force a citizen to engage in compelled speech directly.<sup>44</sup>

Government speech doctrine is thus built on three important distinctions: between speech and conduct, public and private, coercive and non-coercive. These categories are unstable.<sup>45</sup> Controversies over Confederate monuments help illustrate why.

## II. SPEECH AND CONDUCT

I begin with the speech/conduct distinction. Confederate iconography is generally understood to be a form of symbolic “speech.” But calling the government’s erection, maintenance, and (in some cases) celebration of Confederate monuments, “speech” as opposed to “conduct” is already a conclusion about the relative harms of such symbols. Speech doctrine relies on a distinct category of activity called “speech,” but that category is at the very least unstable, if not indefensible.

### A. “Speech” is an Unstable Category

The idea that “speech” is an unstable category has been recognized since the Supreme Court first asserted that falsely shouting fire in a crowded theater is unprotected conduct.<sup>46</sup> The distinction between words that incite violence, constitute a criminal conspiracy, or amount to false advertising and words that are “merely” offensive, constitute a meeting of the American Nazi Party, or amount to “puffery” is not natural or obvious.<sup>47</sup> Whether burning a flag, a cross, or a draft card is speech or conduct are all questions that have reached the Supreme Court;<sup>48</sup> the Court’s conclusions have not been to everyone’s satisfaction.<sup>49</sup> Some time ago, Stanley Fish provocatively asserted that “there’s no such thing as free speech, and it’s a good thing, too.”<sup>50</sup> What he meant is that “[f]ree speech’ is just the name we give to verbal behavior that serves the substantive agendas we wish to advance.”<sup>51</sup> In other words, “when a court invalidates legislation because it infringes on protected speech, it is not because the speech in question is without consequences but because the

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<sup>43</sup> See *Rust*, 500 U.S. at 192–94.

<sup>44</sup> See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018); *United States v. United Foods, Inc.*, 533 U.S. 405, 410–11 (2001); *Wooley v. Maynard*, 430 U.S. 705, 706 (1977).

<sup>45</sup> See discussion *infra* Parts II–IV.

<sup>46</sup> See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>47</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (incitement); *Yates v. United States*, 354 U.S. 298, 327 (1957) (subversive advocacy).

<sup>48</sup> See generally *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O’Brien*, 391 U.S. 367 (1968) (draft card burning).

<sup>49</sup> Cf. FISH, *supra* note 5, at 114; Schauer, *Must Speech*, *supra* note 5, at 1296; Schauer, *On the Distinction*, *supra* note 5, at 454.

<sup>50</sup> FISH, *supra* note 5, at 102.

<sup>51</sup> *Id.*

consequences have been discounted in relation to a good that is judged to outweigh them.”<sup>52</sup>

Fred Schauer has more recently questioned the speech/conduct distinction along similar lines.<sup>53</sup> He argues that a free speech principle has to explain why the state should tolerate communicative actions that are likely to cause harm to third parties when it would not tolerate non-communicative actions with equivalent consequences.<sup>54</sup> The assumption, which he contests, has to be that communicative actions systematically cause less harm than do non-communicative actions.<sup>55</sup> But that cannot be right—or at least not empirically obvious. As Schauer observes, most speech is harmless, but so is most action.<sup>56</sup> When there are demonstrable, potential harms of speech, equivalent to the demonstrable, potential harms of action, why should the former receive more protection than the latter? Schauer concludes that it is “hardly clear that respect for an agent’s autonomy ought to lead other agents, or the state, to tolerate autonomous communicative actions that are determined to be likely to cause harm to third parties any more than they should tolerate autonomous non-communicative actions whose consequences are equivalent.”<sup>57</sup>

If “speech” and “conduct” are simply names we give to activities that have already been assessed in relation to some harm, then calling government activities “speech” suggests that we have already discounted the consequences of that activity. Fish and Schauer do not oppose constitutional protections for certain kinds of activities. In some cases, those activities will be called “speech” and, in some cases, they will be called “conduct.” They both contest, however, the assertion that “speech” constitutes a unique category of human endeavor such that it can be categorically exempt from regulation.<sup>58</sup>

This skepticism of a free-standing “free speech principle” can be applied to government speech as well. Normally, the speech/conduct distinction is deployed either to constrain government regulation of “speech” or to permit government regulation of “conduct.” But the distinction between speech and conduct also arises when the government “speaks,” and, in that context, the choice of category also embeds substantive judgments about relative harms.

Indeed, when applied to the government’s communicative actions, the speech/conduct distinction seems to be even less defensible. When thinking about the distinction between speech and conduct from the perspective of the citizen resisting government regulation, the concept of “rights”—fundamental, human, or natural—is doing a lot of work. Individuals (and maybe groups) generally have some autonomy, dignitary, or other interest in having a sphere of activity (call it “speech”) that, despite its harms, is necessary for full human flourishing, or for the effective

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<sup>52</sup> *Id.* at 106.

<sup>53</sup> See generally Schauer, *On the Distinction*, *supra* note 5.

<sup>54</sup> *Id.* at 439–49.

<sup>55</sup> *Id.* at 438.

<sup>56</sup> *Id.* at 452.

<sup>57</sup> *Id.* at 453.

<sup>58</sup> See FISH, *supra* note 5, at 104; Schauer, *On the Distinction*, *supra* note 5, at 433–34.

exercise of democratic self-government.<sup>59</sup> That sphere of activity is certainly difficult to define, and Schauer is undoubtedly correct that “autonomy” interests apply equally to acts and speech.<sup>60</sup> Nevertheless, if the best we can do is balance harms, we might err on the side of individual human flourishing or, alternatively, democratic accountability.<sup>61</sup>

Government, by contrast, does not have an interest in “flourishing” necessarily, and whatever sphere of activity that the term “speech” captures does not serve as a political check on the very government that is speaking. Of course, as many have pointed out, government speech is necessary for effective governing.<sup>62</sup> Much of what the government does involves communicative conduct of one sort or another. The government could not operate unless it could “speak” from a certain perspective and with a particular viewpoint. The government “speaks” through its laws and proclamations, through its official communiques, through its elected officials, through its bureaucrats, and through its symbols.

Nevertheless, we might wonder what interests are being protected when we connote an activity that the government undertakes as “speech.” In other words, we can ask why “speech” should be treated differently from something called “conduct” for constitutional purposes. Schauer asks this question of non-government speech. He asks what makes speech “special” in relation to other human activities that have consequences, and he is skeptical of the answer.<sup>63</sup> In relation to government speech, we should be too.

### *B. Confederate Iconography as “Speech” or “Conduct”*

Consider Confederate iconography—flags, monuments, and place names. There is an initial question of categorization. Why is the government’s building and maintenance of a Confederate monument “speech” instead of “conduct”? Erecting a statue (or tearing it down) is certainly a government act, even if expressive. When a government official makes an official pronouncement or a declaration, that is speech, but it is also an act. Consider a town that places a creche on the courthouse steps,<sup>64</sup>

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<sup>59</sup> See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

<sup>60</sup> Schauer, *On the Distinction*, *supra* note 5, at 453.

<sup>61</sup> Schauer leaves open the possibility that while justifications for a free speech principle sounding in individual autonomy do not adequately support a speech/conduct distinction, those justifications grounded in democratic accountability might. See *id.* at 453–54.

<sup>62</sup> See, e.g., Helen Norton, *Government Speech and Political Courage*, 68 *STAN. L. REV. ONLINE* 61, 61–62 (2015) (proposing a requirement that the government expressly claim speech as its own both when it is authorized and when it is delivered); Adam Winkler, *Free Speech Federalism*, 108 *MICH. L. REV.* 153, 153–55 (2009) (surveying core free speech cases and concluding that federal speech restrictive laws are more likely to be upheld than similar laws enacted by state and local governments).

<sup>63</sup> Schauer, *Must Speech*, *supra* note 5, at 1306; see also Leslie Kendrick, *Free Speech as a Special Right*, 45 *PHIL. & PUB. AFF.* 87, 117 (2017); cf. Micah Schwartzman, *What if Religion is Not Special?*, 79 *CHI. L. REV.* 1351, 1352–55 (2012) (rejecting the idea that religion is “special” along similar grounds).

<sup>64</sup> *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 578–79, 600–01 (1989) (prohibiting the display of a creche in a county courthouse because it expressly endorsed a Christian message).

or a city council that commissions sectarian prayers to open council sessions.<sup>65</sup> These activities are clearly speech, but also obviously acts. So, of course, is wearing an armband,<sup>66</sup> burning a flag,<sup>67</sup> or holding up a sign.<sup>68</sup> Acts and speech cannot be so easily distinguished, especially in the symbolic realm.<sup>69</sup>

One might focus instead on the harms of government expressive activity. One might argue that what differentiates communicative (especially symbolic) and non-communicative government conduct is that the former is mostly harmless. “Sticks and stones may break my bones but words will never hurt me,” goes the old playground saying.<sup>70</sup> This notion that “mere offense” is not actionable tracks the fighting words distinction in free speech doctrine.<sup>71</sup> The government cannot regulate “merely” offensive speech without running afoul of the Free Speech Clause.<sup>72</sup> By the same token, when the government engages in “mere” speech, it, too, can do no harm.

But what if words *do* harm? Schauer certainly thinks that the harms of some forms of speech are as real and as consequential as the harms of some forms of action.<sup>73</sup> And so does the law, which treats words as harmful in numerous settings<sup>74</sup>—consider hostile work environment claims in employment discrimination, reputational torts, or criminal conspiracy. The law has done so in constitutional cases as well. The Establishment Clause, for example, has long been read to regulate the government’s religious expression,<sup>75</sup> either because the government is absolutely disabled from speaking “religious truth” or because the potential harms of government religious expression are too significant. The present Court is somewhat hostile to that Establishment Clause limitation,<sup>76</sup> but has not

<sup>65</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 572–75, 591–92 (2014) (upholding the use of sectarian prayer before town meetings).

<sup>66</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

<sup>67</sup> *Texas v. Johnson*, 491 U.S. 397, 399, 406 (1989).

<sup>68</sup> *Carlson v. California*, 310 U.S. 106, 112–13 (1940).

<sup>69</sup> See generally *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating the Flag Protection Act of 1989).

<sup>70</sup> Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1284–86 (2011).

<sup>71</sup> See *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>72</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (“Giving offense is a viewpoint. We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’” (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))); *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (“The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”). Whether this is an appropriate carve-out is a legitimate question, which I do not address here. See Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 82–83.

<sup>73</sup> See Schauer, *supra* note 72, at 83, 96–97; Schauer, *On the Distinction*, *supra* note 5, at 428, 452; cf. MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 116, 204 (2019) (describing the harms of silencing, denigrating, and derogatory speech on women and minorities); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 472–475 (arguing that racist speech imposes unequal burdens on racial minorities).

<sup>74</sup> Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability* 13 (Va. Pub. Law & Legal Theory Research Paper Series, No. 2019-44).

<sup>75</sup> E.g., David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 563 (2002); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 509 (2005); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 681 (2003).

<sup>76</sup> *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080, 2087 (2019).

rejected it outright. The government's religious speech is threatening enough to warrant constitutional oversight.

Confederate monuments also do harm, even as the courts are hesitant to permit "offended observers" to bring equal protection claims against them.<sup>77</sup> But this raises a question: Why is religiously-inflected speech more harmful than racially-inflected speech? The answer is not at all clear, considering the salience of racial division in the United States and the centrality of the Equal Protection Clause in our constitutional culture.<sup>78</sup>

Along these same lines, what is the difference between a government "act" of racial classification and government "speech" that was originally intended to endorse white supremacy? Historically, there was not much. The bulk of Confederate monuments in the United States were erected around the turn of the twentieth century and then again in the 1950s and 1960s, two periods when white majorities felt threatened by rising black rights consciousness.<sup>79</sup> The first period coincided, unsurprisingly, with the overall legal effort to construct the Jim Crow state.<sup>80</sup> These monuments were often erected in "whites only" parks, but also in front of courthouses and other official government buildings, and were part and parcel of an effort by white majorities to inscribe white supremacy into the law and landscape.<sup>81</sup> African-Americans did not miss the message; in Charlottesville, Richmond, and elsewhere, the monuments were accompanied by shows of white supremacist strength in the form of Ku Klux Klan marches and ceremonial statements of white racial superiority.<sup>82</sup>

Those who take the "sticks and stones" approach treat the government's conduct and the government's speech very differently, arguing that, unlike mandated separate facilities enforced by criminal and civil sanction, a Confederate monument can be ignored. The monument need only mean what viewers care for it to mean; unless one can point to some kind of material harm, speech is "harmless."<sup>83</sup> Taken to its logical conclusion, this account means that the government can make any verbal or symbolic

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<sup>77</sup> Cf. *id.* at 2098 (Gorsuch, J., concurring).

<sup>78</sup> For arguments that religious speech is not special, see Schwartzman, *supra* note 63; Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 649–50 (2013).

<sup>79</sup> *Whose Heritage?*, *supra* note 19.

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> In various speeches commemorating the unveiling of statues to Confederate generals Stonewall Jackson and Robert E. Lee in Charlottesville, Virginia, the commentators all made their race-based intentions clear. At the unveiling of the Jackson statue on October 18, 1921, Edwin Alderman, President of the whites-only University of Virginia, celebrated Jackson as "a great Christian warrior . . . [who] passed without dispute, in the glory of unconquerable youth, into the inner circle of the soldier-saints and heroes of the English race." *Jackson Statue is Unveiled*, DAILY PROGRESS, Oct. 19, 1921, at 3. Similarly, at the dedication of the Lee statue on May 21, 1924, the event's keynote speaker was celebrated as a man for whom "[e]very drop of the red blood that visits his heart and flows in his veins is CONFEDERATE BLOOD." *Introduction of Rev. M. Ashby Jones, D.D.*, DAILY PROGRESS, May 21, 1924, at 1. Subsequent speakers celebrated Lee himself as "the South's ideal hero" who represented "all those traditions and characteristics that constituted the moral greatness of the Old South at its best estate." *Dr. H. L. Smith Presents Statue*, DAILY PROGRESS, May 21, 1924, at 7. For an account of the unveiling of a Lee statue in Richmond, Virginia, see *The Moving of the Lee Statue*, RICH. PLANET, May 10, 1890, at 1.

<sup>83</sup> *See* *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2098–2103 (2019) (Gorsuch, J., concurring).

claim it wants regarding the inequality of the races, as long as it does not act in ways that penalize or injure one race.

One might hear echoes of *Plessy v. Ferguson* here: the notion that a government act that is facially neutral and does not materially injure blacks—i.e., the separation of the races—is hurtful “solely because the colored race chooses to put that construction upon it.”<sup>84</sup> This is absurd of course. Government acts, purposefully communicative or not, convey messages of second-class status, create and reinforce social hierarchies, influence both public and private discriminatory activity, and cause psychological and stigmatic harms. The Court (and hopefully the constitutional culture) has rejected *Plessy*.<sup>85</sup> Indeed, the current Court has held that government racial classification alone, even when the purpose and effect of that classification is to advance integration as opposed to segregation, conveys the constitutionally wrong message.<sup>86</sup>

This emphasis on the message of racial classification suggests another way in which the speech/conduct distinction is untenable. Under expressivist theories of law and morality, the only way to understand the rightness or wrongness of a government act is to understand what *message* that act conveys.<sup>87</sup> For expressivists, the government’s communicative conduct is all that matters: the constitutionality of any government act is a function of that act’s social meaning.<sup>88</sup> On this account, the test of a government act—whether a racial classification or a Confederate monument—is whether the act conveys a denigrating message. Justice O’Connor’s mostly defunct endorsement test, which she applied to the government’s religious speech, takes this form as well.<sup>89</sup> In assessing the constitutionality of government-sponsored religious symbols, O’Connor asked whether a religious symbol or practice conveys a message to non-adherents of second-class or outsider status.<sup>90</sup> Why would we not also ask the same question of Confederate monuments?

Judges are hesitant to do so not because “speech” is special but because they have already discounted the harms of the government’s expressive conduct. Critics of O’Connor’s endorsement test simply do not believe that the Establishment Clause should be understood as a substantive matter to regulate most forms of government support or endorsement of religion, whether that support comes in the form of government funding or government symbols.<sup>91</sup> The speech/act distinction is less

<sup>84</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>85</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

<sup>86</sup> *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

<sup>87</sup> The literature on expressive harms is vast. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Simon Blackburn, *Group Minds and Expressive Harm*, 60 MD. L. REV. 467 (2001); Dorf, *supra* note 70; B. Jessie Hill, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Michele Moody-Adams, *Taking Expression Seriously: Equal Citizenship, Expressive Harm and Confederate Iconography* (Oct. 18, 2018) (unpublished paper) (on file with the New York University School of Law Center for Law and Philosophy). For a recent extended discussion, see Richard C. Schragger, *Unconstitutional Government Speech*, 24–31 (Va. Pub. Law & Legal Theory Research Paper Series, No. 2019-56).

<sup>88</sup> *See* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2–3 (2000).

<sup>89</sup> *See Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O’Connor, J., concurring).

<sup>90</sup> *Id.* at 687–88.

<sup>91</sup> *See, e.g.*, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098–2103 (2019) (Gorsuch, J., concurring).

important than the judge's substantive views of the permissibility of religious support, whether material or symbolic.

That being said, certain forms of government speech must certainly be out-of-bounds constitutionally. It is possible that the courts would have nothing to say if the White House sponsored an annual cross burning on the South Lawn. But to assert as a general matter that cross burning does no harm or does less harm than government "conduct" because it is "speech" seems implausible.

Certainly, recent events reveal that how government officials speak and what they say has significant material consequences. Consider the tragic events in Charlottesville. The speech/conduct distinction has been asserted as a defense by those white supremacists who fomented the violence that accompanied the Unite the Right rally held there in August 2017. The federal district court judge hearing a civil rights case brought on behalf of those injured has thus far rejected the argument that the rally organizers and participants were engaged in "mere" speech. He has held instead that the facts alleged in the plaintiffs' complaint would amount to a conspiracy to violate civil rights.<sup>92</sup>

Nevertheless, the speech/conduct distinction stands in the way of an equal protection challenge to the statues of Robert E. Lee and "Stonewall" Jackson that adorn the city's central civic spaces and on behalf of which the Unite the Right participants were rallying. Those statues still stand two years later,<sup>93</sup> and they still cause harm.

### III. PUBLIC AND PRIVATE

The moniker "government speech" requires not just "speech" but also "government." The decision to denote speech as "governmental" also tends to insulate speech from constitutional review. The government has a great deal of leeway to say what it wants when it is speaking.

Indeed, the drawing of the public/private line is often outcome determinative. If speech is non-governmental, the government must act neutrally toward it. It can neither favor certain viewpoints nor censor the speech.<sup>94</sup> If speech is governmental, however, the government need not act neutrally toward it. The government is permitted to have its own viewpoint and is not required to give other speakers equal time.<sup>95</sup>

Like the speech/conduct distinction, the public/private distinction is unstable.<sup>96</sup> The conventional approach to dismantling state action has been to attribute governmentality to ostensibly private transactions or to entities ostensibly private but

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<sup>92</sup> *Sines v. Kessler*, 324 F. Supp. 3d 765, 773 (W.D. Va. 2018).

<sup>93</sup> Shannon Van Sant, *Judge Blocks Removal of Confederate Statue that Sparked Charlottesville Protest*, NPR (Sept. 14, 2019, 6:40 PM), <https://www.npr.org/2019/09/14/760876494/judge-blocks-removal-of-confederate-statue-that-sparked-charlottesville-protest> [<https://perma.cc/TFY7-HJNB>]. *But see* Oliver, *supra* note 15 (reporting that the Virginia General Assembly has amended its statue statute to permit local governments to remove Confederate monuments).

<sup>94</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

<sup>95</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).

<sup>96</sup> *See* Kennedy, *supra* note 5, at 1349.

affected with the public interest, such as corporations, in an effort to hold them constitutionally accountable.<sup>97</sup>

In the context of free speech doctrine, by contrast, the decision to attribute speech either to the government or to private parties does not necessarily have predictable constitutional outcomes. That is because both private and public speech enjoy certain immunities from constitutional restraint. One can toggle back and forth between these categories and thereby avoid constitutional regulation of the content of speech.

### A. Attribution and Constitutional Avoidance

By way of illustration, compare *Pleasant Grove City v. Sumnum*<sup>98</sup> and *Town of Greece v. Galloway*,<sup>99</sup> two religious speech cases. In 1971, Pleasant Grove accepted a privately donated Ten Commandments display from the Fraternal Order of Eagles that was erected in a local public park.<sup>100</sup> In 2003, the Sumnum Church offered a similarly designed display of the Church’s Seven Aphorisms to the city, which the city declined.<sup>101</sup> The Church argued that the city’s selective receipt of the Ten Commandments monument violated the First Amendment’s requirement that government not pick and choose among speakers to favor in the public square.<sup>102</sup>

Under conventional free speech doctrine, the government cannot select among viewpoints when it is operating a traditional public forum<sup>103</sup>—in this case, a city park. The Court, however, determined that the city was not operating a public forum when it accepted gifts of certain monuments, but was instead engaged in government speech.<sup>104</sup> Justice Souter, in his concurrence, noted that a reasonable observer would assume that permanent monuments in public parks are the city’s expression.<sup>105</sup> Because the Ten Commandments monument was city speech, it did not have to be viewpoint neutral.<sup>106</sup> The city was not required to adopt an all-comers policy when it came to permanent monuments.

The Court took a different position in *Town of Greece v. Galloway*.<sup>107</sup> That case involved a challenge to a town’s practice of inviting local religious leaders to lead

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<sup>97</sup> See *Shelley v. Kraemer*, 334 U.S. 1, 20–22 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946); Jaffe, *supra* note 5, at 221; cf. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 260–62 (2007) (describing early civil rights challenges to the state action doctrine).

<sup>98</sup> 555 U.S. 460 (2009).

<sup>99</sup> 572 U.S. 565 (2014).

<sup>100</sup> *Pleasant Grove City*, 555 U.S. at 464–65.

<sup>101</sup> *Id.* at 465–66.

<sup>102</sup> *Id.* at 464–66.

<sup>103</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.”).

<sup>104</sup> *Pleasant Grove City*, 555 U.S. at 471–72.

<sup>105</sup> *Id.* at 487 (Souter, J., concurring); see also *id.* at 471.

<sup>106</sup> See *id.* at 479–80 (majority opinion); see also *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view . . .”).

<sup>107</sup> See 572 U.S. 565 (2014).



prayers at town council meetings.<sup>108</sup> The Court held that though the prayers were often sectarian and predominantly Christian, the prayer practices did not violate the Establishment Clause.<sup>109</sup> The Court determined that the ministers' prayers were *not* government speech, subject to the dictates of the Establishment Clause, even though the town council had commissioned the prayers and regularly opened their meetings with them.<sup>110</sup>

Legislative prayer is a lacuna in the Establishment Clause. The Court had previously held that legislatures may commission ministers to pray for the legislators in their personal and institutional capacities.<sup>111</sup> The Court doubled-down on this idea in *Town of Greece*, asserting that the city council prayers were meant for the edification of the town's councilors, were thus "internal" to the council's own practices, and were therefore not government communications intended to promote public religiosity.<sup>112</sup> The Court further suggested that the prayers were the private speech of the ministers who were invited to speak.<sup>113</sup> As to the latter, Justice Kennedy's majority opinion observed that it would be constitutionally problematic for the town to regulate the content of the ministers' religious invocations at all under principles of free speech and free exercise neutrality.<sup>114</sup> In other words, the public/private distinction insulated the prayers in *Town of Greece* from the neutrality requirements of the Establishment Clause in the same way that the distinction insulated the speech in *Pleasant Grove* from the neutrality requirements of the Free Speech Clause.

Manipulating the public/private distinction is an effective way to restrict the reach of the First Amendment. If speech is governmental, the government can resist demands for equal time, even when the government selects speakers, so long as the government is understood to be the "owner" of the speech. In *Walker v. Texas Division, Sons of Confederate Veterans*, for example, which involved a challenge to Texas's denial of a specialty license plate exhibiting the Confederate battle flag, the Court was divided 5-4 over whether specialty license plates were government speech or private speech, with the majority concluding the former.<sup>115</sup> Because the license plates were government speech—like the monuments in *Pleasant Grove*—the state did not have to comply with the demands of viewpoint neutrality.<sup>116</sup>

In *Walker*, Justice Alito, the author of the majority opinion in *Pleasant Grove* and a member of the majority in *Town of Greece*, complained in dissent that government speech doctrine was being used to take a "large and painful bite out of the First Amendment."<sup>117</sup> It is notable that he did not voice the same complaint in

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<sup>108</sup> *Id.* at 569–70.

<sup>109</sup> *Id.* at 573, 591–92.

<sup>110</sup> *See id.* at 569–71, 574–75.

<sup>111</sup> *Marsh v. Chambers*, 463 U.S. 783, 784–85, 792–95 (1983) (holding that the practice of opening legislative sessions with a prayer did not violate the U.S. Constitution, despite the fact that only Christians were chosen to participate).

<sup>112</sup> *Town of Greece*, 572 U.S. at 587–91.

<sup>113</sup> *See id.* at 583.

<sup>114</sup> *See id.* at 581.

<sup>115</sup> 135 S. Ct. 2239, 2243–44, 2246 (2015).

<sup>116</sup> *Id.* at 2246.

<sup>117</sup> *Id.* at 2255 (Alito, J., dissenting).

*Pleasant Grove* or *Town of Greece*, where the decision to categorize speech as public (in the former)<sup>118</sup> and private (in the latter)<sup>119</sup> also limited the reach of the First Amendment.

Perhaps Alito’s views on religious speech influenced his views of the distinction between public and private speech.<sup>120</sup> Indeed, these cases suggest that the category of “government speech” is being dictated by the nature of the speech and less by a consensus theory of state action. Unsurprisingly, the public/private distinction is serving a substantive goal.

### B. Public and Private Confederate Monuments

The use of the public/private distinction to achieve substantive ends is evident in the context of Confederate monuments as well. In Memphis, Tennessee, the city sought to remove statues of Jefferson Davis and Nathan Bedford Forrest (a former Confederate general and grand wizard of the Ku Klux Klan),<sup>121</sup> but was barred by a state statute that limits the circumstances under which local governments can remove war memorials.<sup>122</sup> That statute only applied to publicly owned statues on public lands, however.<sup>123</sup> The city thus transferred the statues and the land on which they sat to a private owner.<sup>124</sup> The private owner, unrestrained by the state statute, removed the statues.<sup>125</sup>

This kind of formalism seems a little silly, though the social meaning of an expressive act may change depending on its attribution. Indeed, maybe the entire concept of state action is a function of social meaning. The same act—erecting and maintaining a Confederate monument—has different meanings depending on whether it is accomplished with public funds on public lands or is completed by private actors using private funds on private lands. It is certainly the case that a state statute barring a private citizen from removing her own Confederate memorial would invite serious First Amendment questions. But why does the same statute not raise constitutional questions when a city is prevented from doing so? The answer is, of course, the private/public distinction: municipal corporations are generally not treated as private speakers. They *are* the state.

The distinction is regularly deployed, but whether it should hold is an important question. Consider the case of Birmingham’s Confederate memorial, a large obelisk in the city’s civic center.<sup>126</sup> The state sued Birmingham, to which Birmingham

<sup>118</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009).

<sup>119</sup> See *Town of Greece*, 572 U.S. at 588.

<sup>120</sup> See Schauer, *supra* note 34, at 271.

<sup>121</sup> Liliana Segura, *Forrest the Butcher: Memphis Wants to Remove a Statue Honoring First Grand Wizard of the KKK*, INTERCEPT (Sept. 2, 2017, 8:00 AM), <https://theintercept.com/2017/09/02/memphis-wants-to-remove-statue-honoring-kkk-grand-wizard-nathan-bedford-forrest/> [<https://perma.cc/5WVY-YRY6>].

<sup>122</sup> Bray, *supra* note 26, at 27–30.

<sup>123</sup> *Id.* at 27–29.

<sup>124</sup> *Id.* at 29–30.

<sup>125</sup> *Id.*

<sup>126</sup> Ian Stewart, *Judge Throws Out Alabama Law that Protects Confederate Monuments*, NPR (Jan. 15, 2019, 5:52 PM), <https://www.npr.org/2019/01/15/685672038/judge-throws-out-alabama-law-that-protects-confederate-monuments> [<https://perma.cc/YW8Z-ZY7C>].

responded by arguing that a state law preventing it from removing the memorial was a violation of the city's free speech rights.<sup>127</sup> Citing *Pleasant Grove*, the trial judge agreed, holding that the obelisk was city speech and that Birmingham "has a right to speak for itself, to say what it wishes, and to select the views that it wants to express."<sup>128</sup> In *Pleasant Grove*, recall, the Supreme Court concluded that reasonable observers would conclude that a permanent Ten Commandments monument in the middle of a city park was the city's speech.<sup>129</sup>

In addition to Tennessee and Alabama, a number of other states have adopted "statue statutes" that are drafted to prevent cities from removing Confederate monuments and other war memorials.<sup>130</sup> These statutes have been challenged on First Amendment and equal protection grounds.<sup>131</sup> As to the First Amendment claim, normally the public/private distinction would be a barrier to the assertion of a municipal speech right. The government does not enjoy a "right" to speak, but rather speaks at the behest of the polity, normally through electoral mechanisms that give political majorities decision-making power. Moreover, if a city is simply an arm of the state government, then it cannot assert a claim against the state for a violation of rights. The city is merely a convenient administrative unit through which the state exercises its decision to speak or not to speak and in what form. In overturning the trial judge's decision, the Alabama Supreme Court recited these familiar maxims, asserting that municipal corporations, as creatures of the state, do not enjoy constitutional rights.<sup>132</sup>

That conclusion is somewhat overstated, however. The Supreme Court has never definitively held that cities do not enjoy speech rights and some courts have treated cities as potential First Amendment rights holders.<sup>133</sup> The *Pleasant Grove* Court did not hesitate to attribute speech to the city, though it did not say anything about whether the state could order the city to speak.<sup>134</sup> For some commentators, the fact that profit and non-profit corporations enjoy speech rights suggests that municipal corporations should as well.<sup>135</sup> These commentators reject the public/private distinction as applied to cities, arguing that the values underlying the distinction point to treating cities just like other corporations or associations, at least for speech purposes.<sup>136</sup>

What kind of analysis should courts undertake in the face of claims of municipal constitutional right? Acknowledging that the public/private distinction is a

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<sup>127</sup> Order on Cross Motions for Summary Judgment at 1, *State v. City of Birmingham*, No. CV-17-903426-MGG (Ala. Cir. Ct. Jan. 14, 2019).

<sup>128</sup> *Id.* at 4–6.

<sup>129</sup> See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470–71 (2009).

<sup>130</sup> *Bray*, *supra* note 26, at 23–44.

<sup>131</sup> *Id.* at 17–18.

<sup>132</sup> *State v. City of Birmingham*, No. 1180342, 2019 Ala. LEXIS 132, at \*6, \*13 (Ala. Nov. 27, 2019).

<sup>133</sup> See, e.g., *Creek v. Vill. of Westhaven*, 80 F.3d 186, 192 (7th Cir. 1996); *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 701 F. Supp. 2d 568, 598–99 (S.D.N.Y. 2010).

<sup>134</sup> *Pleasant Grove City*, 555 U.S. at 472–73.

<sup>135</sup> See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 61, 67–68 (2018) (collecting and describing the literature).

<sup>136</sup> See, e.g., Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 370–73 (2019); David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1686–87 (2006).

conclusion and not a fact about the world would be a good start. As Micah Schwartzman and I have argued, the “nature” of a given corporate entity does not tell us anything about whether it should be treated as a rights holder.<sup>137</sup> The appropriate approach is to assess the justifications for the attribution of rights in any given context.<sup>138</sup>

Whether a city should be able to assert constitutional rights against the state is a more complex question than current constitutional doctrine—which is generally hostile to the idea—acknowledges.<sup>139</sup> Municipal corporations, in contrast to business corporations, ended up on the “public” side of the public/private distinction as that distinction was developed in the early part of the nineteenth century.<sup>140</sup> But history need not be destiny. The general hostility to corporate speech rights suggests that the constitutional culture is not necessarily comfortable with treating business corporations as free speech rights holders.<sup>141</sup> On the other hand, the Birmingham judge’s decision to treat the city as it would any private speaker suggests that these categories are not foreordained.<sup>142</sup>

One need not recognize a municipal speech right, however, to rule on behalf of municipalities seeking to remove their Confederate monuments in the face of restrictive state laws. Instead of asking whether a city enjoys a free speech right, one could instead ask whether it makes sense to call a monument in a city-owned park that the city would rather remove “government” speech in the first place. If an expressive act is going to be associated with a city, then the city ought to have some significant say in what that expressive act *is*. There should be a minimum nexus between the government speech and the government speaker.

In other words, instead of thinking of the connection between speech and the city as a city’s speech right, one could instead think of it as a minimum requirement for treating an expressive act as “government speech.” An essential feature of government speech is that the government that is speaking *be* the actual speaker.<sup>143</sup> This nexus is necessary because, as the Supreme Court has emphasized, the primary constraint on government speech is the fact that the government is “accountable to

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<sup>137</sup> Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345, 345–46 (Micah Schwartzman et al. eds., 2016).

<sup>138</sup> *See id.* at 347.

<sup>139</sup> *See* Schragger, *supra* note 135, at 60–61.

<sup>140</sup> RICHARD SCHRAGGER, *CITY POWER* 57–60 (2016); *see also* HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* 182–204 (1983); Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057, 1099–1109 (1980) (discussing the origin and development of the public/private distinction).

<sup>141</sup> *Cf.* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 348–53 (2010) (holding that corporations do hold free speech rights, in spite of the Supreme Court’s previous jurisprudence which held that there was a “compelling governmental interest in preventing ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas’” (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990))).

<sup>142</sup> *See* Order on Cross Motions for Summary Judgment at 3, *State v. City of Birmingham*, No. CV-17-903426-MGG (Ala. Cir. Ct. Jan. 14, 2019).

<sup>143</sup> *See* Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 *N.Y.U. L. REV.* 605, 615 (2008).

the electorate and the political process for its advocacy.”<sup>144</sup> To enjoy the immunities that the “government speech” label provides to government speakers, that speech has to be representative. To require majority black cities like Memphis or Birmingham to keep their monuments—or Charlottesville, where the statues are a constant reminder of the violence done to the community—seems a violation of this basic political principle.<sup>145</sup>

This applies to official and formal pronouncements—memorials and such. But what about public officials’ rhetoric? Here, too, the public and private get mixed up. Government speech turns out to be a very muddy category, in part because the “government” speaks in so many ways.<sup>146</sup> Public officials make statements all the time that contravene norms of equal treatment or disestablishment and yet the courts regularly do nothing.<sup>147</sup> Sometimes standing doctrine is used to shield elected officials from being hauled into court for the things they say;<sup>148</sup> sometimes it is the Court’s willful blindness.<sup>149</sup>

In any case, the judicial hesitance to regulate officials’ speech is more a function of institutional capacity than a considered understanding of what constitutes “government speech.” The courts are simply incapable of policing the rhetoric of public officials except indirectly. This means that any constitutional constraint on government speech is going to be underenforced.<sup>150</sup> Even if the courts bar the government’s overtly sectarian, hateful, or exclusionary speech when presented in the form of a prayer or a monument, they are not likely to regulate the many statements made by public officials that convey the same message or have similar exclusionary effects. Donald Trump’s statement that there were “very fine people on both sides” of the racist violence that occurred in Charlottesville at the Unite the Right rally is not likely to be remedied by any court.<sup>151</sup>

#### IV. COERCED AND NON-COERCED SPEECH

If a city is a rights bearer, like any other corporation, then forcing it to “speak” by requiring it to maintain its Confederate monuments is an act of compelled

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<sup>144</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). A similar accountability principle is reflected in the Court’s federalism decisions, which seek to ensure that citizens can track the real origins of legislation and appropriately attribute enforcement to the correct level of government. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 918–22 (1997); *New York v. United States*, 505 U.S. 144, 168–69 (1992).

<sup>145</sup> *Cf. Romer v. Evans*, 517 U.S. 620, 633–35 (1996) (striking down a state law preempting local anti-discrimination ordinances).

<sup>146</sup> *See Corbin, supra* note 143, at 607.

<sup>147</sup> *See* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 *TEX. L. REV.* 583, 588 (2011).

<sup>148</sup> *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5, 17–18 (2004); *Moore v. Bryant*, 853 F.3d 245, 248, 253 (5th Cir. 2017).

<sup>149</sup> *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416–17, 2423 (2018).

<sup>150</sup> *See generally* Schragger, *supra* note 147 (describing how the Establishment Clause is underenforced). On underenforcement, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978).

<sup>151</sup> *See* Steven R. Shapiro, *Reflections on Charlottesville*, 14 *STAN. J. C.R. & C.L.* 45, 47–48 (2018). Neither, it turns out, are his statements denigrating Muslims. *See Trump*, 138 S. Ct. at 2417–18, 2423.

speech. But what constitutes “coerced” as opposed to “free” speech? Current doctrine tends to draw categorical lines. Appropriate government speech includes cases in which the government engages in expressive activities itself, when it chooses to selectively fund the expressive activities of non-governmental actors<sup>152</sup> or when it places expressive conditions on the receipt of government funds,<sup>153</sup> and, finally, when it compels taxpayers to pay for expressive activities generally.<sup>154</sup> Inappropriate “compelled” speech occurs when the government forces an actor to recite something she does not believe in or requires her to directly subsidize others’ private speech.<sup>155</sup>

Despite these rule-like statements of the doctrine, the distinction between coerced and non-coerced speech continues to be highly contested and contestable. Consider again Birmingham’s First Amendment claim. One argument the city could make is that local taxpayers should not have to pay for speech with which they disagree. But this kind of claim is normally unavailing. Generally, outside of the Establishment Clause, citizens cannot object to the things the government says “in their name” and for which the government taxes them.<sup>156</sup> If, however, the city is understood as an individual or a corporation, then forcing the city *qua* city to maintain a Confederate monument looks the same as forcing any other private actor to recite a certain dogma.<sup>157</sup> Birmingham’s citizens can be compelled to fund speech that is anathema to them, but Birmingham, the corporate entity, cannot.

For those who object to forcing a city to continue maintaining Confederate monuments, however, these forms of compulsion look pretty similar. Government speech doctrine draws a line between direct and indirect compulsion and direct and indirect subsidies. But this distinction has always been fairly brittle.

#### A. *Conscience and Compelled Speech*

Consider the Court’s rhetoric in the recently decided *Janus v. American Federation of State, County and Municipal Employees*.<sup>158</sup> There, Justice Alito, writing for a 5–4 majority, held that a state law requiring public employees to pay dues to a union over the employees’ objections violates the compelled speech doctrine.<sup>159</sup> Alito’s statement of the principle could not be clearer: “Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command . . . . When speech is compelled, . . . individuals are coerced

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<sup>152</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998).

<sup>153</sup> *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544–46 (1983).

<sup>154</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005).

<sup>155</sup> *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410–11 (2001); *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977).

<sup>156</sup> Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 376–80 (2011).

<sup>157</sup> *Cf. Wooley*, 430 U.S. at 715 (holding that “[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable”).

<sup>158</sup> *Janus*, 138 S. Ct. 2448.

<sup>159</sup> *Id.* at 2459, 2486.

into betraying their convictions.”<sup>160</sup> One hears echoes of the Supreme Court’s famous decision in *West Virginia State Board of Education v. Barnette*, the compulsory flag salute case.<sup>161</sup>

And yet the robust conscience claim embraced by the Court in *Janus* does not apply *at all* to taxes, or to specifically targeted fees as long as those taxes and fees fund the government’s own expressive programs. The difference between *Janus* and taxes or targeted fees, according to Justice Scalia, is that “[c]ompelled support of a private association is fundamentally different from compelled support of government.”<sup>162</sup> Why that would be the case in light of Alito’s compelled speech principle is unclear. One needs to ask why betraying one’s convictions in relation to the government is different from betraying one’s convictions in relation to a private party; both seem like similar offenses to conscience.<sup>163</sup>

Another limit on *Janus*’s compelled speech principle is conditional government funding. Under *Rust v. Sullivan*, viewpoint-based restrictions that accompany government funding are effectively legitimate.<sup>164</sup> Recall that, in *Rust*, the Court dismissed a challenge to a federal statute mandating that government family planning funds not be used to “encourage, promote[,] or advocate abortion.”<sup>165</sup> The *Rust* Court denied that the statute imposed an unconstitutional condition on the receipt of government aid in violation of the First Amendment.<sup>166</sup> The *Janus* problem, however, seems present in *Rust* as well. Is it not the case that the threat of the withdrawal of government funding inappropriately influences recipients to “betray” their “convictions” as Alito claims in *Janus*?<sup>167</sup>

These cases are all overwrought. The compelled speech principle stated in *Janus* is overstated; so is the too-easy dismissal of the compelled speech claim in *Rust*. And the distinction that Justice Scalia draws between compelled support of government and compelled support of private speakers cannot possibly be doing the necessary work.

Consider a similar claim in the Establishment Clause context. In opposing a Virginia plan that would impose a government collected tax to pay for clergy, Thomas Jefferson famously declared that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.”<sup>168</sup> This “Jeffersonian proposition”<sup>169</sup> is the original statement of

<sup>160</sup> *Id.* at 2463–64; see also Schwartzman, *supra* note 156, at 318–21 (discussing the “Jeffersonian proposition” that the Establishment Clause prohibits taxation designed to promote religion on the grounds that such taxation infringes on taxpayers’ freedom of conscience).

<sup>161</sup> 319 U.S. 624, 642 (1943).

<sup>162</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring)).

<sup>163</sup> *Cf.* Schwartzman, *supra* note 156, at 325–26.

<sup>164</sup> 500 U.S. 173, 193 (1991).

<sup>165</sup> *Id.* at 180.

<sup>166</sup> *Id.* at 196–97.

<sup>167</sup> *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (Alito, J., concurring).

<sup>168</sup> Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd ed., 1950) (footnote omitted).

<sup>169</sup> Schwartzman, *supra* note 156, at 319.

Justice Alito’s compelled speech principle.<sup>170</sup> And yet, the Court, including Justice Alito, has permitted (and, in a number of cases, required)<sup>171</sup> the government to fund religious speakers and institutions even as those speakers and institutions advocate positions that are anathema to those paying the bill.<sup>172</sup> Here we see the collapse of the principle before it even gets off the ground.

Two things seem to be going on. The first is what Micah Schwartzman calls the “anarchy objection”<sup>173</sup>—the worry that government “could not function” if conscientious objectors could refuse to pay taxes that might be used to fund the government’s expressive activities.<sup>174</sup> The second seems to be an objection to redistributive government arrangements, like compulsory union dues, that implicate speech.<sup>175</sup> This may be why, as to the latter, Justice Kagan accuses the majority in *Janus* of “weaponizing” the First Amendment to attack laws that regulate an economic *act*—the paying of union dues in the context of municipal employment—that is only tangentially related to *speech*.<sup>176</sup> For Kagan, the use of compelled speech doctrine to undercut a long-standing and embedded feature of labor law is a form of *Lochnerism*.<sup>177</sup>

These cases of compelled support raise numerous important questions. In the first instance, does the paying of money constitute an expressive or conscientious act, as Alito and Jefferson contend?<sup>178</sup> Does government funding always mean that the government “owns” the speech, and therefore can dictate its content?<sup>179</sup> Can an individual or community distance themselves from expressive conduct by not participating in government programs that violate their conscientious commitments?<sup>180</sup> How far does such a principle go?

Answering these difficult questions would require a great deal more room than this short Article allows. The general point is that there is nothing simple about drawing a distinction between coerced and non-coerced speech. At stake in these cases is the content of the substantive principle. The justices disagree not only about the appropriate categorization but also about the scope and application of the individual right.

<sup>170</sup> *Janus*, 138 S. Ct. at 2464.

<sup>171</sup> See e.g., *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 (2017).

<sup>172</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

<sup>173</sup> Schwartzman, *supra* note 156, at 323.

<sup>174</sup> *United States v. Lee*, 455 U.S. 252, 260 (1982) (rejecting a religious exemption from Social Security taxes on the ground that “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief”).

<sup>175</sup> *Janus*, 138 S. Ct. at 2459–61; see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–92 (2014) (holding that compulsory health insurance coverage requiring contraception violates the corporation’s freedom to exercise religion).

<sup>176</sup> *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

<sup>177</sup> See *id.* at 2498; see also *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (arguing that the Constitution, and especially the concept of liberty in the Fourteenth Amendment, “is not intended to embody a particular economic theory”).

<sup>178</sup> See *Janus*, 138 S. Ct. at 2463–64 (majority opinion); Schwartzman, *supra* note 156, at 360.

<sup>179</sup> See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

<sup>180</sup> See *Burwell*, 573 U.S. at 716.



*B. Are There Non-coercive Expressive Activities that the State Cannot Engage in?*

In Confederate monuments cases, issues of attribution and compulsion tend to recede, supplanted by the broader question of whether there are simply things that the government cannot say. Compelled or not, the government's expressive activities might be impermissible.

For this reason, those advocating constitutional limitations on government expressive conduct find resources in Establishment Clause doctrine. I have already mentioned the non-endorsement principle, which holds that when government speaks it may not "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>181</sup> Nelson Tebbe has sought to generalize this principle beyond the context in which Justice O'Connor first articulated it.<sup>182</sup> Tebbe has argued that an expressive equal treatment principle is implicit in doctrinal areas beyond the Establishment Clause.<sup>183</sup>

In Establishment Clause cases themselves, however, the non-endorsement doctrine is mostly moribund. In *American Legion v. American Humanist Association*, the Court recently upheld the constitutionality of a thirty-two-foot tall Latin cross memorializing soldiers killed in World War I that had stood in Bladensburg, Maryland since 1925.<sup>184</sup> In doing so, the Court refused to apply the endorsement test; indeed, it appeared to reject all of the existing Establishment Clause tests at least as applied to symbolic government communications.<sup>185</sup> Instead, the Court adopted a presumption of constitutionality for all long-standing government religious practices.<sup>186</sup>

Some number of justices are inclined to go further and hold that government religious speech can never be constitutionally actionable when it is not accompanied by coercion. Under a coercion test, the government is only constitutionally liable if the government compels citizens to engage in a religious ritual or practice.<sup>187</sup> Passive monuments or practices would never be unconstitutional under this standard.

Justice Gorsuch argues for this approach in his *American Legion* concurrence.<sup>188</sup> He asserts that "offended observer" standing in Establishment Clause cases is an anomaly in the law, and that it should be eliminated.<sup>189</sup> He points out that those asserting racially based expressive harms are normally barred from bringing claims,

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<sup>181</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>182</sup> *Id.*; Tebbe, *supra* note 78, at 659–60; *see generally* Schwartzman, *supra* note 63 (theorizing how religion may or may not be afforded special treatment by the Constitution).

<sup>183</sup> *See* Tebbe, *supra* note 78, at 693–96; *see also* Schragger, *supra* note 87, at 21–22.

<sup>184</sup> 139 S. Ct. 2067, 2074, 2077 (2019).

<sup>185</sup> *See id.* at 2087–89.

<sup>186</sup> *See id.* at 2089–90.

<sup>187</sup> *Id.* at 2093 (Kavanaugh, J., concurring); *id.* at 2095 (Thomas, J., concurring).

<sup>188</sup> *Id.* at 2098–2100, 2103 (Gorsuch, J., concurring).

<sup>189</sup> *Id.* at 2102–03.

but those asserting religiously based ones are not, and he finds that disparity troubling.<sup>190</sup> Gorsuch would eliminate offended observer standing in all cases.<sup>191</sup>

Gorsuch’s concurrence represents the “sticks and stones” position.<sup>192</sup> The coercion test assumes, as a general matter, that the government’s symbolic expression is less harmful than its conduct. But again, the distinction between speech and conduct already embeds a value judgment. If the harms from some kinds of expressive conduct are significant, why draw a categorical line?

So, too, what constitutes coercion is, of course, disputed. School prayer with an opt-out for dissenters technically does not coerce elementary and secondary school children to pray, even if, as a matter of social reality, the exercise by a student of the opt-out might result in significant stigma. Justice Kennedy took the position that prayer in school was inherently coercive but that prayer in a city council chamber was not.<sup>193</sup> The concept of coercion can be even more capacious, however. Some have argued that government funding of public schools might unduly coerce parents who would rather send their children to private, parochial schools.<sup>194</sup> Free exercise neutrality, on this account, would require equivalent funding for religious education.

Here again, a substantive account of what government neutrality requires in relation to a given right is doing the necessary work, not a relevant distinction between coercive and non-coercive government action. If one agrees that the Equal Protection Clause should protect against the government’s racially hateful speech in the same way that the Establishment Clause protects against religiously hateful speech, then coercion is beside the point. Justice Gorsuch would “level down” by eliminating offended observer standing under the Establishment Clause.<sup>195</sup> But why not “level up” and allow those with colorable claims of discriminatory state expression under the Equal Protection Clause bring those claims as well?

## V. EXPRESSIVE EQUAL TREATMENT?

What does the application of a general expressive equal treatment principle look like?<sup>196</sup> Justice Kagan’s dissent in *Town of Greece* suggests a possible model.<sup>197</sup> Recall that, in *Town of Greece*, the Court upheld a town’s practice of opening its council meetings with sectarian, mainly Christian, prayers.<sup>198</sup> Attendees in the town

<sup>190</sup> *Id.* at 2099.

<sup>191</sup> *Id.* at 2098.

<sup>192</sup> See Schragger, *supra* note 87, at 8–9 (citing Dorf, *supra* note 70, at 1284–86).

<sup>193</sup> Compare *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (holding that prayer in public schools carries an indirect risk of coercion), with *Town of Greece v. Galloway*, 572 U.S. 565, 586–87, 591–92 (2014) (holding that prayer at town board meeting was not coercive).

<sup>194</sup> For a discussion, see Nomi Maya Stolzenberg, “*He Drew a Circle that Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 590 & n.37 (1993).

<sup>195</sup> See *Am. Legion*, 139 S. Ct. at 2100 (Gorsuch, J., concurring). But see Schragger & Schwartzman, *supra* note 35, at 34–36.

<sup>196</sup> See Schragger, *supra* note 87, at 21–31.

<sup>197</sup> *Town of Greece*, 572 U.S. at 615–31 (Kagan, J., dissenting).

<sup>198</sup> *Id.* at 569–71 (majority opinion).

are not required to stand or pray under penalty of law, nor are they required to otherwise participate in the religious ceremony.<sup>199</sup>

Nevertheless, Justice Kagan argues in her dissent that the town's prayer practices are themselves an expressive wrong.<sup>200</sup> In so doing, she explicitly rejects the majority's line drawing between public and private.<sup>201</sup> She also implicitly rejects the majority's speech/conduct and coerced/non-coerced distinctions.<sup>202</sup> According to Kagan, the Town of Greece's prayer practices are forms of government action that are both harmful and potentially coercive.<sup>203</sup>

### A. *The Equal Citizenship Principle*

It is worth taking a closer look at Kagan's argument. Kagan starts by noting that the Constitution does not only embrace the freedom to worship as one chooses, but also a principle of equal citizenship.<sup>204</sup> As Justice Kagan asserts:

A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.<sup>205</sup>

Sectarian religious speech that is integrated into a quintessential government act—a town council meeting—betrays that individual and collective identity. “And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.”<sup>206</sup>

Kagan further worries that this symbolic and expressive dividing will be accompanied by certain kinds of harms. What if a judge starts a trial by asking those present to stand while a minister blesses the proceedings in sectarian terms, or an election official asks a minister to say a benediction before the opening of the polls, or a presiding officer in a naturalization ceremony has a minister invoke Christ before administering the oath for new citizens?<sup>207</sup> These prayer practices would be problematic, Kagan asserts, both because they violate the equal citizenship principle and also because the person coming before the government in these instances would feel pressure to comply, because “[a]fter all, she wants, very badly, what the judge or poll worker or immigration official has to offer.”<sup>208</sup> Once put to the choice, the

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<sup>199</sup> *Id.* at 588–89.

<sup>200</sup> *Id.* at 631–33 (Kagan, J., dissenting).

<sup>201</sup> *See id.* at 634–36.

<sup>202</sup> *See id.* at 621–23, 630–31.

<sup>203</sup> *Id.* at 620–21, 630–31.

<sup>204</sup> *Id.* at 615, 632–33, 637.

<sup>205</sup> *Id.* at 615.

<sup>206</sup> *Id.* at 621.

<sup>207</sup> *Id.* at 617–18.

<sup>208</sup> *Id.* at 620.

person who opts not to participate, “must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations.”<sup>209</sup> The implication is that in addition to marking herself as “other,” she will receive less favorable treatment from government officials and her fellow citizens.

In other words, the social meaning of the government’s prayer practices is such that it alters the fundamental relationship of equal concern and respect required of the state. It alters the citizen’s identity before the law, placing her in a position of coming to the law clothed with a disfavored status.<sup>210</sup> Those prayer practices may also force her to identify herself as a religious minority and may cause government officials or other citizens to act differently toward those who are so identified.

The government’s expressive practices are wrong in two ways. First, there are the *harms* caused by expressive activity in altering the behavior of citizens and officials. Second, there is the *wrong* of the social message of inequality,<sup>211</sup> regardless of its material effects.

### B. Equal Citizenship and Confederate Monuments

Now consider these principles as applied to Confederate monuments or other Confederate iconography. One might look to the original animating purposes of the monuments as well as to their present-day message.

As to the purpose, the historical record is quite clear. The American Historical Association has asserted that the Confederate monuments erected in the twentieth century were “part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South.”<sup>212</sup> These monuments “were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African-Americans politically and isolate them from the mainstream of public life.”<sup>213</sup> When black rights consciousness appeared to threaten white supremacy, Southern whites sought to assert their political dominance unequivocally. That message was received. The *New National Era*, an African-American newspaper edited by Frederick Douglass, called the first wave of monuments to the “lost cause” “monuments of folly,” which would only create a “needless record of stupidity and wrong” and serve no purpose except to “cultivat[e] hatred.”<sup>214</sup> The newspaper was right.

Statues and memorials to the “Lost Cause” were not predominantly erected in out-of-the-way places, in quiet cemeteries, or battlefields. Instead, they were placed in front of courthouses, city halls, libraries, schools, in central squares, and along the

<sup>209</sup> *Id.* at 621.

<sup>210</sup> *See id.* at 630–32.

<sup>211</sup> Hellman, *supra* note 88, at 27; Schragger, *supra* note 87, at 4.

<sup>212</sup> AM. HISTORICAL ASS’N, *AHA Statement on Confederate Monuments*, PERSP. ON HIST. (Oct. 1, 2017), <https://www.historians.org/publications-and-directories/perspectives-on-history/october-2017/aha-statement-on-confederate-monuments> [<https://perma.cc/9GQS-BQPG>].

<sup>213</sup> *Id.*

<sup>214</sup> *Monuments of Folly*, NEW NAT’L ERA, Dec. 1, 1870, <https://chroniclingamerica.loc.gov/lccn/sn84026753/1870-12-01/ed-1/seq-3/> [<https://perma.cc/NM2M-73K6>]; *see also* Bray, *supra* note 26, at 10.

cities' main boulevards. This monument building was not incidental to the segregated South. In Charlottesville, the Lee statue was built in the whites-only Lee Park, opposite the whites-only library and just up the street from the whites-only elementary school.<sup>215</sup> In the lead up to the dedication of the Lee statue, the Ku Klux Klan held a cross-burning.<sup>216</sup> The Klan's subsequent march through the town drew a large crowd and positive reviews from the local newspaper.<sup>217</sup> Across the South, bomb-throwings and lynchings were commonplace means of terrorizing black citizens. Monuments were only one way in which whites inscribed their dominance into the political landscape, but they were an important way.<sup>218</sup>

Do Confederate statues continue to convey a message of unequal citizenship status? For those aware of the history of Confederate iconography—and awareness has certainly grown in recent years—the message is fairly clear. Consider the African-American citizen who is required to pass a statue of a Confederate soldier standing guard underneath a Confederate battle flag as she walks into a courthouse or city hall.<sup>219</sup> Certainly, a reasonable observer with some knowledge of context<sup>220</sup> would experience that statue as a signal of second-class status, a reminder that the institutions of state and local government still do not truly represent all people.

To be sure, meanings change. Some motivations recede and others take their place.<sup>221</sup> In the *Bladensburg Cross* case, Justice Alito observes that crosses had become secular symbols of the World War I dead, and that the present-day meaning of the cross had changed over time.<sup>222</sup>

But meanings can change in a less politically inclusive direction as well. In a post-civil rights regime, perhaps Confederate monuments are just statues of old soldiers, historic relics of little import. Or, alternatively, maybe the more recent embrace of Confederate monuments by white supremacists colors the objective social meaning of Confederate monuments today. I think it is fair to say that many people viewed Confederate statues differently after the violence in Charlottesville and elsewhere. In some cases, those changed meanings have induced local officials to remove those monuments, in the places where they have the power.<sup>223</sup>

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<sup>215</sup> DANIEL BLUESTONE, *BUILDINGS, LANDSCAPES, AND MEMORY: CASE STUDIES IN HISTORIC PRESERVATION* 213–20 (2011); City of Charlottesville Blue Ribbon Comm'n on Race, Memorials, & Pub. Spaces, Report to City Council 7 (2016).

<sup>216</sup> *Cross Burned on Patterson's Mountain*, DAILY PROGRESS, May 17, 1924, at 1.

<sup>217</sup> *Klan Parade Drew Big Crowd*, DAILY PROGRESS, May 19, 1924, at 1.

<sup>218</sup> See, e.g., *Klan Burns Cross Near Mechums River*, DAILY PROGRESS, June 23, 1924, at 1 (reporting that the KKK set off “heavy explosions from three bombs”).

<sup>219</sup> See generally Bennett Capers, *Flags*, 48 HOW. L. J. 121 (2004).

<sup>220</sup> See *Salazar v. Buono*, 559 U.S. 700, 720–21 (2010); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); see also B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1408 (2014); *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987) (arguing that the reasonable observer standard “must turn on the message received by the minority or nonadherent”).

<sup>221</sup> See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019).

<sup>222</sup> *Id.*

<sup>223</sup> See, e.g., Christopher Mele, *New Orleans Begins Removing Confederate Monuments, Under Police Guard*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/us/new-orleans-confederate-statue.html> [<https://perma.cc/378E-KQ4C>]; Frances Robles et al., *Nikki Haley, South Carolina Governor, Calls for Removal of Confederate Battle Flag*, N.Y. TIMES (June 22, 2015),

That political response seems appropriate. Government expressive acts that are animated by and continue to convey a message of racial exclusion should fall under a robust equal protection principle. But even within the doctrinal contours of the government speech doctrine, government speech that is a product of a deeply flawed political process should be constitutionally problematic. As the Court has stated, the ultimate check on government speech is that it is responsive to political oversight.<sup>224</sup> At a minimum, government speech is legitimate to the extent that it is representative.

The Confederate monuments erected during the Jim Crow era, however, are the very antithesis of representative. They were erected when African-Americans were disenfranchised, in places that purposefully segregated them from the political, economic, and social life of the community.<sup>225</sup> So too, it is anti-democratic when one political community forces another one to continue speaking in that same anti-democratic register, as states are doing when they force local governments to keep their monuments. Doing so constitutes a form of political and symbolic domination<sup>226</sup> and it arguably violates the minimal representativeness requirement for legitimate government speech.

#### CONCLUSION

The doctrinal category of “government speech” does not theorize its own limits. When deployed as a conclusion, the category hides the distinctions on which it is constructed—between speech and conduct, public and private, and coercive and non-coercive government activity. The lines courts draw within those binaries are contested.

This is evidenced by recent controversies over Confederate monuments. There is no categorical reason why Confederate iconography should not be subject to the same tests of constitutionality that are applied to other forms of government conduct. Nor is there a good reason to treat municipal speech as if it were simply attributable to the state, when it is obviously the speech of a different and unique political community. And, finally, it is insufficient to assert that the government’s speech can do no harm because it does not coerce. Words often harm as much or more than “sticks and stones.” Government symbolic activities that have constitutionally detrimental effects or that convey a constitutionally inappropriate message should be subject to constitutional limits.<sup>227</sup>

Those limits could be external to the government speech doctrine—the Establishment Clause in cases of religious speech and the Equal Protection Clause in cases of racial speech. But there is also a constraint internal to the doctrine. Legitimate government speech must be, by definition, representative. If it is the result

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<https://www.nytimes.com/2015/06/23/us/south-carolina-confederate-flag-dylann-roof.html> [<https://perma.cc/6FBN-8WQ7>].

<sup>224</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 468–69 (2009).

<sup>225</sup> AM. HISTORICAL ASS’N, *supra* note 212.

<sup>226</sup> Schragger, *supra* note 87, at 52; *see also* NORTON, *supra* note 34, at 6 (discussing transparency); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 12 (2000) (discussing ventriloquism).

<sup>227</sup> In this regard, I agree with Helen Norton. *See* NORTON, *supra* note 34, at 6–11.

of a political process that systematically disfavors and targets out-groups, it is illegitimate. The government speech doctrine should not protect it.

Denoting an expressive activity as “government speech” thus far mostly limits constitutional oversight of the government’s exclusionary expressive conduct. Unearthing the assumptions embraced by the doctrine, however, reveals a different possibility: that the government speech doctrine could be used to constrain hateful government speech instead. Government speech doctrine can embody an ideal of expressive equal treatment, or at least a concept of representative speech. When a legitimately democratic regime determines to stop speaking in the register of an illegitimate one, we should call that progress.