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NOTE

STATE ACTION, GOVERNMENT SPEECH, AND THE NARROWING SPECTRUM OF PRIVATE, PROTECTED SPEECH

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INTRODUCTION

In First Amendment jurisprudence, the Supreme Court has employed two doctrines—state action and government speech—to demarcate the boundaries between the public and private spheres. Under the state-action doctrine, a plaintiff claiming a free-speech infringement must show some state action in order to trigger constitutional protection; the constraints of the First Amendment apply not to private persons but to the government. But when the government itself speaks, it is not constrained by the Free Speech Clause, and it need not represent all viewpoints equally. The government-speech doctrine is a defense the government raises when it is accused of vio-

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lating an individual's freedom of speech or of viewpoint discrimination.

After the birth of the state-action doctrine in the *Civil Rights Cases*,[1] the Supreme Court began to impose more and more constitutional requirements on private action. Thus, in *Marsh v. Alabama*,[2] the Court applied the First Amendment against a privately owned company town with no governmental connections whatsoever.[3] But since the apex of the state-action doctrine in *Marsh*, the Court has substantially contracted its definition of state action, requiring greater government contacts to invoke constitutional protection.[4] During this same period, the government-speech doctrine has expanded to impute more private speech to the government, thus removing its First Amendment protection. Accordingly, in *Johanns v. Livestock Marketing Ass'n*,[5] the Court ruled that an advertising campaign funded entirely by the beef industry was government speech.[6] And in *Pleasant Grove City, Utah v. Summum*,[7] the Court held that a privately funded monument proposed to be constructed in a city park constituted government speech as well.[8] In those cases, the government was able to insulate itself from claims of viewpoint discrimination by claiming arguably private speech as its own.[9] Although the state-action and government-speech doctrines serve different purposes, they have achieved a singular result: the contraction of state action and the expansion of government speech together narrow the spectrum of private, protected speech.

Underlying the Court's government-speech decisions—which employ different rhetoric and different standards from its state-action decisions—is an assumption that government speech is not equivalent to state action. But if speech is rather understood as a *form* of action, separate standards may not be necessary, and the two doctrines can be combined or treated similarly. Perhaps a singular test—such as a rational-observer test or an examination of government intent or government function—can reconcile the two doctrines. But pitfalls remain. Despite conceptual similarities, courts employ the two doctrines to address very different constitutional problems; any singular

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1 109 U.S. 3 (1883).

2 326 U.S. 501 (1946).

3 *See id.* at 509–10.

4 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) (noting that even extensive state regulation does not necessarily convert private action into state action for the purposes of the Fourteenth Amendment).

5 544 U.S. 550 (2005).

6 *See id.* at 553.

7 555 U.S. 460 (2009).

8 *See id.* at 481.

9 *See Pleasant Grove*, 555 U.S. at 470–71; *Johanns*, 544 U.S. at 560–62.

standard may be so over- and underinclusive as to render it ineffective.

This Note does not argue that the Rehnquist-Roberts Court's use of these doctrines to narrow the spectrum of private protected speech is necessarily improper—I leave that debate to others. Rather, it considers whether reconciliation of the two doctrines would result in more consistent and predictable rulings without undermining the doctrines' respective functions. To that end, this Note examines whether government speech is separate from or a form of state action and, if it is a form of state action, whether courts can consistently apply one standard to both doctrines.

Part I recounts the historical development of the state-action and government-speech doctrines, tracing how the modern decline of the state-action doctrine has coincided with an expansion of the government-speech doctrine. Part II demonstrates how the two doctrines together narrow the spectrum of private, protected speech and considers whether government speech is fully distinguishable from state action. Part III argues that government speech is a form of state action and considers whether the doctrines can be applied consistently by examining reasonable-observer, government-intent, and government-function tests.

I
The Historical Development of the State-Action and Government-Speech Doctrines

A. The Rise and Fall of State Action

The Supreme Court enunciated the state-action doctrine shortly after the ratification of the Fourteenth Amendment and thereby greatly restricted Congress's power to proscribe private racial discrimination.[10] Under the doctrine, state action, as opposed to private action, is necessary to trigger constitutional protection.[11] Despite these restrictive beginnings, however, the Court significantly expanded the doctrine in the following decades to encompass many types of private action, so long as that private action involves sufficient government contacts or a usurpation of a government function.[12] But since its apex in *Marsh v. Alabama*, the doctrine has contracted sharply. Under the modern state-action doctrine, the Court has revived the public/

10 *See* The Civil Rights Cases, 109 U.S. 3 (1883).

11 *Id.* at 17 ("The wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong . . . .").

12 *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946) (holding that a privately-owned town had assumed a governmental function and was thus subject to the requirements of the Fourteenth Amendment).

private distinction of the *Civil Rights Cases*, requiring greater government contact before constitutional protection may be invoked.[13]

In 1883 the Supreme Court first delineated the scope of the Fourteenth Amendment, clarifying against which actors the first section of the Amendment applies. In five cases, decided together and now known as the *Civil Rights Cases*, the Court first laid the foundation of the state-action doctrine.[14] These cases established that purely private action is not the province of the Fourteenth Amendment. Rather, the Fourteenth Amendment applies only to state action. Writing for the majority, Justice Joseph Bradley enunciated the first statement of the doctrine:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [A]mendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.[15]

Relying upon a formalistic distinction between public and private action, the doctrine greatly curtailed the federal government's ability to regulate private racial discrimination, despite indications that the framers of the amendment likely intended to grant Congress power to guard against discrimination, regardless of its source.[16] Thus, in the *Civil Rights Cases*, the Court struck down portions of the Civil Rights Act of 1875,[17] which prohibited private racial discrimination on public conveyances, in inns, and in theaters and other places of public amusement.[18]

Notwithstanding the majority opinion in the *Civil Rights Cases*, later applications of the state-action doctrine are grounded in Justice

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13 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (limiting state action to "powers traditionally exclusively reserved to the State").

14 *But see* United States v. Cruikshank, 92 U.S. 542, 554–55 (1875) (discussing state-action principles prior to the doctrine's elaboration in the *Civil Rights Cases*).

15 *The Civil Rights Cases*, 109 U.S. at 11.

16 *See* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 210–11 (1908); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 162–66 (1950); Richard F. Watt & Richard M. Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13, 31–33 (1949); *see also* Adamson v. California, 332 U.S. 46, 74–87 (1947) (Black, J., dissenting) (outlining the historical origins of the Fourteenth Amendment), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964). The best proof that the framers intended to grant Congress power to regulate private discrimination is found in various civil rights acts passed contemporaneously with the Fourteenth Amendment.

17 Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (1875).

18 *See The Civil Rights Cases*, 109 U.S. at 25–26.

John Marshall Harlan's dissent.[19] Although Justice Harlan did not concede that state action is a prerequisite under the Fourteenth Amendment,[20] he argued that even if state action were required, that burden had been met in these cases.[21] In the case of the railroads, Justice Harlan stressed the role of the railroads in fulfilling an important state function, arguing that the high degree of government control of the industry constituted state action.[22] He treated inns similarly under the common-law obligations of innkeepers.[23] Finally, in the case of the theater, Justice Harlan found government action in the grant of power afforded by state licenses.[24]

Over the following decades, courts incorporated the reasoning of Justice Harlan's dissent into the state-action doctrine, recognizing that state action could be implicated in private activities in many ways: by granting power,[25] allocating aid,[26] creating monopolies,[27] granting protected status,[28] influencing private persons to accomplish government objectives,[29] or judicially enforcing private rights.[30]

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19 *See infra* notes 25–30 and accompanying text.

20 *See The Civil Rights Cases*, 109 U.S. at 49–50 (Harlan, J., dissenting) (reasoning that because freedom from racial discrimination in public accommodations is an attribute of United States citizenship, Congress can enact legislation to protect that right regardless of the source of discrimination).

21 *Id.* at 57–59.

22 *See id.* at 37–40.

23 *See id.* at 40–41.

24 *See id.* at 41–42.

25 *See* Nixon v. Condon, 286 U.S. 73, 85 (1932) ("Whatever power of exclusion has been exercised by the members of the committee has come to them . . . as the delegates of the State. . . . If the State had not conferred [the power], there would be hardly color of right to give a basis for its exercise.").

26 *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (requiring that for government aid to constitute state action, the state must become involved in the private activity "to some significant extent"); *cf.* Grossner v. Trs. of Columbia Univ., 287 F. Supp. 535, 548 (S.D.N.Y. 1968) (finding *general* aid to a university to be insufficiently related to challenged disciplinary procedures to constitute state action).

27 *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (considering state-sanctioned monopoly power a relevant factor in determining whether state action has occurred but finding that in this case—a partial monopoly—there had been no state action). *But see* Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189, 191 (7th Cir. 1972) (rejecting the state-created monopoly theory).

28 *See* Reitman v. Mulkey, 387 U.S. 369, 377, 380–81 (1967) (holding that a state constitutional amendment guaranteeing a private right to discriminate constitutes state action and overturning the amendment).

29 *See* Coleman v. Wagner Coll., 429 F.2d 1120, 1126 (2d Cir. 1970) (Friendly, J., concurring) ("[I]f the state wishes the benefits of such deterrence in private colleges, must it not accept responsibility for preventing overdeterrence by excessive sanctions and lack of fair procedure for enforcement?").

30 *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("State action . . . refers to exertions of state power in all forms. . . . We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

The state-action doctrine reached its zenith in *Marsh v. Alabama*. In *Marsh*, a Jehovah's Witness distributed religious tracts in a small company town without obtaining a permit from the corporation that owned and operated the town.[31] The question as articulated by the Court was whether "the mere fact that all the property interests in the town are held by a single company . . . give[s] that company power, enforceable by a state statute, to abridge these freedoms."[32] The Court held that it did not and reversed Marsh's conviction, reasoning that "[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."[33] Thus, the *Marsh* Court defined state action not by the extent of the government's actions—which were nonexistent in *Marsh*—but by the nature of the function in question. It did not matter that the conduct in question was committed entirely by private actors; no actual state action of any kind was required.

Many contemporary scholars heralded *Marsh*'s expansion of the state-action doctrine, championing continued application of constitutional limitations to other nonstate entities, such as private individuals and corporations.[34] Adolf Berle advocated comprehensive application of the state-action doctrine to corporations based not on public function but on the grant of power inherent in the corporate form.[35]

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31 Marsh v. Alabama, 326 U.S. 501, 502–04 (1946). The town, Chickasaw, a suburb of Mobile, Alabama, was owned by the Gulf Shipbuilding Corporation. *Id.* at 502. The company owned all of the town's public spaces, including its roads and sidewalks, and it employed a deputy of Mobile to serve as its policeman. *Id.* Despite these characteristics, "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 503.

32 *Id.* at 505.

33 *Id.* at 506. The Court's reasoning recalls Justice Harlan's argument in favor of applying the Fourteenth Amendment to railroads in his dissenting opinion in the *Civil Rights Cases*. *See* The Civil Rights Cases, 109 U.S. 3, 37–40 (1883) (Harlan, J., dissenting).

34 *See, e.g.*, Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 627–29 (1946) (discussing cases in which the Court found that private individual action violated the Fourteenth Amendment, reasoning that state legislation applied to such action and noting that the private discriminatory action would have been permissible but for the existence of the state legislation); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957) ("[W]henever, and however, a state gives legal consequences to transactions between private persons there is 'state action' . . . ."); J.D. Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 555–56 (1951) (discussing whether the Fourteenth Amendment reaches to protect personal rights against infringement by an entity other than the state); John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855 (1966) (arguing that the Supreme Court would likely extend the Fourteenth Amendment's reach beyond state action in response to the sit-in movement); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 3–5 (1961) (discussing the state-action limitation with respect to race cases arising under the Fourteenth Amendment).

35 *See* Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 950 (1952).

He argued that the doctrine requires a grant of government power and sufficient economic power in order to trigger constitutional protection.[36] For Berle, the corporate form itself constituted a sufficient grant of government power.[37] Since the privilege of incorporation is granted by the state,[38] Berle inferred that "state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself."[39] Once the state grants the power of incorporation, Berle would look to market concentration and economic power.[40] Thus, if a corporation exercises monopoly or oligopoly control over the market, "denial of [its] service[s] would be denial of equal protection of the laws."[41]

Jessie Choper advocated a similar power-centric theory, arguing that "conduct of a private individual or organization that has a widespread and fundamental impact on other private individuals should be held to the obligations that the Constitution imposes on the state."[42] Choper based his argument at least in part on institutional, societal, and technological changes that subject personal liberties—once vulnerable only to government intrusion—to private determination.[43] Unlike Berle, who focused on market concentration and economic power, Choper focused on the power of private actors to fundamentally impact an individual's rights.[44]

Although the courts have not adopted Berle's or Choper's expansive power theories of state action, the open-ended public-function exception pronounced in *Marsh* had the potential for continued expansion. Justice William Douglas articulated what is perhaps the loosest expression of the doctrine in *Evans v. Newton*,[45] finding state action implicated in powers or functions that are merely "governmental in nature."[46] But the public-function exception receded from the

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36 *See id.* at 950–51.

37 Berle's reasoning recalls Justice Harlan's treatment of theaters and other places of public amusement in his dissenting opinion in the *Civil Rights Cases*. *See The Civil Rights Cases*, 109 U.S. at 41–42.

38 *See, e.g.*, Louis K. Liggett Co. v. Lee, 288 U.S. 517, 545 (1933) (Brandeis, J., dissenting in part) ("Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable.").

39 Berle, *supra* note 35, at 952.

40 *See id.* at 952–55.

41 *Id.* at 952.

42 Jessie H. Choper, Commentary, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 777.

43 *See id.*

44 *See id.*

45 382 U.S. 296 (1966).

46 *Id.* at 296.

high water mark of *Evans* in the subsequent decade.[47] In *Jackson v. Metropolitan Edison Co.*,[48] then-Justice William Rehnquist reaffirmed the *Civil Rights Cases*' formalist construction of the state-action doctrine as drawing a bright line between public and private action and significantly contracted the public-function exception to apply only when a private person exercises "powers traditionally exclusively reserved to the State."[49] This new standard is strikingly strict. Police, firefighters, park rangers, and school officials all provide public services, but none of them fulfill a traditionally *exclusively* government function. Indeed, throughout the history of the United States, most public functions have been fulfilled through a combination of government and private action.[50]

Since *Jackson*, the Court has maintained the formalist distinction between public and private action.[51] For example, in *United States v. Morrison*,[52] Chief Justice Rehnquist recognized "the enduring vitality of the *Civil Rights Cases*"[53] and determined that the statute at issue[54] was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias,"[55] despite evidence that the statute was meant to address and would help to remedy

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47 For example, Justice Hugo Black explained the *Marsh* Court's holding in *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.* on different terms than mere public function, emphasizing that Chickasaw had *all* the attributes of a town:

> I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had *all* the attributes of a town and was *exactly like* any other town in Alabama.

391 U.S. 308, 331 (1968) (Black, J., dissenting) (emphasis added), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

48 419 U.S. 345 (1974). In *Jackson*, a customer sued Metropolitan Edison Co., a privately owned and operated utility corporation, seeking damages under the Civil Rights Act for terminating her electric service before she was afforded notice, a hearing, and an opportunity to pay any amounts found due. *See id.* at 346–47. The district court dismissed the complaint for lack of state action; both the Third Circuit and the Supreme Court affirmed. Jackson v. Metro. Edison Co., 348 F. Supp. 954 (M.D. Pa. 1972), *aff'd*, 483 F.2d 754 (3d Cir. 1973), *aff'd*, 419 U.S. 345 (1974).

49 *Jackson*, 419 U.S. at 352.

50 *See* Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental.").

51 *See Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1251 (2010).

52 529 U.S. 598 (2000).

53 *Id.* at 624.

54 In question was the civil-remedy provision of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified at 42 U.S.C. § 13981 (2000)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000). The Court struck down the provision, holding that neither the Commerce Clause nor the Fourteenth Amendment granted Congress the authority to enact the provision. *Morrison*, 529 U.S. at 627.

55 *Morrison*, 529 U.S. at 626.

disparate treatment on the basis of gender by state officials.[56] Thus, the modern state-action doctrine at once forces the courts to draw a bright line between public and private action and very narrowly defines what constitutes public action. This narrow definition of public action has resulted in an expansion of what the Court deems purely private activity—activity that is not subject to constitutional regulation.

Taken together, the various threads of the state-action doctrine form a patchwork of rules but no consistent standard. *Jackson* and *Morrison* both concerned situations where the government had not actually acted. (The purported "state actors" in those cases were, respectively, a privately owned utilities company[57] and an individual who committed criminal acts motivated by gender bias.[58]) Those cases required a traditionally exclusively governmental function but supplied no standard for determining which functions are traditionally exclusively governmental.

Where the state *has* allegedly acted, it is also unclear which standard applies. Earlier cases required that the state become "involved" in a private activity "to some significant extent" for state action to be found.[59] Post-*Morrison*, the Court has looked at the pervasiveness of public "entwinement" with the private actor.[60] In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, the state school board and public schools were so pervasively entwined in the management of a private, not-for-profit organization that regulated interscholastic sport competition among public and private schools that the organization essentially ceased to be a private actor.[61] In that case, the Court found state action.[62] But where the government's entwinement concerns money, resources, or other forms of aid—rather than managerial control—it is much less clear how that standard is to apply.[63]

This lack of clarity is a function of the doctrine's convoluted development. Because the state-action doctrine expanded in the mid-twentieth century before contracting under the Rehnquist Court,

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56 *Id.* at 619–20.

57 *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

58 *See Morrison*, 529 U.S. at 626.

59 Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

60 Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298–302 (2001).

61 *See id.* *Brentwood*'s entwinement test recalls the third prong of the *Lemon* test, which requires that government actions not excessively entangle the government with religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

62 *Brentwood*, 531 U.S. at 291.

63 *Compare id.* at 303 (noting that encouragement is "like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead" but going on to say that "no one criterion must necessarily be applied"), *with* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that the Government can "merely chose[ ] to fund one activity to the exclusion of [an] other").

the doctrine encompasses a rich body of jurisprudence but no clear standards.

B. The Expansion of Government Speech

Whereas the state-action doctrine is fundamental Fourteenth Amendment jurisprudence and has long been applied to other constitutional protections, the government-speech doctrine first gained prominence in the 1990s.[64] The core principle of the doctrine is that when the government speaks, its speech is not constrained by the Free Speech Clause's requirement of viewpoint neutrality but by the Establishment Clause.[65] So long as it does not run afoul of the Establishment Clause, the government can speak as it pleases. And it can also choose not to speak. This is a fundamental function of government: "[t]o govern, government has to say something,"[66] but it cannot say everything. Thus, the government may encourage recycling, call for war, or champion universal healthcare—but it need not simultaneously advocate contrary positions.

In the realm of free speech, the government-speech doctrine is closely related to the state-action doctrine: the state-action doctrine is concerned with the identity of the actor; the government-speech doctrine is concerned with the identity of the speaker. But whereas individuals claiming a violation of their constitutional rights must show state action, government speech is a defense the government raises when it is accused of a Free Speech violation.

The 1991 *Rust v. Sullivan*[67] decision is now widely regarded as the first government-speech case.[68] In *Rust*, doctors challenged a regulation barring recipients of funds under Title X of the Public Health Service Act[69] from discussing abortion with their patients.[70] The Supreme Court upheld the regulation, reasoning that the government had "merely chosen to fund one activity to the exclusion of the other."[71] Although the term *government speech* is not explicitly mentioned in the opinion, *Rust*'s logic tracks that of later

64 *See, e.g.*, *Rust*, 500 U.S. 173.

65 *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 460–61 (2009).

66 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

67 500 U.S. 173 (1991).

68 *But see infra* text accompanying notes 107–23 (tracing the government-speech doctrine to earlier school-speech cases).

69 42 U.S.C. §§ 300 to 300a-6 (2006).

70 *Rust*, 500 U.S. at 177–78.

71 *Id.* at 193.

government-speech cases,[72] and the Court has since explained that the doctrine underlies its holding in *Rust*.[73]

If one accepts that the government activity in *Rust* is in fact speech, there is little doubt that the government is doing the speaking.[74] But difficulties arise when private individuals and the government speak in concert or when the government aids private speech or vice versa.[75] As one circuit court has recognized, "[n]o clear standard has yet been enunciated . . . for determining when the government"—as opposed to a private person—"is 'speaking.'"[76]

The Supreme Court's decision in *Pleasant Grove City, Utah v. Summum*[77] is the most recent articulation of the government-speech doctrine. In *Pleasant Grove*, practitioners of a small religious sect known as Summum sought an injunction to compel Pleasant Grove City to install a privately funded monument in a public park.[78] The park in question is a 2.5-acre municipal park located in the Historic District of Pleasant Grove City, Utah.[79] The park contains fifteen permanent displays, including "a historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971."[80] At least eleven of the displays were privately donated.[81] On several separate occasions, the president of Summum requested permission to erect a "'stone monument,' which would contain 'the Seven Aphorisms of

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72 *Cf. id.* ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

73 *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

74 Although the doctors in *Rust* were the speakers, they were speaking on behalf of the government. The Court held that because they received funds from the government, their speech could be limited during their employ. *See Rust*, 500 U.S. at 198–99; *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

75 Caroline Corbin has suggested that such cases should be deemed "mixed speech," subject to intermediate scrutiny. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008). One circuit has recognized the idea of mixed speech, but it has not found widespread recognition. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005).

76 Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002).

77 555 U.S. 460 (2009).

78 *See id.* at 464.

79 *Id.*

80 *Id.* at 465.

81 *Id.*

SUMMUM' and be similar in size and nature to the Ten Commandments monument."[82] The city denied the requests, stating that the park is limited to monuments that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community."[83] Summum sued the city, claiming that it had violated the First Amendment's Free Speech Clause by allowing the Ten Commandments monument but rejecting Summum's Seven Aphorisms monument.[84] The district court dismissed Summum's motion for a preliminary injunction, but the Tenth Circuit reversed, holding that the resolution was a content-based restriction on free speech and was not narrowly tailored to meet the city's stated interests.[85]

The Supreme Court reversed, holding that the city's decision to accept certain privately donated monuments while rejecting Summum's was an exercise of government speech.[86] Writing for a unanimous Court, Justice Samuel Alito reaffirmed that the government "is entitled to say what it wishes, and to select the views that it wants to express."[87] But the Court also recognized that the government does not have absolute freedom to regulate private speech on government property.[88] Thus, the question before the Court was whether the city was engaging in its own expressive conduct or providing a public forum for private speech.

Although Justice Alito recognized that there are some situations when it is difficult to tell whether the government is speaking for itself or providing a forum for private speech, he had no trouble categorizing the situation at hand as government speech.[89] First, the Court held that the acceptance of a privately funded or donated monument constitutes an expressive act because such monuments are meant to

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82 *Id.* (footnote omitted). For the full text of the Seven Aphorisms, see *Seven Summum Principles*, SUMMUM, http://www.summum.us/philosophy/principles.shtml (last visited Nov. 6, 2013).

83 *Pleasant Grove*, 555 U.S. at 465. The city formalized the policy in a resolution after Summum made two such requests; the resolution also included other criteria, such as safety and esthetics. *Id.*

84 *Id.* at 466.

85 Summum v. Pleasant Grove City, 483 F.3d 1044, 1054 (10th Cir. 2007), *rev'd*, 555 U.S. 460 (2009).

86 *Pleasant Grove*, 555 U.S. at 481.

87 *Id.* at 467–68 (citations omitted) (internal quotation marks omitted).

88 *Id.* at 469–70 ("Reasonable time, place, and manner restrictions are allowed [in traditional public fora], but any restriction based on the content of the speech must satisfy strict scrutiny, . . . and restrictions based on viewpoint are prohibited." (citations omitted)).

89 *Id.* at 470 ("There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation."). But the fact that the Court overturned a split-panel decision that was denied an en banc rehearing by an equal vote suggests otherwise. *See Summum*, 499 F.3d at 1171.

convey[90] and have the effect of conveying[91] a government message. Next, the Court addressed Summum's argument that the monument only constitutes government speech if the city takes "control over the message."[92] According to Summum, this control could be achieved during the planning stage by helping to craft the message or after the display has been created through formal resolution.[93] The Court dismissed such requirements because these monuments do not evoke one discrete message that can be adopted or not; rather, they are inherently open to various subjective and mutable interpretations.[94] Lastly, although the Court recognized that the park is a public forum, it drew a clear distinction between speech activities such as proselytizing, distributing leaflets, or public demonstrations—all of which are ephemeral in nature—and erecting permanent monuments.[95] Thus, the Court determined that the park is not a public forum in this context.[96]

The concurring opinions of Justices John Paul Stevens,[97] Stephen Breyer,[98] and David Souter[99] attempted to distance the Court as much as possible from the government-speech doctrine. Justice Stevens described the government-speech doctrine as "recently minted" and its precedent as being "of doubtful merit."[100] But his alternative, construing the acceptance of the monument as an implicit endorsement of the donor's message, seems merely to restate the government-speech doctrine: the government can choose not to endorse the donor's message precisely because the government can discriminate between various messages when it speaks. Justice Breyer shied from rote categorization of the city's denial of Summum's request as government speech and would instead have "ask[ed] whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[101] Applying this standard, Justice Breyer concluded that the city's action was not a disproportionate restriction on Summum's freedom of ex-

90 *Pleasant Grove*, 555 U.S. at 470 ("When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.").

91 *See id.* at 472 ("Public parks are often closely identified in the public mind with the government unit that owns the land.").

92 *See* Brief for Respondent at 33–34, Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009) (No. 07-665).

93 *Id.*

94 *Pleasant Grove*, 555 U.S. at 473–78.

95 *See id.* at 479.

96 *See id.* at 478–80.

97 *Id.* at 481 (Stevens, J., concurring).

98 *Id.* at 484 (Breyer, J., concurring).

99 *Id.* at 487 (Souter, J., concurring in the judgment).

100 *Id.* at 481 (Stevens, J., concurring).

101 *Id.* at 484 (Breyer, J., concurring).

pression and therefore did not violate the First Amendment.[102] But this reasoning seems to concede that Summum has a Free Speech interest while inexplicably not applying heightened scrutiny. Justice Souter, concurring only in the judgment, argued that the Court should have "ask[ed] whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige."[103]

But *Pleasant Grove* did not adopt Justice Souter's rational-observer test. Instead, the government-speech doctrine has retained the formalist private/public distinction and remains without a clearly articulated standard. Despite this lack of a clear standard, the doctrine clearly imputes more private and quasi-private conduct to the government than the state-action doctrine does. Thus, the government-speech doctrine enables the government to subsume certain forms of private speech in order to immunize itself from claims of Free Speech violations.

II
The Interaction Between State Action and Government Speech

A. Rhetorical Tension, Functional Cohesion

The interaction of the state-action and government-speech doctrines has resulted in a strange incongruity: the Court declines to extend First Amendment protection to speech that is censored by a third party by claiming that there has been no state action, yet it invokes a seemingly opposite rationale—claiming that certain private speech is in fact government speech—to deny, once again, First Amendment protection. But despite these seeming rhetorical inconsistencies, the state-action and government-speech doctrines converge in their result: the contraction of state action and the expansion of government speech narrow the spectrum of private protected speech.

But the two doctrines do not necessarily operate on the same playing field because they address different problems. The state-action doctrine requires a certain amount of state action to trigger constitutional protection because purely private conduct is not subject to the constraints of the First Amendment. Thus, state-action analysis concerns the extent of the state's involvement, support, influence, aid,

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102 *See id.*

103 *Id.* at 487 (Souter, J., concurring in the judgment); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 578–79 (2005) (Souter, J., dissenting) ("Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it."). The merits of Justice Souter's rational-observer standard are discussed *infra* Part III.A.

and grant of power, *inter alia*, in a constitutional infringement. In the context of the First Amendment, this could take the form of the government compelling a third party to censor protected speech. The government-speech doctrine, on the other hand, is concerned with the identity of the speaker. If the government is deemed to be the speaker, there is no First Amendment protection because the government may speak as it pleases, constrained not by viewpoint neutrality—as when the government censors speech through state action—but by the Establishment Clause.[104] Thus, a private monument may be considered government speech if it is erected in a city park.

The Court's language places the doctrines on two different spectrums: action and speech. Consider a continuum ranging from purely private action to no private action (i.e., purely government action). The decline of the state-action doctrine has effectively extended the range of private action—which is not constrained by the First Amendment—requiring stronger government action in order to trigger constitutional protection. On an analogous continuum ranging from purely private speech to no private speech (i.e., purely government speech), the rise of the government-speech doctrine has expanded what constitutes government speech, thereby limiting what speech is private speech and thus protected by the First Amendment.

Although the two doctrines operate across different spectrums, these spectrums relate to each other in their effect upon private speech. Together, these two doctrines narrow the scope of private, protected speech: the contraction of the state-action doctrine has limited protected speech on one end by narrowing what is considered government action, while the government-speech doctrine has limited protected speech on the other end by expanding what is considered government speech.

The Court seems to want to have it both ways; it is at once a state-action minimalist and a government-speech maximalist. Implicit in this reasoning—indeed the only way to maintain these seemingly contradictory positions—is the presupposition that government speech is not state action. Underlying that presupposition is the private/public dichotomy. Thus, the Court relies on formalist, bright-line distinctions between state action and government speech and between public and private conduct to achieve a cohesive functionalist—or perhaps consequence-driven—result, viz., limiting the scope of the First Amendment's protection of private speech.

This result is not necessarily undesirable. But because neither the state-action doctrine nor the government-speech doctrine has

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104 *See Pleasant Grove*, 555 U.S. at 468 ("This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.").

clearly articulated standards, the reasoning that the Court has employed to reach that result has produced inconsistent and unpredictable rulings.

B. Is Government Speech State Action?

Although the Court's decisions implicitly distinguish between government speech and state action, it is unclear whether this distinction is necessary—or even internally consistent. Reconciliation of the state-action and government-speech doctrines could resolve the inconsistency and unpredictability produced by the lack of clear standards.

Any attempt to reconcile the two doctrines first requires a definition of both state action and government speech. Defining state action noncircularly presents a challenge: What is state action but the acts of the state? State action is not defined by the Court; it is a basic idea—a fundamental concept—underlying the Court's jurisprudence. Under the Fourteenth Amendment, the cornerstone of the Court's state-action doctrine, lawmaking and law enforcement are clearly state action.[105] But the Court's state-action decisions do not so much define state action as distinguish it from private action.[106] State action is thus defined negatively; it is the acts of the state that are not the acts of private individuals. Yet although the crux of the doctrine is the public/private distinction, the state-action decisions do give examples of what sorts of activities constitute state action. Together, these cases provide a broad picture of state action: the government legislates, regulates, and taxes; it may enforce the law through police or judicial action; it can also incentivize or subsidize certain activities. Thus, state action is how the government governs. It is the means by which the government accomplishes its normative goals.

Is government speech conceptually or functionally separable from this definition? The First Amendment does not grant the government freedom of speech; rather, it restricts government regulation of private speech.[107] Thus, the government-speech doctrine is not grounded in the First Amendment, and it need not be. Unlike private

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105 U.S. CONST. amend. XIV, § 1 (beginning its list of prohibitions with the phrase: "No State shall make or enforce any law . . . ."); *see also* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (considering legislation to be state action).

106 *See The Civil Rights Cases*, 109 U.S. at 17 ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals . . . .").

107 *Cf. Pleasant Grove*, 555 U.S. at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *Johanns*, 544 U.S. at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression." (citation omitted)).

speech, government speech is not valuable qua speech. Rather, the Court has based its justification for the government-speech doctrine on the fact that the government's ability to speak—to favor one viewpoint at the expense of another—is a fundamental necessity of governing.[108] The government uses speech to promote its policies.[109]

Here, state action and government speech converge. Both are fundamental to governing; both advance the government's goals. But they are not equivalent or fully interchangeable: not every state action is government speech. Rather, government speech is one of the means that the government can employ to achieve a desired policy. Government speech is a form of state action.[110] Take, for example, the problem of obesity. If the government's goal is to fight obesity, it has various means at its disposal: It can regulate the size of soft drinks, require restaurants to display nutritional information, tax junk foods, or subsidize healthy foods. It can also broadcast television commercials or sponsor websites that encourage healthy diet and lifestyle choices. The latter options are not valuable to the government in a First Amendment sense, that is, because they are speech. Rather, as a form of state action, government speech is valuable because it advances the government's policy goals.

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108 *See, e.g.*, *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("To govern, government has to say something . . . ."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) ("It is the very business of government to favor and disfavor points of view . . . .").

109 Helen Norton points to public-awareness campaigns as one example of government speech facilitating First Amendment interests, such as sharing knowledge and discovering truth. *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 589–90 (2008). But it is not the speech nature of those campaigns that makes them valuable. It is the ability of that speech to influence the public. Government speech's ability to "facilitate" First Amendment interests is only valuable if it results in the achievement of desired policy goals. Facilitation of First Amendment interests may be a happy side effect of government speech, but it is not a necessary result. Government speech often undermines First Amendment values: the inherent and potentially overwhelming power of government speech—rooted in the power of the state—can distort the marketplace of ideas, undermine democratic legitimacy, repress individual autonomy, and suppress dissent. *Cf., e.g.*, Ronald Dworkin, *Foreword* to EXTREME SPEECH AND DEMOCRACY, at v, v–ix (Ivan Hare & James Weinstein eds., 2009) (democratic legitimacy); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26–27 (1965) (self-government); JOHN STUART MILL, ON LIBERTY 89–90 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (marketplace of ideas); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA, at xi (1999) (dissent); C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997) (autonomy and self-disclosure). Indeed, government speech is at best irrelevant, if not antagonistic, to First Amendment values such as autonomy, self-disclosure, and dissent. But government speech does not lose its value when it frustrates First Amendment values. Whether facilitating or undermining those values, government speech remains independently valuable as a means by which the government achieves its normative goals.

110 *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1285 (2011) ("[G]overnments must be permitted to speak freely because government speech is often a form of government action.").

III
Toward a Consistent State-Action Standard

If government speech is a form of state action, why do the courts apply different standards when determining what action constitutes state action and what speech constitutes government speech? One reason could be that the two doctrines address different sets of problems. The state-action doctrine is a response to constitutional violations committed by private actors. It protects private victims from the acts of private actors by imposing limitations normally applied only to the government upon those actors. The government-speech doctrine, on the other hand, is not applied to protect private citizens. Rather, it protects the government from allegations of free-speech violations by construing arguably private expressive acts as government speech. Thus, the state-action doctrine applies the constitutional limitations of the state to private actors while the government-speech doctrine releases the state from the restraints of the First Amendment. Although these two doctrines converge in their effect—both narrow the spectrum of private protected speech—perhaps the issues that the two doctrines address are too distinct for one standard to apply.

Despite the differences between the two doctrines and the problems that they seek to address, the following subparts apply several different standards to both doctrines in an attempt to determine whether a consistent standard could be effective.

A. Reasonable Observer

One such standard is found in Justice Souter's concurrence in *Pleasant Grove*.[111] Concurring only in the judgment, Justice Souter argued that instead of creating a per se rule that monuments on public land are government speech, the Court should ask if a "reasonable and fully informed observer" would see the challenged speech as being government speech rather than private speech that the government has voluntarily accommodated.[112] Unlike the majority

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111 Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 487 (2009) (Souter, J., concurring in the judgment).

112 *Id.*; *see also Johanns*, 544 U.S. 550, 578–79 (2005) (Souter, J., dissenting) ("Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it."). In *Johanns*, the Court considered an advertising campaign funded entirely by an excise tax on the beef industry to be government speech. The advertising campaign in question promoted the "consumption of beef and beef products, using funds raised by an assessment on cattle sales and importation." *Id.* at 553 (internal quotation marks omitted). Respondents, cattle ranchers and other members of the beef industry, claimed that the campaign violated their First Amendment rights because it amounted to a compelled subsidy of speech (while the ranchers did not protest the promotion of beef consumption, they objected that the advertisements did not differentiate between grades of beef). *See id.* at 556. The Court held that the assessment was constitutional

opinion—and the rest of the government-speech decisions[113]—Justice Souter's concurrence proposes a clear and simple standard for determining which speech constitutes government speech. This standard would reduce the government-speech inquiry to one question: Would a reasonable observer attribute the speech to the government? Not only would such a standard be easier to administer,[114] the test also moves away from unwieldy, formalist distinctions between public and private speech. Furthermore, an observer test reinforces democratic values: only if the public is aware that the government is speaking can it hold the government accountable for its speech.[115]

Justice Souter's reasonable-observer test is not new; it was first used to determine what speech could be considered school-sponsored speech. Although the Court has traced the roots of the government-speech doctrine to *Rust*, it previously applied similar reasoning in the context of student speech in public schools.[116] In *Hazelwood School District v. Kuhlmeier*,[117] the Court upheld a public school's decision to censor student articles published in a student-edited school newspaper because public schools may exercise editorial control over school-sponsored speech.[118] Just as the government may speak as it pleases under the government-speech doctrine, public schools have a similar prerogative to oversee school curricula and protect students from inappropriate material.[119] Foreshadowing Justice Souter's reasonable-observer test by two decades, the *Hazelwood* Court defined school-sponsored speech as any "expressive activities that students, parents, and members of the public might reasonably perceive

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as government speech. *See id.* at 566–67. Justice Souter dissented because there was little to no indication to the public that the advertisements were government run. *See id.* at 578–79 (Souter, J., dissenting).

113 *See* Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002) ("No clear standard has yet been enunciated . . . for determining when the government is 'speaking' . . . .").

114 Courts have long applied similar reasonable-person standards in other areas of law, such as torts; furthermore, Justice Souter's reasonable-observer test "is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases." *Pleasant Grove*, 555 U.S. at 487 (Souter, J., concurring in the judgment).

115 *See Johanns*, 544 U.S. at 575, 578–79 (Souter, J., dissenting) ("Democracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.").

116 Although the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment," Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), the Court has consistently reaffirmed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*

117 484 U.S. 260 (1988).

118 *Id.* at 273.

119 *See id.* at 271–72.

to bear the imprimatur of the school."[120] Assuming that public school speech is a form of government speech, the reasonable-observer test may be the first standard the Court articulated for determining when the government is speaking.

Although the Supreme Court's jurisprudence has confined the reasonable-observer test to Justice Souter's dissents, a recent area of government-speech contention—specialty license plates—has proven an apt testing ground for this approach. The specialty-license-plate cases generally involve a state producing license plates with a particular viewpoint without representing the alternative view.[121] The question is whether the specialty license plates represent government speech or private speech. If they represent private speech, then producing, for example, a "Choose Life" plate without providing a prochoice alternative would constitute impermissible viewpoint discrimination. These cases have split the circuits, producing three separate approaches to the issue.[122] But two circuits have employed the reasonable-observer test to determine that specialty license plates are best construed as private speech.[123] Thus, those courts required viewpoint neutrality.[124]

But a rational-observer test has several drawbacks. It invites intensively fact-based decisions about what a "reasonable observer" would believe in a given situation. Such determinations add little predictability to the law, as each new case could be distinguished on its particular facts. Furthermore, the test loses its clarity in the state-action

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120 *Id.* at 271. The Court explicitly placed school-sponsored publications and theatrical productions in the category of school-sponsored speech but failed to provide any criteria for determining what other activities might be "reasonably perceive[d] to bear the imprimatur of the school." *Id.* It is unclear to what extent other activities (e.g., after-school programs, athletic practice, sports games, musical performances, speech and debate meets, etc.) might be classified as school-sponsored speech.

121 For a survey of the specialty-license-plate cases, see Corbin, *supra* note 75, at 619–23.

122 The Seventh, Eighth, and Ninth Circuits have held that specialty license plates are private speech. *See* Roach v. Stouffer, 560 F.3d 860, 867–68 (8th Cir. 2009); Choose Life Ill., Inc. v. White, 547 F.3d 853, 865 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 960, 973 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008). The Sixth Circuit has held that specialty plates constitute government speech and thus allowed a "Choose Life" plate. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 371–72 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006). The Fourth Circuit has held that specialty license plates are a hybrid of government and private speech but determined that, because the private element substantially predominated, the plates must be content neutral. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005).

123 *See Roach*, 560 F.3d at 867 ("[A] reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."); *Choose Life Ill.*, 457 F.3d at 863 ("Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?").

124 *See Roach*, 560 F.3d at 870; *Choose Life Ill.*, 457 F.3d at 855–56.

context. Applied to the state-action doctrine, the rational-observer standard would only impose constitutional limitations on private actors when a rational observer would consider a private act to be the act of the state. This would be similar to an examination of whether the private actor has apparent authority.[125] While this may be effective for determining when a private actor has assumed a government function,[126] it would be woefully inadequate for dealing with cases in which the government has given considerable—though not patent—aid or support to a private actor. Indeed, in such cases it should not matter how much the private actor looks like a state actor, but to what extent the state has empowered the private actor's acts.

B. Government Intent

Hazelwood was not the first case to touch upon government-speech issues in the context of public schools. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[127] the Court enunciated an intent-based standard that is foreign to the current government-speech regime.[128] In *Island Trees*, the school board removed several books that were deemed "irrelevant, vulgar, immoral, and in bad taste" from the school library and curriculum.[129] Justice William Brennan, writing the Court's plurality opinion, focused upon the students' rights to access information, holding that the school board could exercise its discretion to determine the content of the school library based only on a book's "educational suitability," not on

125 The Court has employed an apparent-authority approach in cases where private individuals act under color of law. *See, e.g.*, Williams v. United States, 341 U.S. 97 (1951) (affirming the conviction of a private detective for violating federal rights under color of law).

126 For example, Justice Rehnquist's requirement that an exercise of power be traditionally exclusively reserved to the state to be considered state action would exclude such fundamental public functions as firefighting and even police, whereas a rational-observer standard would likely include such public functions.

127 457 U.S. 853 (1982) (plurality opinion).

128 *See id.* at 871.

129 *See id.* at 859.

the board's desire to suppress disfavored content or ideas.[130] For the Court, this was a question of intent.[131]

Whereas the plurality opinion focused upon the intent of the school board, Chief Justice Warren Burger's dissenting opinion more clearly presages the modern government-speech doctrine. Chief Justice Burger rejected the plurality's reliance upon the students' right to access information, instead asserting the power of the school to craft its own curriculum.[132] He saw this power as essential to the school's role as an inculcator of fundamental values.[133] Rather than construing the school board's action as a restriction of speech, he saw it as a proper exercise of the board's authority to determine the content of its curriculum.[134] This language anticipates Justice Souter's explanation of government speech in *Johanns*: just as the government must express one view at the exclusion of another in order to govern, so must the school make content-based decisions in order to teach.[135] Thus, Chief Justice Burger recognized that any determination of the educational suitability of a book is not easily divorced from an examination—and implicit approval or disapproval—of the book's message.[136] Under Chief Justice Burger's analysis, it is not the First Amendment that restrains the school board's curricular choices but the democratic process. Rather than assign the policing of the curriculum to the federal courts, he would leave that role to the people, who can vote to replace school-board members with whom they disa-

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130 *See id.* at 870–71, 873. Clearly, the school cannot be expected to include *all* books in its curriculum or its library. Thus, the school must choose among books to be included and books not to be included (i.e., to be excluded). Such decisions necessarily entail an adjudication of a book's content and suitability for the educational context. *Id.* Thus, the Court does not hold that the school board must make content-neutral decisions regarding which books to include—such a requirement would undermine the school's ability to craft its curriculum and make educational decisions. *Id.* Rather, the Court forbids the school board from intentionally suppressing disfavored viewpoints by making certain books unavailable. Thus, the Court recognizes that this is not a standard restriction on pure speech (which may be subjected only to content-neutral "time, place, or manner" restrictions, *see* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)), but it does not go so far as to recognize the school board's choices as government speech.

131 *See Island Trees*, 457 U.S. at 871 ("If [the school board] *intended* by their removal decision to deny respondents access to ideas with which [the board] disagreed, and if this intent was the decisive factor in [the board's] decision, then [the board has] exercised [its] discretion in violation of the Constitution." (footnote omitted)).

132 *See id.* at 889 (Burger, C.J., dissenting).

133 *See id.*

134 *See id.*

135 *Compare id.*, *with* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

136 *See Island Trees*, 457 U.S. at 889 (Burger, C.J., dissenting) ("Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are 'fundamental values' to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum.").

gree.[137] But Chief Justice's Burger's view that the school board's decision to remove the books was a form of government action or speech that is not subject to the constraints of the First Amendment did not prevail. The plurality instead held that such an act is a violation of the First Amendment if by it the school board *intended* to suppress a disfavored view point.[138]

Although analysis of government intent did not make its way out of the school context and into the modern government-speech doctrine, examining the government's intent may be an effective method of adjudicating some forms of government speech. For example, an intent-based analysis could have been applied in *Pleasant Grove*: if the city's policy were intended to suppress a disfavored viewpoint rather than to limit the park to monuments that are relevant to the city's history or donated by groups with a longstanding connection with the city, it would not be permissible. But this approach is less appropriate in the state-action context. Indeed, some state-action cases involve *de minimis* government contacts, meaning that the government's intent is irrelevant. For example, an examination of the government's intent in a case like *Marsh*—a case devoid of any actual state action—would be futile. Furthermore, proving the government's intent when it is comprised of various actors working in multifarious capacities can prove a daunting hurdle.

C. Government Function

The government-function test has long been a part of the state-action doctrine. As discussed in Part I.A, the standard's current articulation—applying only to those "powers traditionally exclusively reserved to the State"[139]—has significantly limited its scope. But a government-function test along the lines of that articulated in *Evans* may prove an effective standard for both state action and government speech. In the context of state action, the doctrine was once an effective tool for ensuring that public rights could not be infringed by private actors who had assumed a government function. In the realm of government speech, a government-function approach would allow the government to control private speech that is governmental in nature—for example, the erection of permanent monuments on government land. At the same time, speech with no apparent governmental

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137 *See id.* This rationale also anticipates Justice Souter's justification for his rational-observer test in *Johanns* and *Pleasant Grove*. *See, e.g.*, *Johanns*, 544 U.S. at 578–79 (Souter, J., dissenting).

138 *Island Trees*, 457 U.S. at 871.

139 Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

nexus—such as an advertising campaign that does not publicize its governmental origins—would not constitute government speech.[140]

But the government-function standard is not comprehensive enough to account for all of the various types of state-action cases. When the Court applies the government-function test, it imputes government action to private individuals when no actual government action has taken place. Although the government-function test is perfectly suited for those situations, they are not the only circumstances to which the state-action doctrine has been applied. For example, state-aid cases such as *Burton v. Wilmington Parking Authority*[141] would not satisfy the government-function test because rather than a private individual entangling itself in matters governmental in nature, the government has involved itself in the private sphere in these cases.[142]

Furthermore, the government-function test has proved an unworkable standard in other contexts. In *National League of Cities v. Usery*,[143] the Court held that the Tenth Amendment barred Congress from regulating the wages, hours, and benefits of State employees because the Commerce Clause does not empower Congress to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[144] To do so would impermissibly regulate "the States as States."[145] Thus, Justice Rehnquist imported the traditional government-function standard—similar to that which he had articulated two years prior in *Jackson*—into the Tenth Amendment context.[146]

But because the Court did not articulate a clear test for determining which functions are traditional governmental functions, the government-function standard proved unworkable, producing a

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140 As applied here, the test clearly mirrors Justice Souter's concurrence in *Pleasant Grove* and dissent in *Johanns*. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 481 (2009) (Souter, J., concurring); *Johanns*, 544 U.S. at 570. Indeed, an attribution-based standard such as Justice Souter's is closely related to an inquiry into the speech's function: speech that serves a government function will almost certainly be readily attributable by a reasonable observer to the government.

141 365 U.S. 715 (1961).

142 In *Burton*, the Court applied the Fourteenth Amendment to a private restaurant that leased property owned by the Wilmington Parking Authority, an agency of the State of Delaware. *See id.* at 716–17. Whereas operating a municipal parking garage is a public function, leasing property to private restaurants is probably not; furthermore, there were no apparent signs that the government was involved with the private enterprise.

143 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

144 *Id.* at 852.

145 *Id.* at 845.

146 *See id.* at 842, 852 (finding that the Tenth Amendment prohibited Congress from enacting legislation that displaced the "[s]tates' freedom to structure integral operations in areas of traditional governmental functions").

patchwork of protected and unprotected functions in the lower courts. In the decade following *National League of Cities*, courts held that licensing automobile drivers,[147] operating a municipal airport,[148] performing solid waste disposal,[149] regulating ambulance services,[150] and operating a highway authority[151] are traditional governmental functions protected under *National League of Cities*. At the same time, courts held that operation of a telephone system,[152] regulation of traffic on public roads,[153] leasing and sale of natural gas,[154] issuance of industrial development bonds,[155] regulation of intrastate natural-gas sales,[156] regulation of air transportation,[157] operation of a mental-health facility,[158] and provision of in-house domestic services for the aged and handicapped[159] are not entitled to immunity and thus are subject to congressional regulation under the Commerce Clause.

With the lack of guidance creating inconsistent and unpredictable rulings in the lower courts, the Court took up the issue again in *Garcia v. San Antonio Metropolitan Transit Authority*.[160] Recognizing the impossibility of determining which functions are properly "traditional governmental functions," the Court overruled *National League of Cities*:

> "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."

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147 *See* United States v. Best, 573 F.2d 1095, 1102–03 (9th Cir. 1978).

148 *See* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037–38 (6th Cir. 1979).

149 *See* Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1196 (6th Cir. 1981), *vacated*, 455 U.S. 931 (1982).

150 *See* Gold Cross Ambulance v. City of Kan. City, 538 F. Supp. 956, 967–69 (W.D. Mo. 1982).

151 *See* Molina-Estrada v. P.R. Highway Auth., 680 F.2d 841, 845–46 (1st Cir. 1982).

152 *See* P.R. Tel. Co. v. FCC, 553 F.2d 694, 700–01 (1st Cir. 1977).

153 *See* Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977).

154 *See* Pub. Serv. Co. of N.C. v. FERC, 587 F.2d 716, 721 (5th Cir. 1979).

155 *See* Woods v. Homes & Structures of Pittsburg, Kan., Inc., 489 F. Supp. 1270, 1296–97 (D. Kan. 1980).

156 *See* Oklahoma *ex. rel.* Derryberry v. FERC, 494 F. Supp. 636, 657 (W.D. Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981).

157 *See* Hughes Air Corp. v. Pub. Utils. Comm'n of Cal., 644 F.2d 1334, 1340–41 (9th Cir. 1981).

158 *See* Williams v. Eastside Mental Health Ctr., Inc., 669 F.2d 671, 680–81 (11th Cir. 1982).

159 *See* Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1472 (9th Cir. 1983).

160 469 U.S. 528 (1985).

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.[161]

Thus, although the government-function standard has not yet been rejected in the state-action context, its support is eroding. Indeed, the inconsistency and unpredictability with which the test was applied in the Tenth Amendment context counsels strongly against its application in other areas of the law.

Conclusion

The contraction of the state-action doctrine and the expansion of government speech have together narrowed the spectrum of private, protected speech. On one end of the spectrum, the state-action doctrine has imputed *less* private conduct to the government, resulting in less constitutional protection. On the other end of the spectrum, the government-speech doctrine has imputed *more* private speech to the government, resulting again in less constitutional protection. The paradox inherent in the application of these two doctrines makes a search for a consistent standard particularly difficult—despite the fact that the two doctrines are closely related because government speech is a form of state action.

Notwithstanding this close relationship, the two doctrines address very different types of problems: the state-action doctrine protects individuals from constitutional violations perpetrated by other private individuals, and the government-speech doctrine protects the government from claims of First Amendment violations. Furthermore, the two doctrines are premised upon the public/private distinction, yet they almost always involve cases where government action and private action are entwined or difficult to distinguish. Such cases resist formalist classifications. The root of this problem may lie at the very foundation of the state-action doctrine. By limiting the reach of the Fourteenth Amendment to state action—despite contrary congressional intent—the *Civil Rights Cases* set the stage for the current dilemma.

Now, the variety of circumstances in which courts may be called upon to distinguish between government and private action will likely render any formal test suboptimal in many circumstances. Indeed, the three attempts at a consistent standard examined above are all

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161 *Id.* at 546–47 (citation omitted) (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

deeply flawed and perhaps unfit for the task. But the alternative—a multifactor, context-sensitive approach—is exactly what gives courts the freedom to expand or contract the domain of the government relative to the domain of private actors in a results-oriented fashion. Accordingly, a uniform, formal test, even if predictably over- and underinclusive, may be preferable to the existing open-ended approach to drawing the line between private and public.

So long as the Court maintains the formalist distinction between the public and private spheres in the First Amendment arena without a clear test to distinguish them, courts will continue to be able to use the state-action and government-speech doctrines to narrow the spectrum of private, protected speech.