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ESSAY

GOVERNMENT SPEECH AND FIRST AMENDMENT CAPTURE

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Alarm regarding government speech is not new. In earlier decades, scholars worried that the government's speech might monopolize a marketplace and drown out opposing viewpoints. But today, using a move I term "First Amendment capture," the government need not be the loudest speaker because it can become the only speaker. First Amendment capture has been made possible by the Supreme Court's developing government speech doctrine, which holds that government speech is not subject to the Free Speech Clause. Consequently, once speech is declared governmental, the government may censor viewpoints it does not like. First Amendment capture—categorizing contested speech as government speech and then eliminating contrary viewpoints—is an increasingly frequent occurrence and risks giving the government too much power to suppress those who would criticize it or blow the whistle on it. While one solution is to resist the government speech label, this Essay also proposes recognizing "mixed speech" as a potential means of curtailing the expansiveness of the government speech doctrine.

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INTRODUCTION

Government speech is inevitable; the government cannot operate without speaking.[1] Because government speech can educate, inform, and make positive contributions to the marketplace of ideas, government speech is not necessarily problematic.[2] At the same time, government speech may threaten free speech values if it overwhelms critics or distorts debate.

What role government should play in our political discourse was the subject of much debate in the 1980s.[3] Scholars worried that the government might monopolize speech marketplaces and drown out other views.[4] The concern that government speech might distort a marketplace of ideas remains, but thanks to the newly developed government speech doctrine,[5] the government need not be the loudest speaker because it can become the only speaker. According to the Supreme Court's government speech doctrine, once speech is deemed government speech, it falls outside the purview of the Free Speech Clause.[6] That is, while suppressing a viewpoint in private speech triggers strict scrutiny and is presumptively

[1] See infra notes 21–25 and accompanying text.

[2] See generally Abner S. Greene, Government of the Good, 53 Vand. L. Rev. 1, 7–12 (2000) (listing four ways that government speech can be viewed as an affirmative good).

[3] See, e.g., John E. Nowak, Using the Press Clause to Limit Government Speech, 30 Ariz. L. Rev. 1, 9 (1988) ("In recent years, perhaps due to an awareness of the changing factors that increase the danger to our society from government speech, several scholars have examined the topic of whether the judiciary could use the free speech clause of first amendment to limit governmental speech."); Steven Shiffrin, Government Speech, 27 UCLA L. Rev. 565, 570 (1980) ("The government speech problem is to determine when and by what means government may promote controversial values and when it may not."); see also Richard Delgado, The Language of the Arms Race: Should the People Limit Government Speech*?*, 64 B.U. L. Rev. 961 (1984) (discussing prominent themes in the government speech debate); Robert D. Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 Cal. L. Rev. 1104 (1979) (arguing that the First Amendment prohibits government from advocating political ideas); Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863 (1979) (arguing that governments should not have free speech rights); Edward H. Ziegler, Jr., Government Speech and the Constitution: The Limits of Official Partisanship, 21 B.C. L. Rev. 578 (1980) (arguing that partisan government speech does not and should not receive First Amendment protection).

[4] See, e.g., Kamenshine, supra note 3, at 1104 ("[P]articipation by the government in the dissemination of political ideas poses a threat to open public debate . . . ."); Shiffrin, supra note 3, at 601 ("[O]ne of the problems to be faced in assessing government speech [is] the concern that government speech could result in unacceptable domination of the marketplace and the need for measures to confine the danger.").

[5] See infra Part I (describing the development of the government speech doctrine).

[6] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235 (2015) ("The Court has also said that 'government speech' escapes First Amendment strictures.").

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unconstitutional,[7] the same action under the government speech label is perfectly constitutional as the government may exert complete control over its own speech.[8] A free speech challenge will consequently fail if the contested speech is classified as government speech[9] rather than private speech.[10] Thus, the former fear that competing viewpoints will be buried under government speech has given way to the fear that competing viewpoints will be altogether eliminated by the government speech doctrine.[11]

I call this move—classifying contested speech as government speech and then clamping down on certain viewpoints—"First Amendment capture." "Agency capture" occurs when the regulated gain control of the agency charged with regulating them.[12] Likewise, the government, which is supposed to be regulated by the First Amendment, gains control of speech in First Amendment capture.

One obvious way to prevent First Amendment capture is to categorize contested speech as private speech. But that may come with its own costs, such as forcing government to support or sponsor denigrating speech or highly religious speech.[13] Another way to address exponential expansion of government speech is to recognize a new category of speech in addition to private speech and government speech. This new category—"mixed speech"—would cover speech that has both private and government

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[7] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

[8] See infra Part I.

[9] See infra notes 26–34 and accompanying text (discussing cases involving specialty license plates and monuments in public parks).

[10] Governments often provide spaces, such as the plaza in front of the town hall, for private citizens to speak. These are known as forums. Different doctrinal rules might apply depending on the type of forum, but viewpoint regulations are always subject to strict scrutiny. See generally Lyrissa Lidsky, Public Forum 2.0, 91 B.U. L. Rev. 1975, 1980–89 (2011) (describing public forum doctrine).

[11] See, e.g., Daniel J. Hemel & Lisa Larrimore Ouellette, Public Perceptions of Government Speech, 2017 Sup. Ct. Rev. 33, 34–35 (2017) ("[W]ithout some meaningful limit on the government's ability to claim expression as its own, the government speech doctrine could eviscerate the bar on viewpoint discrimination among private speakers.").

[12] Rachel E. Barkow, Insulating Agencies: Avoiding Agency Capture Through Institutional Design, 89 Tex. L. Rev. 15, 21 n.23 (2010) ("Capture, for the purposes of agency design, may be defined as responsiveness to the desires of the industry or groups being regulated.").

[13] See infra Part III.B.

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components, and it would trigger intermediate scrutiny.[14] This recognition would allow more speech to be subject to the free speech prohibition on viewpoint discrimination yet still allow a degree of government control.[15]

This Article has three parts. Part I describes the current government speech doctrine. Part II describes the problems raised by government speech. It begins with a brief review of early government speech literature. It then examines how these concerns manifest today. Part III considers Free Speech Clause solutions,[16] including the recognition of mixed speech as a potential limit on unregulated government speech.

I. GOVERNMENT SPEECH DOCTRINE

The government speech doctrine is a late twentieth century judicial creation.[17] Its primary rule is fairly straightforward: If the speech is the government's, then the Free Speech Clause does not apply.[18] One of the core tenets of the Free Speech Clause is that the government may not censor viewpoints it does not like.[19] However, "[t]he Government's own speech . . . is exempt from First Amendment scrutiny."[20]

The starting assumption for the government speech doctrine is that the government must be able to control its own speech in order to function.[21]

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[14] In contrast, regulations of private speech regularly trigger strict scrutiny while regulations of government speech trigger no scrutiny at all. See infra Part I.

[15] I have discussed this proposal in an earlier work. See Caroline Mala Corbin, Mixed Speech: When Speech Is Both Private and Governmental, 83 N.Y.U. L. Rev. 605, 675–77 (2008) [hereinafter Corbin, Mixed Speech]. Unlike this Article, the earlier one did not focus on the problems of First Amendment capture.

[16] This Essay focuses on how the Free Speech Clause itself might be mobilized, though obviously solutions might be found elsewhere as well.

[17] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."). The 1991 *Rust v. Sullivan*, 500 U.S. 173 (1991), decision is now heralded as one of the first government speech cases, though the decision itself did not use that term. Rather, a decade later *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), identified *Rust* as a government speech decision: "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." Id. at 541.

[18] Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) ("[O]ur cases recognize that '[t]he Free Speech Clause . . . does not regulate government speech.'").

[19] Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys."); see also supra note 7.

[20] *Johanns*, 544 U.S. at 553.

[21] *Matal*, 137 S. Ct. at 1757 ("[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing.").

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Government officials are chosen because of their political platforms, and "[w]hen a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others." [22] As the Supreme Court has observed, when the government promoted the war effort during World War II, the First Amendment did not demand that it simultaneously discourage those efforts.[23] Similarly, the government could not effectively promote vaccinations if it also had to balance its pro-vaccine message by supporting anti-vaxxers.[24] The government cannot do the job it was elected to do without the ability to decide what it says and does not say.[25]

Two recent cases—*Pleasant Grove City v. Summum* (2009)[26] and *Walker v. Texas Division, Sons of Confederate Veterans, Inc*. (2015)[27]—have cemented the government speech doctrine. In *Summum*, a small religious group offered to donate a Summum religious monument to a public park that hosted several previously donated monuments, including one of the Ten Commandments.[28] When the town refused, the group accused it of unconstitutional viewpoint discrimination.[29] The Supreme Court held that monuments in a public park constitute government speech, and therefore the town could welcome a Ten Commandments monument while refusing Summum's Seven Aphorisms monument.[30]

In *Walker*, Texas found itself accused of unconstitutional viewpoint discrimination because, despite offering drivers dozens of specialty license plates, it had refused to make one bearing the confederate flag for the Sons of Confederate Veterans group.[31] Again, the Supreme Court found the contested speech to be government speech.[32] As a result, Texas was free to reject the Sons of Confederate Veterans license plate.[33] "When

[22] Id.

[23] Id. at 1758.

[24] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015).

[25] Id. at 2246 ("But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.").

[26] 555 U.S. 460 (2009).

[27] 135 S. Ct. 2239 (2015).

[28] *Pleasant Grove City*, 555 U.S. at 466.

[29] Id.

[30] Id. at 472.

[31] *Walker*, 135 S. Ct. at 2245.

[32] Id. at 2246.

[33] Id. at 2253.

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government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[34]

Although government speech is not subject to the Free Speech Clause, other clauses might limit it. For example, government speech might violate the Equal Protection Clause, which bars discrimination on the basis of race,[35] or the Establishment Clause, which bars endorsing one religion over others.[36] However, the Supreme Court has argued that the primary check on government speech is the democratic process.[37] People express their approval or disapproval of the government and its speech with their vote. Because the government "is ultimately 'accountable to the electorate and the political process for its advocacy,'"[38] the government may discriminate against certain viewpoints in its own speech. "If the citizenry objects, newly elected officials later could espouse some different or contrary position."[39]

In short, under the government speech doctrine, the government can choose its own words. If the electorate does not like the government's chosen viewpoint, it can act to change the government.

II. PROBLEMS OF GOVERNMENT SPEECH

Three justifications are regularly offered for why free speech is so important that government regulation of speech triggers concern and heightened scrutiny.[40] First, free speech promotes a marketplace of ideas, which helps us in our search for knowledge, including political knowledge.[41] Second, free speech is key for our system of democratic

[34] Id. at 2245; see also id. at 2245–46 ("Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.").

[35] Cf. Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

[36] Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause.").

[37] *Walker*, 135 S. Ct. at 2245 ("[I]t is the democratic electoral process that first and foremost provides a check on government speech.").

[38] *Pleasant Grove City*, 555 U.S. at 468 (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

[39] Id. at 468–69 (quoting *Bd. of Regents*, 529 U.S. at 235).

[40] Cf. Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119, 120 (1989) (arguing that any attempt to articulate a single unifying theory of free speech risks oversimplification).

[41] See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of

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self-governance; a free flow of information ensures that people can keep tabs on the government and make informed political decisions.[42] Finally, free speech furthers autonomy and self-expression and is thus an end in itself.[43] Just as a government monopoly over speech might distort the marketplace of ideas, and with it, our ability to govern ourselves, so too does First Amendment capture.

A. First Generation Concerns: Monopoly

To the extent that free speech scholarship in the 1980s examined government speech, the debate focused primarily on the degree to which the government should be permitted to act as a speaker within the marketplace of ideas. Animating these early discussions was a fear that government might overwhelm private speakers and monopolize the market. A government speech monopoly would not only inhibit a robust exchange of ideas but the resulting distorted free speech markets might also undermine the consent of the governed—a cornerstone of our democracy.

At the birth of the government speech doctrine (and before), scholars differed on the degree to which the government should be a speaker in the marketplace of ideas on controversial subjects. While acknowledging the government's need to communicate in order to enact the democratic will,[44] some believed the government should speak only when necessary.[45] Others argued that the government's speech could actually enrich the marketplace of ideas.[46]

truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.").

[42] See, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

[43] See, e.g., C. Edwin Baker, Harm, Liberty, and Free Speech, 70 S. Cal. L. Rev. 979, 980 (1997) ("Speech can relate to autonomy in two ways: as itself an exercise of autonomy or as an informational resource arguably essential for meaningful exercise of autonomy.").

[44] Yudof, supra note 3, at 865 ("Government expression is critical to the operation of a democratic polity . . .").

[45] Ziegler, supra note 3, at 585–86 ("If the democratic process is to operate with a minimum of distortion, government information and communication functions in connection with structured political questions must be limited by law to those activities necessary for the effective operation of the process.").

[46] Greene, supra note 2, at 8–11. As Greene points out, government can make distinctive contributions to public debate. Id. at 8. For example, it can subsidize arts and science. Id. at 9. It can use its power of persuasion to alter social norms regarding race, smoking, and overeating. Id. at 10. Government can also check concentrations of private power. Id. at 11;

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In spite of these differences, there was general consensus that a government monopoly would pose a problem with potential constitutional implications.[47] As Richard Delgado noted: "A prominent theme in this 'government speech' debate is that the government's powerful voice can easily overwhelm weaker private voices, creating a monopoly of ideas and inhibiting the dialectic on which we rely to reach decisions."[48] Even those like Abner Greene, a strong supporter of the government as a participant in debate,[49] agreed that "government speech is highly problematic when it is the only voice in a relevant speech market."[50] Mark Yudof argued that such a government monopoly was tantamount to censoring of private speech: "The passage of time since adoption of the Bill of Rights has revealed that laws and practices that permit massive government communications activities may as effectively silence private speakers as a direct regime of censorship."[51] Most agreed that government speech that monopolizes might be constrained by the First Amendment.[52]

B. Second Generation Concerns: First Amendment Capture

The worry that the government will drown out private speakers in a particular forum has given way to the worry that the forum will vanish altogether because the speech in it has been deemed government speech.[53]

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see also John Fee, Speech Discrimination, 85 B.U. L. Rev. 1103, 1137 (2005). ("[G]overnment can and should make a positive difference in the world of ideas . . .").

[47] See, e.g., Shiffrin, supra note 3, at 607 ("If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace.").

[48] See Delgado, supra note 3, at 961–62.

[49] Greene, supra note 2, at 5 ("Government may, and should, use its speech powers to advance specific conceptions of the good, even if those conceptions are contested, controversial, or seen as favoring a particular viewpoint.").

[50] Greene, supra note 2, at 27.

[51] Yudof, supra note 3, at 897.

[52] Greene, supra note 2, at 27 ("[A]ctual monopolization [of the speech market] should be understood to violate the Constitution."); see also Randall P. Bezanson & William G. Buss, The Many Faces of Government Speech, 86 Iowa L. Rev. 1377, 1487 (2001) ("We conclude that government speech should receive little or no immunity from the rules that otherwise apply to government regulations when the government's speech creates a monopoly for a particular point of view.").

[53] See, e.g., Steven G. Gey, Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?, 95 Iowa L. Rev. 1259, 1264 (2010) ("The real point of these [government speech] cases may not be, as the Court innocuously suggests, to facilitate government speech. Rather, the point may be to give the government another tool with which to silence its critics.").

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Thus, the fear is not that competing viewpoints will be buried under government speech. Instead, the fear is that the contested speech will be categorized as government speech, giving the government the ability to eliminate competing viewpoints entirely. After all, under the government speech doctrine, government speech lies outside the protection of the Free Speech Clause.[54]

As described in the introduction, I call this move "First Amendment capture." In "agency capture," the regulated gain control of the agency that is supposed to regulate them. For example, the Food and Drug Administration is the agency charged with regulating the food industry. However, if the FDA falls under the influence of the food industry and its lobbyists, it has been captured.[55] In "First Amendment capture," the government, which is supposed to be regulated by the First Amendment, gains control of speech. As explained above, free speech is protected given the crucial role it plays in advancing knowledge (including political knowledge) and in fostering democratic self-governance.[56] First Amendment capture undermines these free speech goals by curtailing political speech markets and political accountability.

1. Capture of Forums

This First Amendment capture is evident in the two government speech cases mentioned in Part I, both of which presented the question of whether the speech at issue was private speech in a forum (and therefore protected by the Free Speech Clause) or government speech (and therefore under complete government control).

Recall that in *Pleasant Grove City v. Summum*,[57] a small religious group known as the Summum attempted to place a monument in a town park. The park already had a donated Ten Commandments monument (along with ten other donated displays),[58] and the Summum wanted to donate an equivalent monument representing their religion's main

[54] See, e.g., Daniel J. Hemel & Lisa Larrimore Ouellette, Public Perceptions of Government Speech, 2017 Sup. Ct. Rev. 33, 34–35 (2017) ("[W]ithout some meaningful limit on the government's ability to claim expression as its own, the government speech doctrine could eviscerate the bar on viewpoint discrimination among private speakers.").

[55] Barkow, supra note 12, at 21 n.23 (2010) ("Capture, for the purposes of agency design, may be defined as responsiveness to the desires of the industry or groups being regulated.").

[56] See supra notes 41–42 and accompanying text.

[57] 555 U.S. 460 (2009).

[58] Id. at 464–65.

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commandments, the Seven Aphorisms.[59] The Tenth Circuit debated what kind of forum for private speech the Park represented, eventually deciding that the City violated the Summums' free speech rights.[60] The Supreme Court reversed, holding that, unlike *speech* in public parks, *permanent monuments* in public parks represented government speech, and "[are] therefore not subject to scrutiny under the Free Speech Clause."[61] As a result, the only monuments seen will be those chosen by the government.

A similar denouement occurred with specialty license plates. These are plates like "Choose Life" that are approved, manufactured, and owned by the government but appear on private vehicles because private individuals select and pay for them.[62] Several states were sued on free speech grounds for issuing pro-life plates while refusing to issue pro-choice ones.[63] In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.,* Texas declined to issue a Sons of Confederate Veterans plate featuring a confederate flag.[64] While the Fifth Circuit held that Texas had unconstitutionally discriminated in a forum on the basis of viewpoint,[65] the Supreme Court ruled that specialty license plates were actually government speech, and "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[66] Consequently, the only viewpoints emblazoned on specialty license plates will be the ones endorsed by the government.[67]

These may seem like insignificant forums, or rather, former speech forums.[68] How much harm can the government do by controlling park statutes and the messages on specialty license plates? Nevertheless,

[59] Id. at 465.

[60] Summum v. Pleasant Grove City, 483 F.3d 1044, 1050–54, 1057 (10th Cir. 2007).

[61] *Pleasant Grove City*, 555 U.S. at 464.

[62] "First surfacing in the late 1980s, specialty license plates are now available in most states." The number of choices varies, with some states offering more than a hundred different options. Corbin, supra note 15, at 608–09.

[63] Hill v. Kemp, 478 F.3d 1236, 1239 (10th Cir. 2007); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 371–72 (6th Cir. 2006); Henderson v. Stalder, 407 F.3d 351, 352 (5th Cir. 2005); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 787–88 (4th Cir. 2004).

[64] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243–44 (2015).

[65] Id. at 2245.

[66] Id.

[67] See, e.g., ACLU of N.C. v. Tennyson, 815 F.3d 183, 185 (4th Cir. 2016) (allowing North Carolina to issue pro-life specialty license plates without issuing pro-choice plates).

[68] In each case, the court held that the speech was not private speech in a forum, but rather government speech outside the protection of the Free Speech Clause. See supra note 10 (describing forums as government-owned spaces open to private speakers and subject to the Free Speech Clause).

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complete control of even these presumably low-stakes forums may have repercussions. After *Summum*, for example, the primary religious monuments people will see in public parks and other public spaces are likely to be Christian ones.[69] This link between American government and Christianity, when made again and again,[70] in multiple contexts,[71] inevitably sends a subtle message that America is a Christian nation and that real Americans are Christian Americans.[72] This message from the government runs contrary to the constitutional promise to reject religious hierarchies in favor of religious equality.

Moreover, government speech has not been limited to parks and plates,[73] and future decisions may more directly implicate democratic self-governance. Erwin Chemerinsky, for example, has wondered, "Could a city library choose to have only books by Republican authors by saying that it is the government speaking?"[74] Or could a government

[69] Cf. Aleksandra Sandstrom, Majority of States Have All-Christian Congressional Delegations, Pew Res. Ctr. (Mar. 21, 2017), https://www.pewresearch.org/fact-tank/2017/03/21/majority-of-states-have-all-christian-congressional-delegations/ [https://perma.cc/U6C3-3U6Y] ("The vast majority of the nation's federal lawmakers (91%) describe themselves as Christians, compared with 71% of U.S. adults who say the same.").

[70] For example, municipalities across the country erect a nativity scene, which depicts the birth of Jesus Christ, during Christmastime. See, e.g., Freedom from Religion Found., Inc. v. City of Warren, 707 F.3d 686, 689–90 (6th Cir. 2013) (upholding holiday display with nativity in atrium of civic center despite refusing to include Winter Solstice display); Wells v. City & Cty. of Denver, 257 F.3d 1132, 1152–53 (10th Cir. 2002) (upholding City and County Building's holiday display with nativity scene despite rejecting Winter Solstice sign).

[71] For example, in addition to displays, many towns and cities open their legislative sessions with Christian prayers. See, e.g., Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014) (upholding town's practice of starting town board meetings with prayer despite most prayers being overwhelmingly Christian).

[72] Cf. Caroline Mala Corbin, Ceremonial Deism and the Reasonable Religious Outsider, 57 UCLA L. Rev. 1545, 1582 (2010) ("The power of government expression to reinforce the outsider status of certain groups should not be underestimated. While many factors determine a group's status, symbols of government are one of them, and government's religious speech signals who belongs and who does not, who is preferred and who is second-class.").

[73] In fact, federal appeals courts have held that speech ranging from advertising banners displayed at public schools, Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1072 (11th Cir. 2015), to tourism brochures displayed for a fee at state rest areas, Vista-Graphics, Inc. v. Va. Dep't of Transp., 682 F. App'x 231, 236 (4th Cir. 2017), was government speech, thereby allowing the government to exclude viewpoints it found objectionable.

[74] Erwin Chemerinsky, Free Speech, Confederate Flags and License Plates, Orange County Reg. (June 25, 2015, 12:00 AM), http://www.ocregister.com/articles/government-668320-texas-license.html [https://perma.cc/6UWX-PPH4].

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Facebook page eliminate unfavorable hyperlinks or public comments on the grounds that everything on its webpage is government speech?[75]

In fact, Trump's Twitter feed was the focus of a free speech lawsuit by litigants arguing that the feed was a forum.[76] Twitter is a modern-day marketplace of ideas.[77] Anyone can follow someone and see their "tweets," whether they contain news or opinion. Moreover, anyone can then comment on the original tweet, either by replying directly or by retweeting the original tweet with added commentary.[78] Both replies and retweets are publicly visible and amenable to comment.[79] As is well known, Donald Trump was a prolific tweeter,[80] and the tweets from his @realDonaldTrump account generated extensive response and media coverage.[81] (Although Trump inherited @POTUS from Barack Obama for the duration of his presidency, he preferred @realDonaldTrump, which predated his administration.[82])

Before a court declared his conduct unconstitutional,[83] Trump had taken to blocking people who criticized him on his @realDonaldTrump

[75] Cf. Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 331 (1st Cir. 2009) (holding that Town website, including hyperlinks to private websites, was government speech); Page v. Lexington Cty. Sch. Dist. One, 531 F.3d 275, 283–85 (4th Cir. 2008) (holding that school district's website, which included links to private websites, was government speech).

[76] Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018); Knight First Amendment Inst. v. Trump, 928 F.3d 226, 233–34 (2d Cir. 2019).

[77] Two-thirds of adults in the United States now get some of their news from social media, and almost three-quarters of those on Twitter use it at least in part for news. See Elisa Shearer & Jeffrey Gottfried, News Use Across Social Media Platforms 2017, Pew Res. Ctr. (Sept. 7, 2017), http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/ [https://perma.cc/Y7ZN-P98R] (finding that 67% of users get news on social media at least occasionally and 74% of Twitter users get news on Twitter).

[78] *Knight*, 928 F.3d at 230.

[79] Id.

[80] Kevin Breuninger, Trump's Most Memorable Twitter Bombshells of 2018, CNBC.com (Dec. 31, 2018, 11:44 AM), https://www.cnbc.com/2018/12/31/trumps-top-10-biggest-twitter-bombshells-made-history-in-2018.html [https://perma.cc/F6C2-9ZR7] (noting that Trump averaged nearly 10 tweets per day in 2018).

[81] *Knight*, 928 F.3d at 231 ("The President's tweets produce an extraordinarily high level of public engagement, typically generating thousands of replies, some of which, in turn, generate hundreds of thousands of additional replies.").

[82] Meredith MacLeod, We've Read All President Trump's Tweets, So You Don't Have to, CTVNews.ca (Apr. 28, 2017, 7:09 PM), https://www.ctvnews.ca/world/analysis-we-ve-read-all-president-trump-s-tweets-so-you-don-t-have-to-1.3389513 [https://perma.cc/ZK4N-7CED].

[83] Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) ("We hold that . . . the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment."); *Knight*, 928 F.3d at 234 ("Because we

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account.[84] He blocked everyday people, celebrities, nonprofit organizations, and even journalists.[85] Seven of these blocked Twitter users sued Trump, arguing that his actions violated the Free Speech Clause by discriminating against them on the basis of viewpoint.[86] Trump did not deny that he blocked them because he did not like their comments.[87] Instead, he argued that the act of blocking did not implicate the Free Speech Clause because his Twitter feed was not a public forum run by the government, but rather, was a purely personal account.[88]

While President, Trump's claim that his Twitter feed was purely private was untenable, and every court to consider it has firmly rejected his defense.[89] As one court observed, Trump "use[d] the account to take actions that can be taken only by the President as President."[90] For example, Trump made official proclamations and announced executive policy from his @realDonaldTrump account.[91] In fact, the National Archives and Records Administration advised that as official records, the @realDonaldTrump tweets must be preserved pursuant to the Presidential Records Act.[92] In short, Trump's Twitter feed, including the interactive

agree that in blocking the Individual Plaintiffs the President engaged in prohibited viewpoint discrimination, we affirm.").

[84] Ashley Feinberg, A Running List of People Donald Trump Has Blocked on Twitter, Wired (June 14, 2017, 3:30 PM), https://www.wired.com/story/donald-trump-twitter-blocked/ [https://perma.cc/94KS-VCLZ].

[85] Id.

[86] *Knight*, 302 F. Supp. 3d at 549, 553.

[87] *Knight*, 928 F.3d at 234 ("The President concedes that he blocked the Individual Plaintiffs because they posted tweets that criticized him or his policies.").

[88] Assoc. Press, Judge to Trump: Muting, Not Blocking Twitter Followers, May End Lawsuit, NBCNews.com (Mar. 8, 2018, 2:56 PM), https://www.nbcnews.com/tech/social-media/judge-trump-muting-not-blocking-twitter-followers-may-end-lawsuit-n854951 [https://perma.cc/7SSC-KWC8]. ("The government says Trump's Twitter feed is a personal account and not a public forum requiring him to welcome all voices.").

[89] A district court, *Knight*, 302 F. Supp. 3d at 549, and Second Circuit panel, *Knight*, 928 F.3d at 230–31, have both rejected Trump's claim, and the Second Circuit declined to rehear the case *en banc*. Knight First Amendment Institute v. Trump, 953 F.3d 216, 217 (2d Cir. 2020).

[90] *Knight*, 302 F. Supp. 3d at 567.

[91] For example, Trump announced his ban on transgender troops for the first time on Twitter. Jessica Estepa, We're All Atwitter: Three Times President Trump Made Major Announcements Via Tweets, USA Today (Mar. 13, 2018, 4:33 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/03/13/were-all-atwitter-3-times-president-trump-made-major-announcements-via-tweets/420085002/ [https://perma.cc/D2HC-KC6A].

[92] *Knight*, 928 F.3d at 232.

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part, was not purely private speech, and Trump's actions with regard to it were government actions that are subject to constitutional limits.[93]

Given that Trump used his Twitter account for official purposes, the real risk to the interactive part of Trump's Twitter feed was not that it would be found to be purely private, but that it would be found to be purely governmental.[94] After all, if a court had deemed Trump's feed to be government speech, then Trump could have exerted total control over its content and excluded anyone who criticized him or challenged his claims. In fact, Trump argued in the alternative that "to the extent [his Twitter] Account [was] government-controlled, posts on it are government speech to which the First Amendment does not apply."[95]

There is no gainsaying the importance of the President's feed to the marketplace of political ideas and democratic self-governance. Before he was banned for inciting a violent insurrection,[96] Twitter was one of President Trump's primary channels for communicating with the public. Given Trump's love of Twitter, blocking people meant depriving them of a crucial in-real-time source of information.[97] As one plaintiff lamented, "I may not be crazy about President Trump, but he is my president, and I want to know what he is saying."[98]

In addition, Trump's Twitter feed provided a rare forum for the exchange of different points of view. In the past, Americans typically shared a common source of news, which exposed them to a range of viewpoints.[99] Today, the abundance of news sources allows people to

[93] Id. at 236 ("In sum, since [Trump] took office, the President has consistently used the Account as an important tool of governance . . . ").

[94] Cf. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (endorsing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ").

[95] *Knight*, 928 F.3d at 234; see also id. at 237, 239.

[96] Brian Fung, Twitter Bans President Trump Permanently, CNN Business (Jan. 9, 2021, 9:19 AM ET), https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html [https://perma.cc/6HDT-GTCZ] (quoting Twitter explaining that "we have permanently suspended the account due to the risk of further incitement of violence").

[97] Even if other people retweet Trump, the blocked user sees only a gray box.

[98] Rebecca Pilar Buckwalter-Poza, Philip Cohen, Eugene Gu, Holly Figueroa & Brandon Neely, I Was Blocked by @realDonaldTrump, Knight First Amend. Inst. (Mar. 25, 2019), https://knightcolumbia.org/content/i-was-blocked-realdonaldtrump [https://perma.cc/YH5M-ZUMB] (quoting Holly Figueroa) [hereinafter I Was Blocked].

[99] Shanto Iyengar & Kyu S. Hahn, Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use, 59 J. Comm. 19, 20 (2009) ("Forty years ago, the great majority of Americans got their daily news from one of three network newscasts [that] offered a

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select those outlets that tend to confirm their pre-existing world views.[100] Studies show that this is especially true for Trump voters, who have an affinity for conservative media such as Fox News and Breitbart.[101] Trump's Twitter feed was arguably one of the few places where people with divergent political outlooks might interact with each other. For the President to block his critics denied them access to a diverse audience and denied them the opportunity to contribute to the formation of public opinion. As one blocked user, and litigant in the suit against Trump, put it, "[b]eing blocked has kept me from participating in critical public conversations."[102]

Finally, blocking dissenters created a false sense of consensus. It allowed Trump to "create a space on Twitter—where there are millions of people—that he can manipulate to give the impression that more agree with him than actually do."[103] Erasing opposing viewpoints enhances the persuasiveness of the remaining ones because studies show that positions perceived as popular wield outsized influence.[104] "It is a 'social

homogeneous and generic 'point-counterpoint' perspective on the news, thus ensuring that exposure to the news was a common experience.").

[100] Patricia Donovan, Study Demonstrates How We Support Our False Beliefs, U. Buff. News Ctr. (Aug. 21, 2009), http://www.buffalo.edu/news/releases/2009/08/10364.html [https://perma.cc/XL9X-Z8LK]. ("[R]ather than search rationally for information that either confirms or disconfirms a particular belief, people actually seek out information that confirms what they already believe."); see also Brendan Nyhan & Jason Reifler, When Corrections Fail: The Persistence of Political Misperceptions, 32 Pol. Behav. 303, 307 (2010) ("[R]espondents may engage in a biased search process, seeking out information that supports their preconceptions and avoiding evidence that undercuts their beliefs.").

[101] Yochai Benkler, Robert Faris, Hal Roberts & Ethan Zuckerman, Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda, Colum. Journalism Rev. (Mar. 3, 2017), https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php [https://perma.cc/33JP-HBY5] (noting that Clinton supporters "were highly attentive to traditional media outlets" but Trump supporters inhabited a "distinct and insulated" right-wing media system anchored around Breitbart that "transmit[ted] a hyper-partisan perspective"); see also id. ("[O]ur study suggests that polarization was asymmetric."); Jeffrey Gottfried, Michael Barthel & Amy Mitchell, Trump, Clinton Voters Divided in Their Main Source for Election News, Pew Res. Ctr. (Jan. 18, 2017), http://www.journalism.org/2017/01/18/trump-clinton-voters-divided-in-their-main-source-for-election-news/ [https://perma.cc/YNL2-2F4J] (noting that Fox News was the main source of news for 40% of Trump voters).

[102] I Was Blocked, supra note 98 (quoting Rebecca Buckwalter-Poza); see also id. (quoting Philip Cohen) ("Being blocked by Trump diminished my ability to respond and engage in the political process.").

[103] I Was Blocked, supra note 98 (quoting Philip Cohen).

[104] This proposition, that a position perceived as popular is likely to wield greater influence, was established by the famous Asch studies. In these studies, when subjects were questioned alone, 99% correctly identified the length of a line. When questioned in the presence of those who intentionally gave the same incorrect answer, 70% agreed with the incorrect answer at

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psychological truism that individuals tend to yield to a majority position even when that position is clearly incorrect.'"[105] In sum, a free and robust exchange of political ideas should occur on the Twitter feed of the President and other public officials. While Trump is no longer in office, political officials' use of social media is growing all the time.[106] Declaring these feeds government speech, subject to total government control, risks distorting the marketplace of political ideas.

2. Capture of Whistleblowers

Potential speech forums are not alone in their importance to democratic self-governance or their vulnerability to First Amendment capture. Government employee speech likewise plays an important role in our democracy, and it has already suffered from the expansion of the government speech doctrine. Citizens in democracies must be able to hold government officials accountable for their actions. To do this, they need information on their public servants.[107] Because public employees are uniquely well-placed to know what government officials are doing, they are some of the best government whistleblowers.[108]

Unfortunately, the government speech doctrine's expansion into the government employee speech context discourages whistleblowing by government employees. Previously, the Free Speech Clause would cover

least once. Solomon E. Asch, Social Psychology 450–59 (1952); see Solomon E. Asch, Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority, 70 Psychol. Monographs: Gen. & Applied 1, 1, 9–24 (1956).

[105] Saumya Manohar, Comment, Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech, 25 Yale L. & Pol'y Rev. 229, 236 (2006) (quoting Anne Maass & Russell D. Clark, III, Internalization Versus Compliance: Differential Processes Underlying Minority Influence and Conformity, 13 Eur. J. Soc. Psychol. 197, 197 (1983)); see also Stephan Lewandowsky, Ullrich K.H. Ecker & John Cook, Beyond Misinformation: Understanding and Coping with the "Post-Truth" Era, 6 J. Applied Res. Memory & Cognition 353, 361 (2017) (People tend to believe things "that they *believe* to be widely shared—irrespective of whether or not they *are* actually widely shared.").

[106] See, e.g., Patrick Van Kessel, Regina Widjaya, Sono Shah, Aaron Smith & Adam Hughes, Congress Soars to New Heights on Social Media, Pew Res. Ctr., (July 16, 2020), https://www.pewresearch.org/internet/2020/07/16/congress-soars-to-new-heights-on-social-media/ [https://perma.cc/JH78-BWU6].

[107] Lewandowsky, Ecker & Cook, supra note 105, at 354 ("It is a truism that a functioning democracy relies on a well-informed public.").

[108] Pauline T. Kim, Market Norms and Constitutional Values in the Government Workplace, 94 N.C. L. Rev. 601, 642 (2016) ("Because political accountability is the primary means by which the public seeks to ensure that public managers are pursuing public goals, speech by public employees plays a particularly important role in self-governance.").

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this speech.[109] It did not always protect it, but the Court would perform a balancing test, weighing the public's interest in hearing speech on matters of public concern against the government employer's interest in avoiding disruption in the workplace.[110] Since the Supreme Court's decision in *Garcetti v. Ceballos*,[111] however, if the employees' speech is "pursuant to . . . official duties," it is essentially the government's speech, and therefore not covered by the Free Speech Clause.[112] Regardless of how important it may be for political accountability, it lies outside free speech protection.[113]

Due to this new government speech rule, countless public officials lost constitutional protection for reporting government malfeasance in the course of their official duties.[114] "In fact, in the years following *Garcetti*, the lower federal courts denied protection to numerous government employees who objected to their employers' illegal practices, health and safety violations, and financial improprieties."[115]

If government employees can be fired for trying to hold the government to account, then they may just stop trying. As Helen Louise Norton summarized, the *Garcetti* rule "allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the

[109] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that the idea "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens . . . has been unequivocally rejected in numerous prior decisions of this Court.").

[110] City of San Diego v. Roe, 543 U.S. 77, 82–83 (2004) (describing the *Pickering-Connick* balancing test).

[111] 547 U.S. 410 (2006).

[112] Id. at 436 (Souter, J., dissenting) ("The majority accepts the fallacy . . . that any statement made within the scope of public employment is (or should be treated as) the government's own speech.").

[113] Id. at 421 (majority opinion) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[114] See, e.g., Caroline Mala Corbin, Government Employee Religion, 49 Ariz. St. L.J. 1193, 1244 (2017) (collecting cases).

[115] Kim, supra note 108, at 644; see also Mark Strasser, Whistleblowing, Public Employees, and the First Amendment, 60 Clev. St. L. Rev. 975, 993 (2013) ("Regrettably, lower courts have learned the lessons of *Garcetti* quite well. Numerous individuals have suffered adverse employment actions when seeking to expose the kinds of practices that whistleblower protections are designed to bring to light.").

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government politically accountable for its choices." [116] In short, the expansion of the government speech doctrine—essentially the First Amendment capture of government employee speech—has undermined government accountability.

Thanks to the government speech doctrine, the government does not need to overpower to dominate the marketplace of ideas. Rather, it manages to eliminate the competition with a doctrinal sleight of hand. Once a stream of information is labeled governmental, the state may completely control it and exclude any contrary opinion or whistleblowing it does not like. The Free Speech Clause provides no protection in these cases of First Amendment capture. As the Supreme Court itself acknowledged, "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse."[117]

III. SOLUTIONS TO FIRST AMENDMENT CAPTURE

There are two potential approaches to limiting the risks of censorship created by an ever-expanding government speech doctrine. The first is to limit what is classified as government, as opposed to private, speech. But as discussed below, this may be an imperfect solution if the speech is not, in fact, purely private. The second is to change free speech doctrine by recognizing "mixed speech" as a new category of speech protected by the Free Speech Clause. Thus, which approach is preferable may be case-specific, but a reevaluation of the doctrine is ultimately needed.[118]

A. Private Speech Not Government Speech

The less-government-speech approach dictates that when the status of speech is in dispute, the speech should usually be categorized as private speech rather than government speech. In other words, private speech is the default. If the contested speech is deemed private speech, then the government cannot censor private speakers under the guise of government speech because any viewpoint restrictions on private speech

[116] Helen Norton, Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression, 59 Duke L.J. 1, 4 (2009).

[117] Matal v. Tam, 137 S. Ct. 1744, 1758 (2017).

[118] Note that while this Article explains the usefulness of a mixed speech category in containing the excesses of the government speech doctrine, it does not recapitulate the comprehensive analysis of mixed speech available in earlier work. See generally Corbin, supra note 15.

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are subject to strict scrutiny under the Free Speech Clause.[119] And only in the rarest of circumstances will speech regulations survive strict scrutiny.[120]

Accordingly, a court faced with a claim that a President's or other politician's Twitter feed was government speech rather than a government forum hosting private speech should hold that it is a forum for private speech. In this way, the debate on the politician's policy decisions will remain "uninhibited, robust, and wide-open."[121] Everyone would be able to participate in the discussion, and all viewpoints would be aired at one of the few online sites where people with radically different points of view might still interact with each other. Furthermore, the government would no longer be able to manipulate the political conversation to make it seem like its viewpoint was more popular than it really was.[122]

B. Mixed Speech Not Government Speech

The problem with relying on the less-government-speech approach alone is that sometimes the speech in dispute is not actually private speech, or at least it is not only private speech. Take the specialty license plates at issue in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, discussed earlier.[123] There is a strong private element. Private individuals select the plate with the message they want, pay extra money for it, and fasten it on their vehicles.[124] In my family, we have a "Save the Manatee" specialty license plate because we care enough about these sea creatures to announce that fact and to serve as a "mobile billboard" for their cause.[125] But specialty license plates are also governmental and

[119] Regardless of the forum, whether traditional, designated, limited, or nonpublic, the government may not discriminate on the basis of viewpoint without passing strict scrutiny. Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009); Rosenberger v. Rector & Visitors of Univ. of Va, 515 U.S. 819, 829–30 (1995).

[120] Indeed, the Court tends to characterize them as "presumptively unconstitutional." See, e.g., Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) ("A law found to discriminate based on viewpoint . . . is 'presumptively unconstitutional.'").

[121] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[122] See supra notes 103–105 and accompanying text.

[123] 135 S. Ct. 2239, 2243 (2015).

[124] Corbin, supra note 15, at 646–47 ("[N]o one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint.").

[125] Cf. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (describing standard license plates "as a 'mobile billboard' for the State's ideological message").

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irreducibly so. After all, the State approves the plates, manufactures them, owns them, and has its name emblazoned across the top.[126] People will inevitably attribute the plate's message not just to the car's owner, but also to the State that issued it. "When the government component in mixed speech is undeniably strong, as it is with specialty license plates, the messages very likely will be linked to the government, regardless of how courts analyze them."[127]

Consequently, a state has a legitimate interest in not endorsing certain messages on plates that bear its name. In *Walker*, to avoid condoning racism and violating equal protection norms, Texas declined to issue plates with a confederate flag.[128] Other states might not want to issue "Say Yes to Jesus" plates to avoid endorsing religion and violating establishment norms.[129] Yet, had the Supreme Court held that the license plates—or any other contested speech—were private speech, then the State would not be able to discriminate on the basis of viewpoint.[130] If speech is private, then all viewpoints, including racist viewpoints and religious viewpoints, must be allowed.[131] This viewpoint-neutral regime would force the government to associate itself with messages that it should not endorse or tolerate. The same problem may present itself in other situations, whether it be speech by a police chief,[132] commemorative

[126] Corbin, supra note 15, at 647.

[127] Id. at 654.

[128] *Walker*, 135 S. Ct. at 2245 (explaining that the state declined the plate because many find the confederate flag offensive and associate it with hate groups); Corbin, supra note 15, at 657 ("States that hoped to keep the Confederate flag off their specialty license plates realized that for many, it represents a celebration of slavery and a not-so-subtly coded message of racial superiority.").

[129] Corbin, supra note 15, at 659 ("If specialty license plates are treated as purely private speech, then the establishment clause does not forbid, and the free speech clause may require, plates with religious messages. But as discussed above, because the plates are actually mixed speech, the state may well be seen as endorsing these religious messages and will thereby run afoul of the establishment clause.").

[130] See supra note 119 and accompanying text (explaining viewpoint regulations are subject to strict scrutiny).

[131] See supra note 120 and accompanying text (explaining speech regulations subject to strict scrutiny are almost never constitutional).

[132] Cf. Cochran v. City of Atlanta, 289 F. Supp. 3d 1276, 1289 (N.D. Ga. 2017) (involving an anti-LGBTQ book written by fire chief and disseminated at work).

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bricks on school property,[133] or advertisements on public transportation.[134]

Under the current binary regime, where speech must be labeled either private speech or government speech, there seems to be no satisfactory solution when elements of both are undeniably present. Labeling a contested stream of speech as government speech removes it entirely from free speech protection, creating the problem of First Amendment capture and government censorship.[135] But insisting that such speech is private speech, with its bar on viewpoint discrimination, risks giving short shrift to the government interests in disassociating from certain speech.[136]

A third option is warranted. When contested speech cannot be fairly treated as purely private or purely governmental, it should be treated as falling within a new category: mixed speech.[137] That is, instead of treating mixed speech as private speech or government speech, acknowledge that it is mixed speech, with both private and government interests present. In contrast to strict scrutiny (for private speech) or no scrutiny (for government speech), any government restrictions on viewpoint would be subject to a rigorous intermediate scrutiny.[138]

A rigorous intermediate scrutiny means that contested streams of information would no longer fall outside the purview of the Free Speech Clause, thereby guarding against attempts to suppress contrary viewpoints simply because the government disapproves of them. At the same time, it would not leave the government without any control over speech that may be attributed to it. If the government articulates a strong enough reason, such as complying with constitutional values (e.g., equal

[133] Cf. Kiesinger v. Mex. Acad. & Cent. Sch., 427 F. Supp. 2d 182, 185 (N.D.N.Y. 2006) (involving commemorative bricks on school property); Demmon v. Loudoun Cty. Pub. Sch., 342 F. Supp. 2d 474, 476 (E.D. Va. 2004) (involving bricks on school property).

[134] Am. Freedom Def. Initiative v. King Cty., 796 F.3d 1165, 1168 (9th Cir. 2015) (involving advertisements on city's transit system); Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp., 826 F.3d 947, 949–50 (7th Cir. 2016) (involving advertisements on city's buses); see also Corbin, supra note 15, at 623–26 (describing examples of mixed speech).

[135] See supra Part II.B.

[136] Corbin, supra note 15, at 656 ("From the government's perspective, a viewpoint neutrality regime would be objectionable because it would force the government to associate itself with messages that it would not voluntarily endorse or tolerate.").

[137] Id. at 671–72.

[138] Id. at 675 ("This three-part test is a rigorous intermediate scrutiny. Its 'intermediate scrutiny' counterpart is the heightened scrutiny given to sex classifications under equal protection rather than the cursory scrutiny given to content-neutral restrictions on expressive conduct.").

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protection or establishment), and a sufficiently tailored means, then the regulation could survive intermediate scrutiny.

Labeling speech as government speech makes it too easy for the government to censor speech it does not like. Classifying such speech as private speech (when appropriate) and recognizing a category of mixed speech (when the government component precludes classification as private speech) would help forestall the expansion of government speech into realms where it does not belong, and as a result, would preserve the marketplace of ideas and protect government whistleblowers.

CONCLUSION

Although inescapable and not necessarily detrimental, government speech has the potential to undermine the necessary mechanisms of democracy. In particular, the expansion of the government speech doctrine allows for First Amendment capture. Once speech is labeled government speech, the government may exercise complete control over it. Such control may stymy robust political discussion needed for informed political decision-making or suppress whistleblowing needed for political accountability.

One solution to First Amendment capture is to categorize speech as private speech, rather than government speech, so that any viewpoint-based restrictions are presumptively unconstitutional. Another is to recognize a new category of speech—mixed speech—where viewpoint regulations must pass intermediate scrutiny, thereby allowing the government to regulate when it has a valid reason, yet at the same time preventing First Amendment capture and censorship.