

LICENSED TO SPEAK: THE CASE OF VANITY PLATES

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INTRODUCTION

During the Vietnam War, Paul Cohen expressed his contempt for the draft on the back of his jacket in unmistakably clear and cogent language, using what one linguist has called the “preeminent” curse word.¹ Although no one complained or expressed offense,² a police officer arrested him, and Cohen was convicted of disturbing the peace by offensive conduct.³ The Supreme Court reversed Cohen’s conviction under the state statute as a violation of the First Amendment, declining to allow the government a role as arbiter of good taste in public discourse.⁴ *Cohen v. California* is now part of First Amendment folklore. But what would happen today if Cohen still felt a lingering anger—not dissipated by the appearance of the all-volunteer military—and wanted to spread his message by car, not clothes? Would he be entitled to get his vanity plate imprinted FUKDRFT?

His request would likely be rejected. Although Justice Harlan might have felt that “one man’s vulgarity is another’s lyric,”⁵ many state governments think they know vulgarity when they see it, and they do not find it at all lyrical, especially on a license plate. They would reject Cohen’s plate request because it was vulgar, offensive, or indecent.

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1. See *Kahn v. Dep’t of Motor Vehicles*, 20 Cal. Rptr. 2d 6, 8 (Cal. Ct. App. 1993).

2. The Court did note that “women and children [were] present in the [courthouse] corridor.” *Cohen v. California*, 403 U.S. 15, 16 (1971).

3. See *id.*

4. See *id.* at 26 (stating that “absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense”).

5. *Id.* at 25.

State governments make money selling vanity license plates for cars,⁶ because many car owners are willing to pay extra to imprint their personality, thoughts, or viewpoints on their car's license plate. More recently, states have offered organizations the opportunity to place their logos on government license plates.⁷ The problem is that government agencies often explicitly forbid offensive plates⁸ and set up elaborate speech

6. For example, Missouri makes several million dollars per year on the plates. See *Lewis v. Wilson*, 89 F. Supp. 2d 1082, 1085 (E.D. Mo. 2000). Virginia's Department of Motor Vehicles recently crawled out from under a \$1.2 million debt and into a \$2.2 million surplus, in part, through the aggressive sales of vanity plates. See *DMV Agency Weathers Financial Turmoil*, RICH. TIMES-DISPATCH, July 22, 2000, at B4. Massachusetts receives \$2.6 million annually from the sale of the license plates. See *RMV Reads Between the Lines When Drivers Appeal to Own Vanity*, BOSTON GLOBE, July 20, 2000, at B1. Michigan had over 125,000 plates in use recently and made a million dollars annually. See Gary Heinlein, *Vanity Plates Become \$1 Million Hit*, DETROIT NEWS, Jan. 2, 2001, at 1.

For information on web-based on-line sales, see, e.g., *DMV Personalized License Plates Online*, at <http://nutmeg.state.ak.us/iXpress/DMV/PersonalPlates/GetPlate.dml> (last visited Feb. 13, 2001). When Alaska allowed on-line web ordering, the number of objectionable plate requests increased, perhaps because it avoided face-to-face communication. See Sheila Toomey, *Vanity Plates' Hedake; Internet Sales Trigger More Naughty Requests*, ANCHORAGE DAILY NEWS, Feb. 9, 1999, at 1B ("Ordering from a machine, not having to look a clerk in the face when they handed in their requests, apparently frees people's darker imaginations.").

7. See *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1100 (D. Md. 1997) (holding that the plate owners were entitled to renew their vanity license plates displaying the group name "Sons of Confederate Veterans" and the confederate flag).

8. See, e.g., CAL. VEH. CODE § 5105(b) (West 2001) (stating that the California DMV "may cancel and order the return of any environmental license plate . . . containing any combination of letters, or numbers, or both, which the department determines carries connotations offensive to good taste and decency or which would be misleading"); COLO. REV. STAT. § 42-3-114(6) (West 2000) ("[T]he department may refuse to issue any combination of letters or numbers, or both, which may carry connotations offensive to good taste and decency or which would be misleading or a duplication of the regular license plates provided for in this article."); FLA. STAT. ANN. § 320.0805 (West 2000) (authorizing department to reject requests for "personalized license plate[s] determined by it to be obscene or otherwise objectionable"); IND. CODE § 9-18-15-4 (2001) (prohibiting combinations on personalized license plates that carry "a connotation offensive to good taste and decency"); IOWA ADMIN. CODE 400.41(d)(5) (1994) ("No combination of characters shall be issued which is sexual in connotation; defined in dictionaries as a term of vulgarity, contempt, prejudice, hostility, insult, or racial or ethnic degradation; recognized as a swear word; considered to be offensive; or a foreign word falling in any of these categories."); KAN. STAT. ANN. § 8-132(c) (1999) (prohibiting vanity plates that "have a profane, vulgar, lewd or indecent meaning or connotation, as determined by the director of vehicles"); KY. REV. STAT. ANN. § 186.174(2) (Banks-Baldwin 2000) ("A personalized plate shall not be issued if, in the discretion of the cabinet, it carries a [sic] letter or number combinations that carry connotations

bureaucracies to ferret out the offensive. These schemes include surveying offensiveness in a number of languages and protecting the sensitive on a number of subjects.⁹ These bureaucracies use a myriad of regulations,¹⁰ computer programs,¹¹

offensive to good taste and decency.”); MINN. STAT. ANN. § 168.12, Subd. 2a. (West 2000) (“No words or combination of letters placed on personalized license plates may be used for commercial advertising, be of an obscene, indecent, or immoral nature, or be of a nature that would offend public morals or decency.”); MISS. ANN. STAT. § 27-19-48(1) (West 2000) (“No combination of letters or numbers which comprise [sic] words or expressions that are considered obscene, slandering, insulting or vulgar in ordinary usage shall be permitted, with the Chairman of the State Tax Commission having the responsibility of making such determination.”); MO. ANN. STAT. § 301.144.2 (West 1999) (“No personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, inflammatory or contrary to public policy.”); MONT. CODE ANN. § 61-3-405 (2000) (“[T]he department may refuse to issue any combination of letters or numbers, or both, that may carry connotations offensive to good taste and decency or which are misleading”); S.C. CODE ANN. § 56-3-2010 (Law. Co-op. 2000) (“The department, in its discretion, may refuse the issue of letter combinations which may carry connotations offensive to good taste and decency”); TENN. CODE ANN. § 55-4-210 (1999) (“The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading.”); UTAH CODE ANN. § 41-1a-411(2) (2000) (“The division may refuse to issue any combination of letters, numbers, or both that may carry connotations offensive to good taste and decency or that would be misleading.”); VT. STAT. ANN. tit. 23, §304 (West 2000) (“An organization applying for a special plate under this subsection shall present the commissioner with a name and emblem that is not obscene, offensive or confusing to the general public and does not promote, advertise or endorse a product, brand or service provided for sale, or promote any specific religious belief or political party.”); WASH. REV. CODE ANN. § 46.16.580 (West 2000) (“[T]he department may refuse to issue any combination of letters or numbers, or both, that may carry connotations offensive to good taste and decency or which would be misleading”).

9. See Mary Ann Lickteig, *KLEN PL8S Censor Separates Smut from Smart*, CHI. TRIB., Dec. 27, 1998, at 3 (detailing Vermont’s Director of Motor Vehicle’s job in part as censoring requests for vanity plates with references to a “bad word list,” containing “3,000 combinations that spell or suggest ethnic, racial and religious slurs and slang in English, French, Spanish and Pig Latin”); Erik Lacitis, *Vanity Plates: The Letters and the Law*, SEATTLE TIMES, Nov. 8, 1996, at E1 (noting that Washington State had a “Personalized Plate Review Committee,” with a secret membership); Jacqueline Boyle, *Vanity Plate Supporting Abortion Pill is Revoked*, HOUS. CHRON., Feb. 8, 1995, at A13.

10. See *McMahon v. Iowa Dep’t of Transp., Motor Vehicle Div.*, 522 N.W.2d 51, 55 (Iowa 1994).

11. See Christi Parsons, *Ensuring State Vanity Licenses are AOKASIS; Lewd References Won’t Make Her Cut*, CHI. TRIB., July 18, 2000, at 6 (noting that in Illinois, many requests “are weeded out by computer, programmed to reject run-of-the-mill swear words and nasty-grams that have turned up before”); see also Toomey, *supra* note 6 (computer program blocks out 13,000 unacceptable tags).

and screening devices. They keep "bad word" and "no-no lists."¹² They read the requests backwards.¹³ State agencies have relied upon the Dictionary of Contemporary Slang,¹⁴ sociologists,¹⁵ clerks,¹⁶ a "word" committee,¹⁷ secret committees,¹⁸ the Tax Commission,¹⁹ and linguists.²⁰ The requirements for revocation of a license plate are similarly easy to satisfy. All it apparently takes is a complaint or two of offense to revoke the plate.²¹

12. See Lickteig, *supra* note 9; Mario F. Cattabiani, *Penndot's "No-No List" Keeps Plates Clean With 149 Pages of Rules*, MORNING CALL, Feb. 1, 2001, at A1.

13. See Parsons, *supra* note 11; Lynn Bartels, *Try If You Will, But You Won't Get That Tasteless License Plate*, DENV. ROCKY MTN. NEWS, Apr. 11, 1999, at 4A (noting that plates "REDRUM" requested but never issued because it spells "MURDER" when viewed in a mirror; "MADDOG" rejected for the same reason).

14. See *McMahon*, 522 N.W.2d at 53 (using the dictionary to prove that a plate used a sexually explicit and offensive phrase).

15. See Saul J. Singer, *Interpreting Language and License*, NAT'L L.J., Dec. 27, 1993, at 15 (noting that the California Department of Motor Vehicles had retained a sociologist at \$75 per hour to study pig Latin "in its never-ending quest to protect the public from being exposed to the horrors of 'bad language'").

16. See *Lewis v. Wilson*, 89 F. Supp. 2d 1082, 1085 (E.D. Mo. 2000) (reviewing Missouri statutory scheme whereby a clerk initially reviews the application for impermissible configurations).

One reviewer of Illinois requests, Karen Kinsel, recently commented on the best qualification for the job: "You take some people, they just don't have a dirty mind . . . Some of my staff doesn't. But I do, kind of. Even before I came to work here." Parsons, *supra* note 11, at 6. Another license plate reviewer opined: "There's free speech but there's a point to it. The point that it stops here is when we get blamed for that free speech." Todd Cooper, *PL8T CRAZ*, OMAHA WORLD-HERALD, Feb. 25, 2001, at 1e.

17. See *Pruitt v. Wilder*, 840 F. Supp. 414, 416 (E.D. Va. 1994).

18. See *Lacitis*, *supra* note 9 (noting that Washington State had a "Personalized Plate Review Committee," with a secret membership).

19. See *McBride v. Motor Vehicle Div. of Utah State Tax Comm'n*, 977 P.2d 467, 471 (Utah 1999). In *McBride*, the Utah Supreme Court held that if a term was offensive in the eyes of an objective, reasonable person, the Tax Commission, in charge of issuing the license plates, could not issue them in violation of its own rule. See *id.* See generally, Andre Douglas Pond Cummings, *Lions and Tigers and Bears, Oh My: Redskins and Braves and Indians, Oh Why: Ruminations on McBride v. Utah State Tax Commission*, *Political Correctness and the Reasonable Person*, 36 CAL. W. L. REV. 11, 12 (1999) (criticizing reasonable person standard in the context of race and gender issues and advocating a standard specific to a reasonable member of the target group).

20. See *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6, 8 (Cal. Ct. App. 1993).

21. Of course all it took was the lone complaint of the listener to George Carlin's monologue in *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978). See also *McMahon v. Iowa Dep't of Transp., Motor Vehicle Div.*, 522 N.W.2d 51, 56 (Iowa 1994) (noting that "[c]omplaints serve to tip the scale in favor of revocation of a questionable plate" after two complaints about an offensive plate triggered a revo-

Offense comes in many forms, including references to sex, alcohol, religion, body functions, and insults. For example, in Tennessee, the plate "FROG" was denied to a frog collector because the government officer in charge of screening the plate applications thought French people would find it insulting.²² Sexually explicit plates are generally forbidden, but sexually implicit plates are often rejected as well. For example, in one case, the car owner challenged the revocation of a plate that read a seemingly inoffensive and indiscernible "3MTA3." The problem was that the plate read "EATME" when viewed in a mirror.²³ Vermont rejected the plate "BABA" because "baba" in French is a reference to a young prostitute.²⁴ In another state, the plate "TP U BG" was pulled because it could be interpreted as "Fuck you" in court stenographer symbols. The same phrase, in pig Latin, was pulled from another creative plate holder.²⁵ Religious plates can also be found unacceptable. State agencies have denied plates that read "PRAY" and "GODCAN."²⁶ A retired wine dealer was refused the plates "WINE," "VINO," and "INVINO" because of the reference to alcohol.²⁷ Virginia ordered the revocation of the plate

cation letter); *Kahn*, 20 Cal. Rptr. 2d at 8 (finding that offensiveness to a small segment of the population is enough to revoke a plate where, during the seventeen years the owner held the plate, one court reporter found the plate offensive based on its meaning in stenographic symbols); Nancy Keates, *FAHGETITJACK! Is Often a Response in Vanity—Plate Fights*, WALL ST. J., Mar. 25, 1999, at 1 (noting that in Tennessee, there is a computer with a list of 2,000 words that will result in a plate request rejection and if an offensive plate slips by, all it takes is one call to the department head); *Parsons*, *supra* note 11; *Cf. Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1100 (D. Md. 1997) (noting that when the special organization plate was issued to the Sons of Confederate Veterans, the Maryland Vehicle Administration received "numerous complaints" about the "negative racial connotations").

22. See Keates, *supra* note 21.

23. See *McMahon*, 522 N.W.2d at 53 (upholding denial of plate against an equal protection challenge). A plate reading "XES" was rejected in Washington apparently because in a rear view mirror it reads "SEX." See *Lacitis*, *supra* note 9.

24. See *Lickteig*, *supra* note 9.

25. See *Singer*, *supra* note 15, at 15 ("UKFAUYA" plate revoked although owner claimed that it bore the acronym for a youth group that he counseled: "Unified Kids For A United Young America").

26. See Keates, *supra* note 21. References to alcohol, as well as police, sex, Jesus, and violence are also taboo in Massachusetts. See *RMV Reads Between the Lines When Drivers Appeal to Own Vanity*, BOSTON GLOBE, July 20, 2000, at B1.

27. See *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 532, 536 n.12 (Or. Ct. App. 2000).

“UPDWAZU” because a complaining citizen found it “vulgar.”²⁸

These examples provide insight into how a government speech bureaucracy might behave if the First Amendment allowed the government to censor our expression. The rejections often appear arbitrary. In Alaska, for example, “POOPOO” is fine, but “WEEWEE” is not, unless you spell it “OUI OUI.”²⁹ The plates “JERK,” “GOON,” and “CREEP,” seem acceptable as well, but do not try to get a “DORK” plate—the computer found that it had an unacceptable meaning.³⁰

Sometimes the subjective meaning controls over the objective meaning. Apparently, you can be somewhat offensive to those around you if you can explain why the plate has some personal meaning to you. For example, “CME2P,” was allowed because a urologist requested it. He had a “legitimate” reason, in the opinion of the DMV, to display it, although it might offend an onlooker who had no reason to know the personal history of the car owner.³¹ So too, the request for the plate “HOOKER” was rejected, but then granted on appeal because it was the owner’s last name.³²

Moreover, not only does “offensiveness” prove to be an infinitely expandable concept, it can easily and conveniently be used to suppress political speech.³³ For example, consider one plate request that was denied that contains the essence of political speech—criticism of the government. A Virginia agency denied a plate containing the concise sentiment that “GVT SUX,” although the same agency agreed to issue a plate that

28. See Mark Holmberg, *Owners FGHTBCK; Pair Appeal Decision to Yank Car Tag After 12 Years*, RICH. TIMES-DISPATCH, Feb. 20, 2000, at B1.

29. See Toomey, *supra* note 6.

30. See *id.*

31. See Jennifer Warren, *California and the West DMV Squad Has Last Word on Vanity Plate No-Nos*, L.A. TIMES, Dec. 27, 2000, at A3. The same censor rejected “BRNKLR” as a “no brainer” because of the anti-social connotations of “born killer.” See *id.* One wonders, however, if an exterminator might lay “legitimate” claim to that plate. A counselor in the field of advanced placement education was allowed to keep a “IM4APE” despite its apparent advocacy of rape to those unaware of the owner’s occupation. See Judy Fahys, *State Tag Team Tries to Keep It Tasteful*, SALT LAKE TRIB., Oct. 17, 1999, at A1.

32. See Heinlein, *supra* note 6.

33. As the Supreme Court has noted, there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964).

said "WNTRSUX."³⁴ License plate requests decrying Utah's 2002 Olympic games—"2002NOT"—were initially rejected although plates reading "OLYMPX" and "5RNGS" were gladly issued.³⁵ Michigan revoked the plate "RU486," when someone spotted and was offended by the reference to the politically controversial abortion pill.³⁶ The state, however, let stand a plate proclaiming the car owner to be "PROLIFE."³⁷ Ohio has expanded the meaning of "hate speech" to include almost any use of the word "hate," on such plates as "HATEGM" and "NUKEGM" that were requested during a General Motors Corporation strike, although "H8TWRK" was allowed.³⁸ Personal animosity to a state is unacceptable, however, as "H8MICH" has been refused.³⁹ A lawyer in New Hampshire who battles the state's Division of Children, Youth, and Family on behalf of clients lost her "H8DCYF" plate.⁴⁰

This article analyzes this censorship and concludes that these laws and regulations abridge speech in violation of the First Amendment. Part I of this article gives a brief road map of the First Amendment issues that have arisen in the case of vanity plate denials. Part II discusses whether the plates qualify as protected speech, or whether their function as vehicle identification marks overrides the speech elements. Part III explores whether the government is abridging speech by regulating vanity plates for "offensiveness" or whether it is acting as a speaker with full control over its speech. Part IV discusses whether more lenient rules applicable to government control of its own property apply. Part V evaluates the governmental interests that justify regulation of the plates' content under either strict scrutiny or the more lenient rules applicable to government control of its property. Although beyond the scope of this article, part VI briefly discusses how

34. See Singer, *supra* note 15, at 15. In a related development, Illinois refused the plate request "WORKSUX." See Parsons, *supra* note 11.

35. See *License Revoked, Motorist Honked Off About Vanity Plate*, COLUMBUS DISPATCH, Jan. 26, 1999, at 8A.

36. See Boyle, *supra* note 9.

37. See *id.*

38. See *Ohio Puts Brakes on H8-ful License Plates*, COLUMBUS DISPATCH, May 17, 1999, at 1A.

39. See *id.*

40. See Alice Giordano, *N.H. 'Hate Plate' Challenges License to Free Speech*" BOSTON GLOBE, Dec. 19, 1999, at B16.

the First Amendment analysis is further complicated by the overbreadth and vagueness doctrines.

There have been a few lower court cases considering the vanity plate issue and these cases are discussed throughout this article.⁴¹ In considering the problem, the lower courts have taken a variety of paths to get to their destinations. For example, some courts have refused to see First Amendment implications in the rejections and revocations.⁴² Another court has found that the car owner's vanity plate requests are speech, but that the speech is the government's and not the car owner's.⁴³ Other courts, finding that the government is regulating private speech, have employed rules relating to government regulation of speech on government property and have found that the denials violate the First Amendment because they are viewpoint-discriminatory.⁴⁴

Not only are the lower courts in conflict, but the Supreme Court also has not maintained clear guidelines for deciding the issue. In the years since Cohen's jacket became a focal point of free speech principles, the Supreme Court has decided several cases that reinforce protection for offensive speech, for example, sustaining the right to burn the United States flag and to send indecent material into cyberspace.⁴⁵ At other times, how-

41. See generally, 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 58 (1997) (concluding that states could refuse vanity plate requests that are offensive).

42. The California Court of Appeals in *Kahn* claimed that "[the Vehicle Code section] does not proscribe conduct which clearly is intended to communicate an idea, viewpoint or opinion; it simply limits to a slight degree the combinations of letters and numbers one may choose as a vehicle identification symbol." *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6, 11 (Cal. Ct. App. 1993). See also *Katz v. Dep't of Motor Vehicles*, 108 Cal. Rptr. 424, 428 (Cal. Ct. App. 1973) (finding First Amendment considerations in Department of Motor Vehicles denial of "EZ LAY" license plate "minimal, if present at all").

One court considered only an equal protection challenge and used rational relationship review to validate the Iowa Department of Motor Vehicles action in revoking a plate. See *McMahon v. Iowa Dep't of Transp., Motor Vehicle Div.*, 522 N.W.2d 51, 57 (Iowa 1994).

43. See *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 562-63 (Or. Ct. App. 2000).

44. See *Lewis v. Wilson*, 89 F. Supp. 2d 1082, 1089 (E.D. Mo. 2000); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1105 (D. Md. 1997); *Pruitt v. Wilder*, 840 F. Supp. 414, 417 (E.D. Va. 1994).

45. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *FCC v. League*

ever, it has created questionable doctrines that allow room for manipulation of the principles. It has, for example, created a “secondary effects” doctrine to allow government regulation of offensive adult entertainment,⁴⁶ sustained a federal statute that allows the federal government to consider “decency” when granting arts funding,⁴⁷ and expanded the rights of potentially offended listeners at the expense of speakers in a public forum.⁴⁸

In resolving the First Amendment limits on government control of vanity plates, the courts first must resolve a number of key subsidiary issues that depend on interpretation of the Supreme Court’s sometimes conflicting precedents. This article discusses the decision points that the courts face and recommends that the courts choose to reinforce free speech principles that keep the government from engaging in censorship of speech. Although the speakers in these cases do not always take the high road, the Court should. Courts should resist the temptation to allow the government to shut down speech that is offensive because offensiveness is a concept that cannot be easily contained. Moreover, each expansion of government power to censor in a particular area can be used to leverage more censorship power in other areas.

This article concludes that governments should be wary of turning down specific requests for vanity plates both because they qualify as individual, not governmental, speech, and because the government’s regulations appear to be content-based abridgements. Even under the more lenient analysis governing

of Women Voters, 468 U.S. 364, 386 n.16 (1984) (holding that taxpayer opposition to funding cannot “be invoked to justify a congressional decision to suppress speech”). *But see* FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (allowing some government regulation of offensive language under the intermediate scrutiny standard applicable to radio and television broadcasting, although noting “the fact that society may find speech offensive is not a sufficient reason for suppressing it”).

46. *See* City of Erie v. Pap’s A.M., 529 U.S. 277, 291 (2000) (finding that an “ordinance prohibiting public nudity [was] aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments” and not at suppressing the erotic message conveyed by nude dancing); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47, 54 (1986) (holding that zoning of adult entertainment establishments was not content-based because it was aimed at alleged “secondary effects” of the businesses, i.e. crime, prostitution, and other “quality of life” issues).

47. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998).

48. *See* Hill v. Colorado, 120 S.Ct. 2480, 2497 (2000).

nonpublic fora, it is difficult for the government to avoid engaging in forbidden viewpoint discrimination when denying particular requests for plates.

I. WHEN THE GOVERNMENT REGULATES SPEECH—THE FIRST AMENDMENT ROADMAP

Are these state licensing systems constitutional? The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”⁴⁹ Not only is Congress barred from making these laws, but the First Amendment is also applied to the states by incorporation into the due process clause of the Fourteenth Amendment.⁵⁰ As earlier noted, the First Amendment protects against government censorship of speech, including the appropriate choice of communicative words or acts.⁵¹ Several fears emerge if the government is allowed to regulate the offensiveness of speech: (1) the government could squelch unpopular ideas under the guise of the czar of good manners;⁵² (2) the concept of offensiveness would be difficult to limit;⁵³ and (3) the precise words of communication

49. U.S. CONST. amend. I.

50. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

51. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (“But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.”).

52. See *Cohen v. California*, 403 U.S. 15, 25 (1971).

53. See *id.* at 25 (“Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (“If it were possible by laying down a principled standard to separate the one [allegedly offensive cartoon parody] from the other [past political cartoons], public discourse would probably suffer little or no harm. But we doubt that there is any such standard and we are quite sure that the pejorative description ‘outrageous’ does not supply one.”); see also *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (rejecting exception to First Amendment doctrine for flag burning based on protection of a national symbol because “symbol” exception had “no discernible or defensible boundaries”).

The Supreme Court recently noted that allowing students to opt out of student activity fees to the extent that the fee went to student activities that a particular student found “offensive” would introduce an unworkable principle into the system. See *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 232 (2000). In *Southworth* the Court held that:

It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal

convey ideas and emotions that are often not interchangeable and the communicative impact of language would be lost within the regulations.⁵⁴ All these fears are well illustrated in the case of vanity plates.

In determining whether the government has abridged freedom of speech in a particular case, however, the courts have devised interpretive rules, exceptions to those rules, and exceptions to those exceptions. As a starting point, when a First Amendment challenge is brought, a court must determine: (1) whether speech is involved;⁵⁵ (2) whether the government is abridging speech;⁵⁶ (3) what level of scrutiny, if any, should be applicable to the government's action;⁵⁷ and (4) whether the government's interests meet that level of scrutiny.

A key precept of the First Amendment, and one illustrated by the *Cohen* case, is that the government cannot regulate speech based on its content.⁵⁸ The Supreme Court has stated that "above all else, the First Amendment means that government has no power to restrict expression because of its mes-

beliefs. If the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support. . . . The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective.").

Id.

54. See *Cohen*, 403 U.S. at 26.

55. Expressive conduct, such as burning the flag to protest United States military policy, is speech. See *Texas v. Johnson*, 491 U.S. 397, 400 (1989); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (wearing an armband to protest United States involvement in Vietnam War is speech). Nude dancing can be expressive conduct, although some members of the Court believe "that it falls only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

56. When the government is subsidizing private parties to speak the government's message, it does not abridge speech by not allowing the parties to convey their own messages on the government's dime. See *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (prohibiting use of federal money to discuss abortion).

57. There are different levels of scrutiny for different types of government restrictions, or for different places where government restrictions operate. These various rules are discussed throughout this article.

58. See *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

sage, its ideas, its subject matter, or its content."⁵⁹ Even where the speech is considered of such low value that government regulation of it is justifiable, as in the case of fighting words and obscenity, the Supreme Court has struck down restrictions that regulate these categories of speech in a content-based manner.⁶⁰ Generally, content-based regulations are subject to strict scrutiny, requiring a compelling government justification and means narrowly tailored to prevent the harm.⁶¹ Although the government has met this standard on occasion,⁶² it is generally a difficult standard to meet because even if the government can demonstrate an interest that is properly described as "compelling," the means used to achieve that interest cannot be over or under inclusive.⁶³

Although strict scrutiny may be the general rule when the government engages in content-based abridgement of speech, the law is far more complex when one delves into specific situations. In fact, the specific exceptions can appear to overwhelm the general rule. Strict scrutiny may not be applicable to content-based regulations where courts determine that: (1) no speech is involved; (2) a category of speech is involved that receives less protection, such as obscenity, fighting words, incitement to illegal activity, commercial or tortious speech;⁶⁴ (3)

59. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

60. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (holding that government prohibition of only certain types of fighting words was a content-based regulation and subject to strict scrutiny).

61. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Boos v. Barry*, 485 U.S. 312 (1988).

62. *See Burson v. Freeman*, 504 U.S. 191 (1992).

63. For example, while the protection of children from "indecent" speech may be considered compelling in some circumstances, the government cannot achieve its interest by blanket or broad restrictions that make it too difficult for adults to gain access to the speech. Thus when the government wished to restrict access of children to "dial-a-porn" that was accessible to anyone capable of making a long distance call, the Supreme Court held that the government had to adopt more narrowly structured methods than a complete ban. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

64. *See Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that government may regulate "fighting words," which are personally abusive insults that, when addressed to the ordinary person, are inherently likely to provoke violent reaction); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (noting that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557

the only speech involved is the government's speech;⁶⁵ or (4) a special circumstance merits more lenient review. As to the latter category, special circumstances can include situations involving the government's control over its: (1) property;⁶⁶ (2) employees;⁶⁷ or (3) schools.⁶⁸ In the case of government property, for example, content-based regulations on certain types of government property may be fine; it is only viewpoint-based abridgments that are unconstitutional. Viewpoint discrimination occurs when the government targets "the specific motivating ideology or the opinion or perspective of the speaker."⁶⁹ Viewpoint-based discrimination is considered more pernicious than content discrimination because the government aims at "particular views taken by speakers on a subject"⁷⁰ and "may effectively drive certain ideas or viewpoints from the marketplace."⁷¹ Denying the request for the plate "2002NOT," which signifies disagreement with holding the 2002 Winter Olympics in Utah, while granting the request "OLYMPX" is an example of viewpoint discrimination.⁷²

In the case of content-neutral regulations, for example, classic time, place, and manner restrictions, the Supreme

(1980) (holding regulation of commercial speech subject to an intermediate standard of review); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding defamatory speech entitled to First Amendment protection and defining circumstances when it may be actionable).

65. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

66. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.").

67. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

68. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73 (1988).

69. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.") (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

70. *Id.*

71. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

72. See discussion *supra* note 35.

Court uses a more lenient standard of intermediate scrutiny.⁷³ Thus a ban on littering, although it has an impact on some speech activities such as passing out leaflets, would receive less exacting scrutiny because the government is regulating the manner, not the content of the message.

Cohen is, in form, a free speech case in which the actor used his own property (his jacket) to state his message, the actor did not have a desire to access government property (although he was on government property at the time—the courthouse corridor), and there was no claim to an equal subsidy for spreading his message.⁷⁴ Government regulation of offensive speech in that context was a content-based regulation. Therefore, the strict scrutiny rule was applicable, and not surprisingly, the state law failed the strict scrutiny test.

In the case of vanity plates, the analysis is more complicated because the court must decide: (1) whether the plate request is speech; (2) if speech, whether the speech is the car owner's or the government's; (3) if the speech is occurring in a public, limited public, or nonpublic forum; and (4) what the appropriate level of scrutiny is to apply, probably requiring a determination as to whether the restriction is content-based and viewpoint-neutral or content-based and viewpoint-based. These issues are discussed in the remainder of this article.

II. IS A VANITY PLATE SPEECH OR MERELY A VEHICLE IDENTIFICATION MARK?

At least one court has attempted to claim that vanity plates do not involve speech.⁷⁵ The more rational argument, however, is that the letter and number combinations are chosen by car owners to convey a message. They generally succeed in conveying that message, occasionally much to the dismay of the government. There may, of course, be plates where no message is intended, but the government generally does not engage in censorship of those requests because there is no reason to censor plates that do not have any discernible message.

73. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

74. See *Cohen v. California*, 403 U.S. 15 (1971).

75. See *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993).

The plates also serve an identification function, but that function does not make their expressive function irrelevant.

A. *Speech?*

To receive First Amendment protection, speech must be involved. The plates are pure speech in the sense that they use language, rather than expressive conduct (like burning the flag), to convey the message.⁷⁶ They are not necessarily pictorial or symbolic, although symbols can be used.⁷⁷ Vanity plates generally would not come within the major categorical exceptions of fighting words, incitement to immediate violence, or obscenity—those exceptions that substantially limit First Amendment protection because of their “low value” as speech.⁷⁸ Nor would they generally fall under the commercial speech doctrine, though they could under certain circumstances, because they do not generally propose a commercial transaction within the meaning of that doctrine.⁷⁹ Rather, vanity plates are a means of self-expression and they are often intended to convey a message—a message often likely to be understood by other drivers and pedestrians, which is why the government program is so popular.⁸⁰

76. If viewed as expressive conduct (such as burning the flag or putting a peace symbol on a flag), however, the expressions on the plate should still be considered protected speech. In *Spence v. Washington*, the Supreme Court stated that the test for whether expressive conduct is speech is whether the actor has “[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.” *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

77. For example, the number “8” can be inserted to stand for the sound “ate,” as in “IMGR8.”

78. See *supra* note 64. Even within these categories, however, content- and viewpoint-based restrictions might still require strict scrutiny. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (applying strict scrutiny even to categories of speech that were viewed as exceptions to full First Amendment coverage such as obscenity, fighting words, and defamation).

79. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

80. See *Spence*, 418 U.S. at 405 (noting that speech encompasses expressive conduct but there must exist an intent to convey a message and a likelihood that the message will be understood). Of course, some drivers may see the plates as merely a means of self-expression and arguably, that “self expression” might not be protected under the First Amendment. See, e.g., *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1305 n.4 (8th Cir. 1997) (declining to extend First Amendment protection to student’s wearing of a decorative tattoo that she wore as a “form of self expression” because it failed to meet the *Spence* test). But

1. Sending a Message

The Supreme Court has already acknowledged that language on license plates is speech. In *Wooley v. Maynard*,⁸¹ the Supreme Court found New Hampshire's requirement that car owners carry the state's motto "Live Free or Die" on their license plate constituted a violation of the First Amendment. The harm in *Wooley*, according to the Supreme Court, came from car owners being forced to display what they did not believe.⁸² If the license plate motto "Live Free or Die" was not speech, and instead was just some identifying mark, then the First Amendment "compelled speech" claim would have failed. The Supreme Court implicitly rejected the notion, however, that the state had an interest in using the phrase as a vehicle identification mark and frankly acknowledged its communicative role.⁸³

In many vanity plate cases, the plate owner intends to convey a message, whether that message is that the plate owner is a wine connoisseur, a frog lover, a racist, pro-life, or anti-Olympics. Plates such as "IMADOC," "IMAFED," and "TOEBIZ," for example, all convey the car owners' professions.⁸⁴ That the message is, by necessity, pithy, does not make

as the court noted in *Lewis v. Wilson*, 89 F. Supp. 2d 1082 (E.D. Mo. 2000), it is unlikely that the states would be raising so much revenue if motorists did not think they were conveying some message.

81. 430 U.S. 705 (1977).

82. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The Court stated: Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. (quoting *Boards of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); see also Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 473-87 (1995).

83. See *Wooley*, 430 U.S. at 717 ("The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism.").

84. The owners were a doctor, a government worker, and a podiatrist. The manager of the special plate division for the Massachusetts Registry of Motor Vehicles says, however, that she has "yet to meet a proctologist with an acceptable

a difference.⁸⁵ Cohen did not mince words in his discourse, nor did Margaret Gilleo when she posted her 8.5 inch by 11 inch “For Peace in the Gulf” sign in her window at home.⁸⁶ Both expressions received full First Amendment protection in the Supreme Court. Self-expression is at the heart of what the First Amendment is intended to protect.⁸⁷

The speaker generally intends to convey a message to some portion of the public, rather than, for example, keeping his frog loving ways to himself. The plate is on the back of the car—placement that shows the car owner wants the public to see what he or she is saying. Indeed, it is hard to argue that most vanity plates do not convey a message when that is precisely why the government is trying to limit them; the plates are being restricted because they convey a message offensive to the reader.

2. Understanding the Message

There is no requirement that everyone understands the message for it to qualify as speech or even that the message be easily understood, as long as some understand the message.⁸⁸

proposal.” *RMV Reads Between the Lines When Drivers Appeal to Own Vanity*, BOSTON GLOBE, July 20, 2000, at B1. But a pitcher (“3UP3DN”), a doctor (“CKHRTBT”), and an emergency room nurse (“CHAOSRN”) can all announce their professions publicly. See Todd Cooper, *supra* note 16.

85. A similar issue arises in the context of Adopt-A-Highway programs where the organizations name is placed on a sign on the roadway. Some courts recognize the name on the road as a form of speech, an attempt to convey their environmental consciousness, as well as get some free advertising for their organization. See *Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep’t*, 807 F. Supp. 1427, 1435–36 (W.D. Ark. 1992). One court concluded that the intended message was one of intimidation of the residents of a public housing complex. See *Texas v. Knights of Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995).

86. See *City of LaDue v. Gilleo*, 512 U.S. 43 (1994) (holding that ordinance denying right of property owner to post sign on property failed even content-neutral standard because there were not ample alternative means of communication).

87. See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 817 (2000) (“It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.”); see also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

88. There may be plates where it is difficult to discern what the exact message is because the message is highly personal. For example, a court stenographer in one vanity plate case claimed that the stenographic symbolism “TP U BG” represented the phrase “I think I can” from the children’s story THE LITTLE TRAIN THAT COULD, rather than the expletive that another court stenographer inferred

For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,⁸⁹ the parade organizers were allowed to exclude a group that wanted to march under a simple banner because the banner would have interfered with the parade organizer's associational rights:⁹⁰

[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.⁹¹

Although the *Hurley* case dealt with the First Amendment right of association, it clarified that the right of expression guaranteed by the First Amendment was not dependent upon the parade organizers, whose choice of participants was eclectic rather than thematic, conveying a single coherent message

from the use of the same symbols. See *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993). Foreign language messages may be difficult to discern as well, sometimes requiring motor vehicle departments to employ interpreters.

Even cryptography, or secret writing, has qualified for First Amendment protection in one federal circuit court of appeals. In other words, a "source code"—only understood by those trained in programming but meant to convey complex scientific ideas—was entitled to First Amendment protection when the government required mathematicians to obtain a prepublication license. See *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000).

89. 515 U.S. 557 (1995).

90. See *id.* at 570 ("In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.' GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.").

91. *Id.* at 574-75.

easily understood by onlookers.⁹² Moreover, if GLIB's simple banner can convey a message celebrating the members' sexual identities, surely many of the similarly concise expressions on the plates must be viewed as speech as well.⁹³

B. Merely a Vehicle Identification Mark?

The theory that the vanity plates are speech protected by the First Amendment is not without critics.⁹⁴ At least one court has claimed that the plate letter and number combinations are functional rather than expressive.⁹⁵ The comparison would be to telephone numbers that serve to connect you to another party, but not to communicate any message.⁹⁶ In other words, license plates serve a vehicle identification function only, and therefore are only incidentally speech.

In *Kahn v. Department of Motor Vehicles*,⁹⁷ the California Court of Appeals found that the California DMV had a right to freely regulate the vanity license plate program. Applying an *O'Brien* analysis, the Court stated that the state's prohibition of plates containing "any combination of letters or numbers, or both, which the department determines carries connotations offensive to good taste and decency" was not a content-based

92. See *id.* at 574 ("Rather like a composer, the [parade organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the [organizer's] eyes comports with what merits celebration on that day.").

93. Of course, the banner in *Hurley* must be considered in the context of a parade with marchers. The license plate "GLIB," without the accompanying marchers or further explanation, might signify a car owner who likes to talk.

94. See Jack Guggenheim & Jed M. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 580 (2000) ("Vanity plates, on the other hand, are only a simple and limited manipulation of letters and numbers. As such, they convey speech only implicitly. . . . Vanity plates are therefore not automatically speech, but should be deemed speech only when they are clear articulations.").

The authors come to the odd conclusion that a vanity plate may not be speech, but that an organizational logo (like the Confederate Flag) is speech. The better conclusion is that both are speech, but on the surface a logo is one step removed from "pure speech." In any event, if the state is rejecting a plate request for offensiveness, it probably is a communicative plate.

95. See *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993).

96. Of course, 1-800-FLOWERS would be communicative as well.

97. 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993).

suppression of free expression.⁹⁸ Rather, in the Court's opinion, "[the Vehicle Code section] does not proscribe conduct which clearly is intended to communicate an idea, viewpoint or opinion; it simply limits to a slight degree the combinations of letters and numbers one may choose as a vehicle identification symbol."⁹⁹

The *Kahn* court's reasoning is weak. When the government generates random symbols and letters for license plates (as it does for any car owner too cheap, too unexpressive, or too uninterested to pay the extra fee) then the resulting gibberish of letters and symbols would be a mere vehicle identification mark that conveyed no message. Nevertheless, when the government allows the owner to choose the combination—because the owner wants a particular combination to say "NEWMOM" or "BADDRVR"—then the program has gone beyond mere identification symbols. As will be discussed below, the intent of the government is to open up the plates to combinations that convey messages.¹⁰⁰ It is doubtful that many vanity plates contain pure gibberish. They may sometimes be difficult to figure out, but the combination of letters and symbols would rarely be without rhyme or reason to the car owner particularly and the public generally. In fact, it is hard to fathom the case in which the vanity license plate is gibberish, but the government nonetheless rejects the request or revokes the plate because it is simultaneously "offensive" in some way. The situations seem mutually exclusive.

Moreover, the idea that the California statute is content-neutral is weak because, contrary to the court's argument, the statute plainly proscribes a car owner from choosing a particular expression for placement on the plate because it is offensive. The car owner's choice is rejected because of its content. Although the California Court of Appeals in *Kahn* viewed that as a "slight degree" of intrusion, the government is proscribing speech based on content.¹⁰¹ The Supreme Court has consistently rejected the notion that the government can require compliance with good manners or civility, a principle most pronounced in *Cohen* where it was certainly possible to

98. *Id.* at 9–12 (applying *United States v. O'Brien*, 391 U.S. 367 (1968)).

99. *Id.* at 11.

100. See *infra* notes 128–129 and accompanying text.

101. See *Kahn*, 20 Cal. Rptr. 2d at 6.

express opposition to the draft in any number of more cordial ways than Paul Cohen chose.¹⁰²

The Second Circuit Court of Appeals recognized this principle when it held that Internet domain names are speech.¹⁰³ The district court had held that the Internet alphanumeric addresses were more in the nature of telephone numbers or source identifiers rather than communicative messages.¹⁰⁴ Although noting that every human activity contains a kernel of expression, the Second Circuit held that domain names could have both a functional and expressive element. Domain names, the court held, can range “from the truly mundane street address or telephone number-like identification of the specific business that is operating the website, to commercial speech and even core political speech squarely implicating First Amendment concerns.”¹⁰⁵

Sequentially generated, or even randomly generated, government-issued numbers and letters should not qualify as speech because they serve only an identification function. When the space is sold for expressive purposes to car owners, however, the government should not be able to deny that the expressive function exists or claim that its existence is somehow superseded by the identification function.¹⁰⁶

102. One could as easily say that whenever the government does not like what you say and re-channels the communication, it is only a “slight degree” of intrusion. For example, one can express his opposition to United States military policy in ways other than burning the flag. Nevertheless, it has never been acceptable for government to restrict speech under the guise of enforcing good manners. *See generally* *Texas v. Johnson*, 491 U.S. 397 (1989).

The Supreme Court has occasionally taken its own questionable liberties with the concept of content neutrality. For example, it found regulations aimed at adult entertainment establishments to be aimed at the “secondary effects” of crime, prostitution, and other related activities, rather than the sexually explicit speech at those establishments. *See City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986).

103. *See Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000).

104. *See id.* at 580 (citing *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F.Supp.2d 389, 407–08 (S.D.N.Y. 1999)).

105. *Id.* at 586. *See Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000) (“Likewise, computer source code, though unintelligible to many, is the preferred method of communication among computer programmers.”).

106. In dicta, the Second Circuit noted, “for example, automobile license plates have a functional purpose, but that function can be served as well by vanity plates, which in a small way can also be expressive.” *Name.Space, Inc.*, 202 F.3d at 586.

III. ARE THE REGULATIONS AN ABRIDGMENT?

If messages on vanity plates qualify as speech, another question arises—whose speech is it? The Supreme Court differentiates between the role of the government in funding government speech and the role of the government as a regulator or subsidizer of private speech. If found to be government speech, then the government can abridge its own speech without any First Amendment constraints. Here, however, the government is inviting private speakers to buy space on the license plates to convey the speaker's message, not the government's message. The government is the facilitator of private speech, in the same manner as when it provides a park as a venue for protests or art exhibits. Nevertheless, the protests are not government speech, nor is the art government art.

A. *The Government as Speaker, Not Regulator*

With regard to the government's own speech, the government may fund it in a viewpoint-based way.¹⁰⁷ For example, in the license plate arena, the government is the speaker when it puts its own motto on the plate—the most famous example being New Hampshire's "Live Free or Die."¹⁰⁸ New Hampshire was not required to provide plates with other mottoes more suitable to its citizens, although it was required to allow an opt-out for citizens who objected to being mobile billboards for this message.¹⁰⁹ More recently, the District of Columbia denounced its political plight—no voting representative in Congress—with the motto "Taxation Without Representation" on its license plates.¹¹⁰

107. See *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Southworth*, the Court noted:

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.

Board. of Regents of Univ. of Wis. v. *Southworth*, 529 U.S. 217, 229 (2000).

108. See *Wooley v. Maynard*, 430 U.S. 705 (1976).

109. See *id.*

110. See Sewell Chan, *District Puts Political Message on the Road*, WASH. POST, Nov. 5, 2000, at C1.

The Supreme Court has held that the government can limit speech without any First Amendment constraints when it gives money to private speakers to spread the government's own message. In *Rust v. Sullivan*,¹¹¹ the Supreme Court held that because the government funded a family planning clinic, it could constitutionally refuse to allow the government-funded clinic employees to speak about abortion while working for the federally-funded program. They could speak about abortion on their own dime, but not on the government's dime.¹¹² Thus, no First Amendment issue was implicated because only government speech was involved.

The Court in *Rust* established the rule that when the government is speaking, it is "entitled to say what it wishes."¹¹³ If the government is funding persons to engage in proselytizing on behalf of the government's interests, the government apparently has no viewpoint limitation whatsoever and has no duty to fund other points of view. Thus, the government may commission billboards that discourage smoking or encourage healthy eating habits or even the consumption of marginally unhealthy foods.¹¹⁴ Nor has the government any duty to fund an individual's exercise of a constitutional right to speak.¹¹⁵

111. 500 U.S. at 180 (holding that regulations barred federally funded family planning clinics from activities that "encourage, promote or advocate abortion as a method of family planning").

112. *See id.* at 193. The Court stated:

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. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id.

113. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (holding that when government speaks through third parties, content generally left to government's editorial discretion).

114. *See Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997) (addressing government promotion of California nectarines, plums and peaches); *Cal-Almond Inc. v. United States Dep't of Agric.*, 192 F.3d 1272 (9th Cir. 1999) (government promotion of almond industry). *See generally*, *Board of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.").

115. *See Rust*, 500 U.S. at 192-94.

Part of the reasoning behind *Rust v. Sullivan* is that the government's failure to fund speech is not coercive, as would be, for example, a ban on criticism of abortion. The government is not telling an individual what to say or not say, and the speakers are free to express themselves without the government subsidy. Of course, failing to provide a subsidy can arguably have the same effect as penalizing the expression, but the Court has not been willing to recognize this similarity.¹¹⁶

The *Rust* principle has at least one exception: it is not applicable in a "traditional sphere of free expression."¹¹⁷ Thus, one could extrapolate from *Rust* that the government might not have any duty to subsidize expression by providing its traditional public fora for expressive purposes.¹¹⁸ Parks, streets, universities, and sidewalks are used by members of the public for expressive activities and, by providing the forum, the government is, in effect, subsidizing the speech. The theory would be that the government had no duty to fund particular speech venues and could close off topics and viewpoints and demand that private speakers find their own avenues to express their opinions. The Supreme Court in *Rust* closed off this argument because those fora and universities were "traditional sphere[s] of free expression . . . fundamental to the functioning of our society."¹¹⁹ Thus, if the government operates a traditional public forum or creates a limited public forum by voluntarily opening up a venue for speech activities,¹²⁰ the government does not have free reign to regulate the speech of private speakers.

116. The Court has also adopted this approach in the area of fundamental rights in the equal protection context. Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (recognizing limited constitutional right to make decision as to abortion), with *Maher v. Roe*, 432 U.S. 464, 477-80 (1977) (finding no duty for the government to fund abortions), and *Harris v. McRae*, 448 U.S. 297, 326-27 (1980).

117. *Rust*, 500 U.S. at 200.

118. See *infra* Part IV.A.I.

119. *Rust*, 500 U.S. at 200.

120. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding when school facilities were opened up after hours for community activities, government could not exclude certain viewpoints); discussion *infra* Part IV.A.

B. The Government Is Not Speaking Through Vanity Plates

The Supreme Court has subsequently characterized *Rust* as a case in which “the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program.”¹²¹ When government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes.¹²² One possible theory of vanity license plates is that the government is the speaker and the car owners are only the government’s mouthpieces for spreading the government message—a vehicle identification system.¹²³ Although the government cedes some measure of control over the message to the car owner, it is allowing the owner only to spread the government’s message—a combination of symbols and letters that serve as a vehicle identification. By defining government speech narrowly at the outset—a combination of non-offensive letters and numbers—the government claims to be licensing speakers to simply choose some combination of letters and symbols for vehicle identification. But as the Supreme Court recently noted, this type of definitional game is circular: “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”¹²⁴

If the government can successfully establish this theory and claim it is funding its own speech, it can argue that the First Amendment is inapplicable because no “abridgement” oc-

121. *Rosenberger*, 515 U.S. at 833.

122. *See id.* The Court noted:

We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 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.

Id. (citations omitted).

123. *See Katz v. Dep’t of Motor Vehicles*, 108 Cal. Rptr. 424, 427–28 (Cal. Ct. App. 1973) (“While the licensee may have both possession and title of the license plates, the plates are also an official mechanism of the state performing the vital governmental function of vehicle identification.”).

124. *Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043 (2001).

curs.¹²⁵ The Oregon Court of Appeals, in interpreting a state constitutional free speech provision, found vanity plates were government speech under the fiction that the state is only giving the car owner:

the opportunity to suggest to the state what, if any, message *it* will convey on the license plates for their vehicles, the opportunity to propose a message does not change the fact that the plates constitute a state communication for a state purpose, and under the circumstances of this case, the state gets to decide what it will communicate in doing that.¹²⁶

The problem with labeling license plates as government speech, however, is that the government uses the symbols for vehicle identification only and not to spread a message. Therefore, the *Rust* theory is inapplicable in this context. The vanity plates convey the car owner's message; that is why the program is popular and makes money for the government. The government cannot argue that the messages on the plates represent the government's message when no plausible connection exists among the myriad of messages that vanity plates send. The government wants only a unique set of symbols and letters (that do not offend anyone). Therefore, the government is not conveying any message nor is anyone likely to understand that the government is conveying any message.¹²⁷

It becomes even more difficult to find *Rust* applicable in these cases because the government is not even funding the

125. If one buys into this questionable argument, then the government is not exacting a penalty because it does not ultimately deny a license plate, only a combination of letters and numbers on a particular plate. It is not the same as denying a job or a tax benefit. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (finding penalty in the government's denial of public funds to public broadcasters who engage in "editorializing"); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding the denial of double tax benefits to organizations that engage in lobbying finding that the government simply declines to extend a subsidy to the activity of lobbying); *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that a state cannot withhold a tax benefit for failure to swear to a loyalty oath).

126. *Higgins v. Driver and Motor Vehicle Servs. Branch*, 13 P.3d 531, 534 (Or. Ct. App. 2000).

127. See also *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

speech; it is charging the car owner. It is in fact speech paid for by the car owner.¹²⁸ It is implausible to claim that the government is not opening up the plates for individual expression. Rather, the reality is that the government is opening the plates up for private expression, but it does not want to suffer the constitutional consequences of its action.

As discussed below, if the government is funding speech and creating a limited public forum—opening up a forum for expressive activities—the government has an obligation to be viewpoint-neutral in its selection of speakers. If the government operates a mail system and opens it up for general receipt and delivery of mail, an expressive activity, the government cannot censor “offensive” mail just because the government is running the mail system.¹²⁹ The government is acting as the regulator of the private speech, not the proponent, and is subject to rules that are more stringent.

IV. THE GOVERNMENT AS PROPERTY OWNER

Special rules apply that grant the government more authority to regulate when operating in its proprietary, rather than its sovereign, capacity.¹³⁰ When it is managing its own

128. The area of “school-sponsored speech” is one where the Supreme Court has recognized diverse individual expression, but allowed the government to maintain almost absolute control over content and viewpoint. In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988), the Supreme Court found that educators could regulate school-sponsored speech (in that case a newspaper used to teach the students journalism skills) as long as their actions were reasonably related to a legitimate pedagogical interest. The curriculum, at least in high school and below, is government speech, or the equivalent. Note that a different standard governs student speech outside the curriculum. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

The government’s control over school curriculum speech appears to be the same as government speech in *Rust*. Thus, although the students wrote various stories on a variety of topics, the Supreme Court ultimately found that the government had not opened up a public forum and retained even viewpoint control over the student speech. The basis for giving the government this much control over speech may be uniquely applicable to the government’s function in running schools. In addition, in these cases, the government does have a message that it wants to spread through the curriculum, a fact recognized in *Hazelwood*. See discussion *infra* notes 268–275 and accompanying text.

129. *Cf. Lamont v. Postmaster General*, 381 U.S. 301 (1965) (striking down statute that restricted delivery of mail determined to be communist political propaganda).

130. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (“It is undeniable, of course, that speech which is constitutionally protected

property, the government has more leeway under First Amendment rules to regulate speech on its property.¹³¹ Several of the courts that have considered the vanity plate issue have used special government forum rules to resolve the problem. The argument is that the actual government property is the plate, and the government is acting in a proprietary capacity in managing the plate and its use.

A. *Forum Rules*

If the license plates are viewed as government property,¹³² the following theories are possible: (1) the plate is a public forum; (2) the plate is a limited public forum; (3) the plate is a nonpublic forum; and (4) the plate is no forum at all.¹³³

Given that the government has opened up license plates for speech activities, and its revenue operations are directly tied to its success in selling the space for the personal speech of car owners, the plates are fora. Under a view that the plates are public, limited, or nonpublic fora, a minimal requirement is that of viewpoint neutrality. Most statutory restrictions on vanity plates cannot meet this standard because the restriction

against state suppression is not thereby accorded a guaranteed forum on all property owned by the State.”).

131. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (“Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”).

132. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (“[W]e must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.”).

133. It is not clear, however, that the government is acting as the manager of its internal operations and therefore forum analysis should apply. With regard to vanity plates, the government is engaged in licensing private cars. Moreover, license plates are—sometimes by title, sometimes by possession, and sometimes by both—the property of the car owner after issuance, not the government. See *Katz v. Dep't of Motor Vehicles*, 108 Cal. Rptr. 424, 427–28 (Cal. Ct. App. 1973) (“While the licensee may have *both possession and title* of the license plates, the plates are also an official mechanism of the state performing the vital governmental function of vehicle identification.”) (emphasis added); ALA. CODE § 40-12-260(a)(1) (West 2000) (“When a current and valid Alabama motor vehicle license plate has been obtained . . . and the vehicle has been sold . . . the license plate shall be removed from the vehicle and retained by the original plate owner.”).

is targeted to ban offensive speech, an inherently viewpoint-based standard.

1. The Public Forum—Strict Scrutiny

If a license plate is a public forum, content-based government regulation of speech in that forum must meet the strict scrutiny standard. A public forum is one that has “immemorially been held in trust for the use of the public, and time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹³⁴ The most common examples are streets, sidewalks (but not in front of the post office), and parks.¹³⁵ The hallmark of this category is that “by long tradition or by government fiat [these fora] have been devoted to assembly and debate.”¹³⁶ Public fora are defined by government practice, intent, and tradition. The Supreme Court limited this category when it decided that a public airport was not a public forum because it was not created with a focus on speech activities, and its use was inconsistent with them.¹³⁷ A public forum can be created by the government, if the government, “by policy or by practice,” intentionally¹³⁸ opened the forum “for indiscriminate use by the general public,” or by some portion of the public.¹³⁹ “Indiscriminate use” may not be an accurate description of vanity plates because although they have an expressive function, the amount of expression possible is limited. The range of subject matter open to discussion on the plates is indiscriminate, however.

License plates are not traditional public fora. The Supreme Court has adopted a restrictive definition of a public forum that allows little room for arguing that the relatively new practice of the government issuing vanity plates conforms to a

134. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

135. Streets and parks generally open to the public must be available for expressive use, including political and ideological advocacy, by organizations and individuals. *See, e.g., id.* (holding that public parks must be available for advocacy speech by labor organization); *United States v. Kokinda*, 497 U.S. 720 (1990).

136. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

137. *See Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 672.

138. *Id.* at 680.

139. *Perry Educ. Ass’n*, 460 U.S. at 47.

place traditionally and historically held out to the practice of open and robust debate.¹⁴⁰ It is more likely that the court would hold that the plates' traditional use has been for vehicle identification and not for expressive purposes.¹⁴¹ Although one could make the argument that the plates are open for "indiscriminate use," they seem more limited because there are certain parameters and limits that arise by the nature of the plate—it is small and contains a limited number of letters and numbers.¹⁴² One could argue, however, that it means "indiscriminate within the confines of the space." The response to that argument might be that the use has never been indiscriminate because the plates have always been censored.

The public forum category would be applicable if the relevant forum were defined as the street, a traditional public forum. As the Supreme Court has previously noted, "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."¹⁴³ Cars are designed to travel the streets and the streets are used for many expressive purposes (including billboards and bumper stickers). Therefore, use of these "mobile billboards" is compatible with the function of the forum.

Courts could declare the streets or roads the "forum" with regard to license plates. Even if they did, it might mean that the government must allow you to have your plates while your car is on the street, but might be able to censor you when you drive elsewhere (into a high school or government parking lot,

140. See *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678 ("Under this approach, regulation of speech on government property that has *traditionally* been available for public expression is subject to the highest scrutiny.") (emphasis added).

141. This factor eliminated airports as public fora. See *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 680 ("But given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity.") (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515).

142. If license plates were viewed as public fora, then the government would have to meet the standard of strict scrutiny to maintain its content-based regulation of them. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). The government would not be able to meet those criteria. See discussion *infra* Part V.B.

143. *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

for example). Such a situation obviously would be logistically difficult for the owners, who would have to take plates on and off at frequent intervals.

If public forum analysis is applicable, strict scrutiny applies.¹⁴⁴

2. The Limited Public Forum—Consistent With Forum Purpose and Viewpoint-Neutrality

A limited public forum is government property that has been voluntarily opened up for some expressive activities.¹⁴⁵ Not all expressive activities need be allowed.¹⁴⁶ Generally, libraries and schools could be limited public fora with the government reserving the ability to allow some expressive activity without having to open it up to every group and every type of speech. The government's limits must be reasonable and consistent with the purpose of the forum¹⁴⁷ and viewpoint-neutral. As the Court has noted:

Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when di-

144. See *Boos v. Barry*, 485 U.S. 312 (1988).

145. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) ("There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated."); *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678 ("The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public."); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("The government does not create a [limited] public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

146. See *Cornelius*, 473 U.S. at 802 (A limited public forum is a "forum . . . created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.").

147. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

rected against speech otherwise within the forum's limitations.¹⁴⁸

The argument that the government has created a limited public forum in the vanity license plate market is strong because the vanity plate programs "encourage a diversity of views from private speakers,"¹⁴⁹ and general access is allowed. Even if license plates are government property and serve a government function, the government has opened the plates up for expressive activity.¹⁵⁰ The government has not just allowed car owners to pick out random identification symbols like lottery numbers. The program is only meaningful when one recognizes that it capitalizes on the car owners' desire to express themselves in an obvious and very visible way. In opening the plates up to expression, the government transforms the identification function to both an identification and expressive function. They co-exist, and once the expressive function comes into play, it cannot be ignored.¹⁵¹ Once the government opens the plates to expressive activities, the government cannot limit the speech on them because it disapproves of the viewpoint.¹⁵²

The question here is whether this situation is one where a category of speech, such as political speech, has been ruled out as incompatible with the limited forum. There is precedent for allowing such a content-based restriction in a limited public fo-

148. *Id.* at 829-30.

149. *Id.* at 834.

150. See *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding university forum "generally open" to wide array of student speech); *Board of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (finding same rule for high schools); *Rosenberger*, 515 U.S. at 824, 829-30 (finding that funding for wide array of student journals created a limited purpose public forum); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757-58 (1995) (finding state-owned plaza open to "free discussion of public questions" and used previously by "[s]uch diverse groups as homosexual rights organizations, the Ku Klux Klan, and the United Way"). *But see Katz v. Dep't of Motor Vehicles*, 108 Cal. Rptr. 424, 428 (Cal. Ct. App. 1973) (rejecting the idea that vanity plate program created an open forum because it provided members of the public with only "a limited input in the formulation of the identifying data to secure a contribution to the environmental defense fund").

151. See *supra* notes 95-106.

152. See *Rosenberger*, 515 U.S. at 835. Vanity license plates are not being used like the draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court sustained the government's right to regulate the burning and defacement of draft registration cards. The Court found the regulation content-neutral. In *O'Brien*, however, the draft protestor took the card and used it—uninvited—to engage in expressive conduct (burning the card to protest the draft). Here, the government is inviting expression.

rum.¹⁵³ If the government regulations limited expression at the outset—for example, only names and places—then the boundaries of the limited public forum would be fairly narrow and more speech could be excluded as incompatible with the government defined purpose of the limited public forum. The government has this control in setting the bounds of the limited public forum. Although the government may limit speech based on compatibility with the primary purpose of the forum in a content-based way, the states have generally not excluded particular subjects or topics on license plates. Rather, the plates are opened up for a wide array of expression in a variety of subject areas and then exceptions are listed, relating to the manner of expressing opinions. The limitation is generally on anything “offensive” or “indecent” from any subject area. These particular restrictions appear to be viewpoint-based.¹⁵⁴

If the government did adopt subject-based guidelines, these guidelines might be allowable if reasonable and viewpoint-neutral.¹⁵⁵ Reasonableness must be judged in conjunction with the purpose of the forum.¹⁵⁶ Various government interests are discussed in Part V, and it is possible that some interests, such as protection of children, would fulfill the reasonableness requirement for some restrictions. It would not mean, however, that the free-ranging censorship that some state governments employ would be acceptable because many of the restrictions would go beyond the government interest. Moreover, some of the government interests, such as protection of a captive audience from offensive speech, may be viewpoint-based depending upon the circumstances.

153. See *supra* text accompanying notes 145–148.

154. That issue is discussed more fully in Part IV.B *infra*.

155. In an analogous situation, one court of appeals claimed that there was no need to even decide whether the state’s “adopt-a-highway” program was a public, limited public, or nonpublic forum, finding more broadly that the state could not deny access to the program based on viewpoint. See *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 121 S.Ct. 1225 (2001). In *Cuffley*, the court held that “it is clear that the State may not deny access to the Adopt-A-Highway program based on the applicant’s views.” *Id.* at 706 n.3. In another court of appeals case, however, the court held that the government could exclude the Ku Klux Klan from the Adopt-a-Highway program because of the presence of the highway close to a housing development. See *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995).

156. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

3. The Nonpublic Forum—Reasonable and Viewpoint-Neutral

A nonpublic forum appears to be a catchall category—areas where there is public access to government property, but the property does not meet the definition of a public or limited public forum. Examples of nonpublic fora are: mailboxes,¹⁵⁷ street light posts,¹⁵⁸ teachers' mailboxes in public schools,¹⁵⁹ post office sidewalks,¹⁶⁰ military bases,¹⁶¹ charity fundraisers in a public office,¹⁶² prisons,¹⁶³ and airports.¹⁶⁴ In these areas, the government is allowed to regulate expressive activities in any reasonable way, but must do so in a viewpoint-neutral manner. The Supreme Court has stated, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral."¹⁶⁵

Although the government has opened plates up to expressive activity, if they are found not to be a limited public forum (perhaps because the expressive activities are quite limited), they would be a nonpublic forum.¹⁶⁶ Reasonableness must be

157. See *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 116 (1981).

158. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

159. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

160. See *United States v. Kokinda*, 497 U.S. 720, 723 (1990).

161. See *Greer v. Spock*, 424 U.S. 828, 830–31 (1976); *United States v. Albertini*, 472 U.S. 675 (1985).

162. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985).

163. See *Adderly v. Florida*, 385 U.S. 39, 40 (1966).

164. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

165. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citing *United States Postal Serv. v. Council of Greensburg Civic Ass'n*, 453 U.S. 114, 131 n.7 (1981)); see also *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000) (applying viewpoint neutrality requirement to student funding of student speech and expressive activities).

166. See *Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

For example, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270 (1988), the Supreme Court found that the school district did not open up a high school newspaper as a public or limited public forum, but rather, "reserve[d] the forum

assessed in light of the uses that the government property is designed to achieve.¹⁶⁷ The problem is that the reasons for rejecting vanity plates are so broad-ranging that it is sometimes hard to link them to particular interests. Nevertheless, “reasonable” is an easier standard to meet than “compelling,” and at least some of the interests assessed in Part V might meet this standard.

The requirement of viewpoint neutrality is also a significant one in this context. In *Lamb’s Chapel v. Center Moriches Union Free School District*,¹⁶⁸ the Supreme Court avoided the question of whether the school rooms opened to the community were limited public or nonpublic fora, and instead focused on the common restriction of “viewpoint neutrality,” which is binding on the government in either case. Even assuming that the state has not opened up the license plates for expressive activities, the government still must not use its control over access to the forum as the key to expressing disapproval of certain viewpoints.¹⁶⁹

4. No Forum at All—No Limitation

Coming full circle in the area of government property, there are some areas, like the editorial room of a public television station, that apparently are not subject to claims of forum status and the government has full discretion over the speech in those arenas. In *Arkansas v. Forbes*,¹⁷⁰ a political candidate tried to gain access to a public debate broadcast by an Arkan-

for its intended purpos[e],” as a “supervised learning experience for journalism.” See also discussion *infra* notes 164–167 and accompanying text.

167. See discussion of government interests *infra* Part V; see also *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 680.

168. 508 U.S. 384, 390 (1993). The technique of avoiding the labeling of the forum is not uncommon. For example, several circuits have grappled with the government’s duty to grant access to “adopt-a-highway” programs to organizations with repugnant beliefs, goals, and advocacy, most notably the Ku Klux Klan. The Eighth Circuit stated there was no need to even decide whether the state’s “adopt-a-highway” program was a public, limited public, or nonpublic forum, finding more broadly that the state could not deny access to the program based on the viewpoint. See *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000); see also *AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994) (addressing limitation on advertisements in subway; no need to decide the type of forum because the restrictions were viewpoint-based).

169. Viewpoint neutrality will be discussed in Part IV.B, *infra*.

170. 523 U.S. 666 (1998).

sas public television station. The Supreme Court specifically noted the scarcity of the broadcast medium and the deference given to editorial control of the medium and stated that the editorial room of a public television station was not a forum,¹⁷¹ allowing the public station to make even viewpoint-based decisions.¹⁷²

The "no forum" choice suggested in *Forbes* may refer, in part, to those government activities in which there is no public access, either by right or invitation.¹⁷³ Thus, no citizen, absent the government intentionally opening up a forum, has a First Amendment right to equal time to have her views on the government's agricultural policy or the surgeon general's smoking policy considered in formulating government policies. Government policy is coordinated and developed by government employees, elected officials, and appointed officials. Past the ballot box, there is not a First Amendment right of access into the system.¹⁷⁴

The "no forum" category slides into the *Rust* "government speech" category when the government puts out a call for speakers to carry the government's message. In that case, private citizens may be involved in speech that is part of the "no

171. The Supreme Court complicated the situation in *Forbes* by simultaneously holding that the actual debate sponsored by public television was a nonpublic forum for which viewpoint neutrality was required. The Court held that "[a]lthough public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule." *Id.* at 675. The difference between the editorial room and the actual debate is that the actual debate invited limited public access, i.e., the candidates. *See id.* ("The very purpose of the debate was to allow the candidates to express their views with minimal intrusion by the broadcaster.")

172. *See id.* at 674. The Court noted:

Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

Id.

173. The public forum grants "unfettered access." *See id.* at 678. The limited and nonpublic fora have more limited access. *See id.* ("To create a [limited forum] . . . the government must intend to make the property 'generally available,' to a class of speakers.") (citation omitted).

174. This right to speak may be distinguished from the right of access to various government proceedings and documents. *See generally* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

forum” category, but it is at the invitation of the government specifically and only to spread the government’s message. Consistent with precedent under the “no forum category,” the private citizen has little control over the government’s rules regarding speech.

The “no forum” category is inapplicable in this context when the government has granted the public general access to license plates, and encouraged expressive activity with regard to them. It is not a case where public access was never granted at all, like the editorial room, but where public access was granted with conditions. Where public access is granted, and the speech is found not to be government speech but private speech, then the choice of descriptions for the license plates is among the public, limited public, and nonpublic fora.

B. The Requirement of Viewpoint Neutrality

Three different categories of government property would require the government to limit its censorship in the particular forum to viewpoint neutrality: the public forum, the limited public forum, and the nonpublic forum. Viewpoint discrimination occurs when the government discriminates against speech based on “the specific motivating ideology or the opinion or perspective of the speaker.”¹⁷⁵ Viewpoint neutrality means that the government may not aim at “particular views taken by speakers on a subject.”¹⁷⁶ The ban on viewpoint discrimination is based on the notion that the government weighing in on one side of the debate is dangerous, and “may effectively drive certain ideas or viewpoints from the marketplace.”¹⁷⁷ For example, in *Rosenberger*, the University of Virginia refused to fund student publications that “primarily promote[d] . . . a particular belie[f] in or about a deity or an ultimate reality.”¹⁷⁸ The

175. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

176. *Id.* at 829.

177. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Supreme Court found that the newspaper's religious viewpoint, rather than the subject, was the reason behind the denial of funding and therefore held the denial to be unconstitutional.¹⁷⁹

Many of the vanity plate cases may be dealt with easily because the government cannot meet even the lowest standard of reasonable and viewpoint-neutral regulation for speech in a nonpublic forum.¹⁸⁰ It may not even be necessary to make the distinction between a limited public forum and a nonpublic forum. The state governments—in their statutes and regulations—are not cordoning off categories of speech, such as political speech. Rather, they are aiming at viewpoints within categories, such as offensive political speech like “GVT SUX,” “H8MICH,” or “2002NOT.” Denying plate requests based on the “offensiveness” of the language carries strong connotations of viewpoint-based determinations.¹⁸¹

Viewpoint discrimination is a subcategory of content discrimination, and not always easily discerned. All viewpoint re-

178. *Rosenberger*, 515 U.S. at 825. The University guidelines defined a “religious activity” as any activity that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.” *Id.*

179. One of the problems with analysis under this theory is that it is sometimes hard to distinguish viewpoint restrictions from subject matter restrictions. For example, there is the subject matter category of religion, there is religious speech, and there is a religious perspective. The court labeled the latter category as a viewpoint restriction in *Lamb's Chapel* and in *Rosenberger*. The group in *Lamb's Chapel* wanted to discuss the family from a religious perspective, as opposed to a psychological, sociological, political, or feminist perspective. The Court labeled the subject the family and the viewpoint religious and struck down the restriction. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993).

180. See *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099 (D. Md. 1997); *Pruitt v. Wilder*, 840 F. Supp. 414 (E.D. Va. 1994); see also *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (holding denial of Ku Klux Klan's application to participate in “Adopt-A-Highway” program was impermissible viewpoint-based exclusion from a government program). *But see Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (holding government's refusal to allow Ku Klux Klan to participate in adopt-a-highway program was reasonable viewpoint-neutral restriction on speech where highway was near housing project that had been site of past Ku Klux Klan intimidation and harassment of residents and therefore exclusion was based on organization's past conduct and not viewpoint).

181. See *Board of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 235 (2000) (“The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.”).

strictions are content-based.¹⁸² Sometimes viewpoint discrimination can be easily identified, as in the case of the ban on sexually explicit material depicting women as “subordinate.”¹⁸³ The prohibitions that one cannot oppose or support the military draft using religious language or cannot refer to a deity on a license plate also seem viewpoint-based.¹⁸⁴ Viewpoint restrictions can be more subtle, however. If one cannot use words referring to alcohol (so a “WINE” plate is disallowed), but can refer to beverages in general on the plates, the restriction seems viewpoint-based as well. Although “hate” speech is disallowed (“H8MICH”), “love” speech would probably be allowed (“LUVMICH”).¹⁸⁵ If so, the restriction is viewpoint-based.

Although the government may argue that these restrictions are content-based, viewpoint-neutral limits on “offensive,” “indecent,” or “otherwise objectionable” speech, these restrictions are an open invitation to engage in viewpoint discrimination. The defining characteristic of “offensive,” “indecent,” or “otherwise objectionable” speech is the unpopularity of the speech.¹⁸⁶ In practice, the government has often accepted the invitation to apply plate restrictions in a viewpoint-based manner.¹⁸⁷

These restrictions can be viewed as content-based and viewpoint-neutral in some circumstances by arguing that the restriction could be narrowed to one where you cannot have a plate that has a sexually explicit term on it, no matter what your viewpoint.¹⁸⁸ Thus, any plates with George Carlin’s seven dirty words would be banned.¹⁸⁹ Under that restriction, support or opposition to the military draft must be expletive free. That prohibition may still exclude a viewpoint, although it purports to alter only the manner of expression, prohibiting a

182. Moreover, every content-based restriction is, in a sense, also viewpoint-based because it is based on the viewpoint that the particular type of content, *e.g.*, obscenity, should not be discussed. The viewpoint is anti-obscenity.

183. See *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (striking down as unconstitutional an Indianapolis ordinance that banned pornography that “subordinated” women).

184. See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

185. See *supra* text accompanying note 39.

186. See *supra* note 8.

187. See *supra* text accompanying notes 35–40.

188. In application, however, the restriction may be viewpoint-based. See *infra* text accompanying notes 211–214.

189. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

few words. As the Court stated in *Cohen*, "Finally, . . . we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."¹⁹⁰

Courts that have struck down bans on vanity plates have generally done so because the particular plate denial was viewpoint-discriminatory. The advantage of this path is that it avoids the necessity of deciding whether the license plate scheme creates either a public, limited public, or nonpublic forum, because viewpoint neutrality is a criterion of all three fora. In the cases that have gone this route, it has been relatively easy to demonstrate viewpoint discrimination in the grant and denial of various requests.

For example, in *Pruitt v. Wilder*,¹⁹¹ the Virginia Division of Motor Vehicles ("DMV") banned any reference to deities, a policy that it subsequently revised. The district court found the policy viewpoint-discriminatory because it allowed references to religion, but not references to deities. Therefore, the DMV had issued plates saying "BIBLE," "ICOR14," and "PSALM14," yet rejected the request for "GODZGUD."¹⁹² The Court held that:

[B]y allowing one sub-set of religious speech—that not directly referring to a deity—to be placed on CommuniPlates, while denying another sub-set of religious speech—that referring to deities—the DMV policy discriminates on the basis of the speaker's viewpoint. This is particularly evident when it is considered that some religions, such as Buddhism, do not make reference to a deity, whereas others, like Christianity, center on a deity or deities.¹⁹³

In *Sons of Confederate Veterans v. Glendening*,¹⁹⁴ Maryland refused the plaintiff's request for a logo on a license plate representing "The Sons of Confederate Veterans." Maryland's program, in addition to allowing for the standard individual-

190. *Cohen v. California*, 403 U.S. 15, 26 (1971).

191. 840 F. Supp. 414 (E.D. Va. 1994).

192. *See id.* at 418.

193. *Id.*

194. 954 F. Supp. 1099 (D. Md. 1997).

ized vanity plate, also allowed a “logo” plate “bearing a special tag number, the name, initials, or abbreviation of the name of the organization, and an emblem or logo that symbolizes the organization.”¹⁹⁵ In Maryland, logo plates are governed by the same restrictions applicable to vanity plates—the Motor Vehicle Administration (“MVA”) may cancel or refuse to issue a plate if it could be “considered objectionable or offensive as a term of bigotry, a term of hostility, an insulting or derogatory term, or a racially degrading term.”¹⁹⁶ The requested plate would have borne the Confederate battle flag and the year “1896.” The district court, using a forum analysis, found the MVA’s action viewpoint-discriminatory and rejected the MVA’s argument that it prohibited all racial epithets and therefore was acting in a viewpoint-neutral manner.¹⁹⁷ The court found irrelevant the fact that an entire category of speech—racially derogatory expressions—was banned.¹⁹⁸ What the court considered important was that there were at least two different views of the flag—one of the Sons of Confederate Veterans, presumably proud of their heritage—another represented by the complaints registered, viewing it as a symbol of discrimination, segregation, hostility, and oppression.¹⁹⁹ The court found that the MVA Administrator could not prefer one view of the symbol over the other, noting the viewpoint-based nature of the discrimination was supported by the fact that the revocation of the plates with the offensive logos occurred only after public controversy erupted.²⁰⁰ Likening the MVA action to the regulation of hate speech in *R.A.V. v. City of Saint Paul*,²⁰¹ and noting that symbols denouncing racism would presumably be acceptable under the regulations, the court struck down the regulation.²⁰² In the course of its discussion, the court noted that lis-

195. *Id.* at 1100 (citing MD. CODE ANN., TRANSP. II § 13-619(g)(I) & (ii) (1996); COMAR 11.15.19.03A.).

196. *Id.* (citing COMAR 11.15.07.01(5)).

197. *See id.* at 1105.

198. *See id.* at 1103.

199. African Americans also considered the Confederate flag to be associated with the Ku Klux Klan. *See Confederate Sons Sue To Put Battle Flag on Va. Vanity Plates*, GREENSBORO NEWS & REC., May 1, 1999, at B5.

200. *See Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1100, 1104 (D. Md. 1997).

201. 505 U.S. 377 (1992). *See also Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding a Wisconsin hate motivated penalty enhancement statute as constitutional).

202. *See Sons of Confederate Veterans*, 954 F. Supp. at 1103.

tener reaction generally "is simply not a viewpoint-neutral basis for regulation."²⁰³

In *Lewis v. Wilson*,²⁰⁴ the district court, by process of elimination, settled upon a view that license plates function as a nonpublic forum. It went on to apply a review based on rationality and viewpoint neutrality. The court found that the portion of the statute that gave the Director the power to refuse to issue letter combinations that were "contrary to public policy" was vague and designed to target particular viewpoints, and therefore unconstitutional.²⁰⁵ The court refused to strike the entire statute, however, and dodged the issue of whether the petitioner who wanted the vanity plate "ARYAN-1" was entitled to get it.²⁰⁶ Instead, the court remanded the case to the Director to determine if there was a constitutional method to deny the plate.²⁰⁷

In *Katz v. Department of Motor Vehicles*,²⁰⁸ the California Court of Appeals dismissed a challenge to the arbitrariness of the California DMV's denial of a sexually explicit license plate. The Court noted twenty-six plates that contain sexual innuendo of varying degrees that the Department had issued, but disingenuously claimed that "only a handful of these can be said to have a single clear sexual connotation, such as the combination EZ LAY submitted by Katz; several of the [twenty-six] are ambiguous and may in fact be the proper names or initials of the individuals involved."²⁰⁹ One must read the list to appreciate the absurdity of the Court's statement.²¹⁰ The court's oblivious approach to the DMV's lack of consistency is difficult to explain. The California Court of Appeals never even dealt with the various forum categories.

203. *Id.* at 1104 (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992)).

204. 89 F. Supp. 2d 1082 (E.D. Mo. 2000).

205. *Id.* at 1091.

206. *See id.* at 1090 n.8.

207. *See id.* at 1091.

208. 108 Cal. Rptr. 424 (Cal. Ct. App. 1973).

209. *Id.* at 429 n.4.

210. *See id.* For example, the approved list includes: "4 PLAY," "STUD," "VIRGIN," "HORNY," "HOT BOD," and "BOOBS." Although it is possible that these plate requests were innocently submitted by: a gambler, a carpenter, an olive oil manufacturer, a family owned business, a race car driver, and a slow witted family, respectively, it seems unlikely. Moreover, the car owner's characteristics would probably not reduce the offensiveness to the viewer.

It is possible that the courts will accept “sexually explicit” speech as a content-based restriction. Even so, viewpoint discrimination within this category may still be a problem depending upon how the restriction is enforced. For example, in *AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transportation Authority*,²¹¹ the First Circuit held that the Massachusetts Bay Transportation Authority violated the First Amendment when it restricted certain advertisements in the subway. The Transportation Authority had freely taken money for advertisements of movies that used women’s body parts and sexual innuendo,²¹² but was decidedly more squeamish when it came to condom advertisements that used male body parts and sexual innuendo.²¹³ The First Circuit struck down the ban on the condom ads because it was viewpoint-based.²¹⁴

As these examples suggest, it may be difficult for the government to stay away from impermissible viewpoint discrimination. Many of the state schemes exclude quite a bit of speech because the standard of offensiveness is so broad. Offensiveness is in the eye of the beholder and is inherently viewpoint-based.

211. 42 F.3d 1 (1st Cir. 1994).

212. The First Circuit noted that the MBTA had taken money for an advertisement for the movie “Fatal Instinct”:

Both of these ads prominently feature the bare, crossed legs of a seated woman whose cleavage is visible but whose face is largely obscured. In one of the ads, the woman is suggestively eating a hot dog, and the headline “Come here often?” is displayed at crotch level. In the second ad, the headline “Opening Soon” is displayed at crotch level across the woman’s bare, crossed legs.

Id. at 5.

213. For example, an ad that carried a picture of a condom, stated, “Haven’t you got enough to worry about in bed?” and then added, “Use a latex condom. It might not take your mind off everything during sex, but at least you’ll have one less thing to worry about. AIDS.” *Id.* at 4.

214. *See id.* at 12. The court noted:

The “Fatal Instinct” ads are more overtly sexual and more blatantly exploitive; but they represent the *conventional* exploitation of women’s bodies for commercial advertising. The condom ads, by contrast, represent sexual humor addressed to men’s bodies and—because of the connection to AIDS—are also capable of provoking homophobic reactions from the public, and did.

Id.

V. GOVERNMENT INTERESTS IN REGULATION AND THE MEANS USED TO ACCOMPLISH THOSE ENDS

The government could attempt to defend its regulation of the content of vanity plates by claiming that its regulation met the standard of strict scrutiny. The government's interests in the regulation are varied—the protection of a captive audience on the road, the prevention of the state from being associated with the offensive message, the protection of children, and the prevention of road rage. None of these interests, however, meets the standard of strict scrutiny.

A. *Content-Based Abridgement*

If vanity plates are speech, and there is an abridgment, can the government regulate vanity plates for offensiveness without violating the First Amendment? One approach, explored in the above discussion, is that the plates are government property and subject to more extensive government control than private property. Nevertheless, if the government is engaging in viewpoint discrimination, it must meet strict scrutiny under even these more lenient rules. Moreover, if the plates are not government property, government restrictions on what the plates can say are more analogous to Cohen's jacket, and the government generally cannot place restrictions based upon communicative impact, no matter how offensive, unless the restrictions meet the strict scrutiny test.²¹⁵ The govern-

215. This assumes that the plate does not contain words that would come within one of the traditional exceptions—incitement to immediate violence, obscenity, or fighting words. In the case of fighting words, it is unlikely any plate could meet the criteria (not met in the *Cohen* case) of being speech "directed to the person of the hearer." *Cohen v. California*, 403 U.S. 15, 20 (1971). Likewise, most of the lewd plates would not qualify as obscene even though they may use sexual terms. *See id.* ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic.").

Strict scrutiny was not applied in the case of *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) where George Carlin's "indecent" monologue was at issue. In *Pacifica*, the FCC defined "indecent" as that which "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 732 (plurality opinion). There the Court relied on the lower level of scrutiny applicable to the broadcast media. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399–400 (1969) (discussing special justifications for the broadcast media that do not apply to other speakers). The Court specifically rejected expanding that concept in *Reno v. ACLU* to include the

ment bears the burden of proving that strict scrutiny can be met.²¹⁶

The laws regulating the letters on the plate are content-based and often viewpoint-based because they are based on concepts of offensiveness and indecency.²¹⁷ The government sometimes does not like the viewpoint (for example, "RU486" or "GOVTSUX") and sometimes does not like the manner of expression (for example, it might deny the "FROG" plate for potential offensiveness, but it might grant HOPPER; similarly, Cohen would likely not have been arrested for having "I don't like the draft" on his jacket). As the Supreme Court stated in *Ward v. Rock Against Racism*, "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."²¹⁸

The vanity plate regulations are adopted because the government does not like the offensive messages that might be conveyed on the plates.²¹⁹ When a regulation is content-based or viewpoint-based, the government generally needs a compelling state interest and the means of furthering that interest would have to be narrowly tailored.²²⁰

Internet. See *Reno v. ACLU*, 521 U.S. 844 (1997) (applying strict scrutiny to federal statute criminalizing the transmission of indecent materials to minors on the Internet). *Reno* signals a desire not to expand the *Red Lion* doctrine further.

216. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816–17 (2000).

217. See *id.* at 811–12 (finding that statute that sought to regulate "sexually explicit adult programming or other programming that is indecent" was content-based). In *O'Brien* the Supreme Court applied an intermediate scrutiny analysis to the defendant's conviction for burning his draft card to protest the Vietnam war because it found that the law was aimed at non-communicative aspects of his conduct, i.e. destroying government property. See *United States v. O'Brien*, 391 U.S. 367 (1968).

218. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). See also *Boos v. Barry*, 485 U.S. 312 (1988) (finding focus on listener impact makes statute content-based).

219. See *supra* note 8; see also *Playboy*, 529 U.S. at 811–12 (holding that where the "overriding justification for the regulation is concern for the effect of the subject matter on young viewers [It] is the essence of content-based regulation").

220. See *Playboy*, 529 U.S. at 811–12 (2000); *Boos*, 485 U.S. at 312; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (applying strict scrutiny even to categories of speech that were viewed as exceptions to full First Amendment coverage such as obscenity, fighting words, and defamation).

In one recent case, however, the Supreme Court allowed the government to take “decency” into account without meeting the exacting standard of strict scrutiny that would surely have doomed the statute.²²¹ *NEA v. Finley* involved legislation authorizing grants of arts funding. The provision at issue stated “artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”²²² The Supreme Court stated that the NEA could consider “decency” when awarding competitive arts funding without meeting a standard of strict scrutiny.²²³ The allowance of this content-based and viewpoint-based factor certainly cut into the general rule of strict scrutiny, which requires both a compelling government interest, and that the means used must be narrowly tailored to address that interest.

Two points make the *Finley* decision inapplicable to vanity plates, even leaving aside the specific criticism of the dissents in that case.²²⁴ First, the Court emphasized that the clause “impose[d] no categorical requirement,” but rather “add[ed] ‘considerations’ to the grant-making process; it does not preclude awards to projects that might be deemed ‘indecent’ or ‘disrespectful,’ nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application.”²²⁵ Although implausible as a theory generally, it is inapplicable in the context of vanity plates.²²⁶ Most of the laws regulating vanity plates do not make “offen-

221. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998). See the discussion of strict scrutiny standard *supra* notes 61–63.

222. Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, § 103(b), 104 Stat. 1960, 1963 (codified at 20 U.S.C. § 954(d) (1994)).

223. See *Finley*, 524 U.S. at 584.

224. See *Finley*, 524 U.S. at 590 (Scalia, J., concurring); *id.* at 600 (Souter, J., dissenting). The dissenters, though disagreeing on other points, both convincingly argue that the use of “decency” as a factor does not make the standard any less content-based. In a related context, even when race is used as a “factor,” in governmental decisions, the decision is still subject to strict scrutiny in the equal protection context. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

225. *Finley*, 524 U.S. at 580–81.

226. If the distinction between a “factor” and a “rule” is taken seriously, then all kinds of manner of government action regarding speech can be re-written to make them constitutional. For example, indecency could be considered a “factor” to be taken into consideration whether certain speech would be allowed on the Internet. See *Reno v. ACLU*, 521 U.S. 844 (1997).

siveness” or “indecent” simply a “consideration” in any form. Rather, they require denial of plates deemed offensive or indecent.²²⁷ Unlike the *Finley* case, the criteria are not merely “advisory.”²²⁸

Second, the majority stated that “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.”²²⁹ Making judgments based on “artistic merit” in awarding limited, competitive funding for the arts requires content-based judgments unless one moves toward a lottery or “first come, first served” system. A wide variety of factors must be considered. That is not the case with the limitless nature of vanity plates, where merit of any kind is not an issue; rather, the only constraint is to avoid duplicate plates.²³⁰

B. Applying Strict Scrutiny

If strict scrutiny applies, several arguably compelling government interests may be advanced: (1) protection of a captive audience; (2) prevention of the appearance of state endorsement; (3) protection of children; and (4) prevention of road rage. Upon examination, however, none of these interests seems to rise to the level of a compelling interest. In any event, in each case, more narrowly tailored means could be used to achieve

227. See *supra* note 8.

228. See *Finley*, 524 U.S. at 581.

229. *Id.* at 585.

230. Another basis for distinguishing *Finley* is that the Court said that the government was not creating a limited public forum, like it did in *Rosenberger*, where the subsidy was available to all student organizations that were “related to the educational purpose of the University.” *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 824 (1995). This is similar to the decisions allocating other public goods such as the school auditorium access that was at issue in *Lamb’s Chapel*. In the Supreme Court’s opinion: “In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately ‘encourage a diversity of views from private speakers.’” *Finley*, 524 U.S. at 586. If it did, it would essentially be funding all comers, a task that would be financially impossible. The NEA was allowed to use the content-based distinction of “excellence,” to justify not funding speech: “[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake” *Id.* at 587–88.

the interest.²³¹ One of the problems in the license plate area is that the statutes and regulations are often broad and allow the government to deny plate requests for any number of reasons. For example, state regulations typically limit racist, sexually explicit, or profane language. Each of these limitations might relate to a different government interest. The hallmark of strict scrutiny is that if a compelling interest is stated, the restriction is "narrowly tailored" to that interest. Thus, even if one of these interests does qualify as a compelling government interest, that does not necessarily allow the extensive regulation that the states appear to be enforcing. Only those restrictions that further the interest in a narrowly tailored way would be allowed.

1. The Captive Audience

The Supreme Court has generally maintained that people who venture out of their houses must avert their eyes from things that are offensive to them.²³² A contrary result might allow for the expansion of a "heckler's veto," whereby unpopular speech could be shut down by claims that potential listeners have a right not to hear it.²³³ Because the First Amendment is generally needed most when speech is unpopular, the value of its protections would be gutted by a claim that one's right to speak is conditioned upon finding willing listeners.

The Supreme Court treats speech that is heard within the

231. On the other hand, if only a "reasonable" approach is required, as in the case of a nonpublic forum (assuming viewpoint neutrality), several of these interests might qualify.

232. See *Cohen v. California*, 403 U.S. 15, 21 (1971); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975). The court struck down city ordinance that prohibited showing of movies containing nudity at drive-in movie theaters, noting that:

The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.

Id. (Citation omitted).

233. See *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (rejecting state's claim that audience reaction to flag burning may justify prohibiting the activity).

privacy of one's own home differently than public speech.²³⁴ The captive audience rule has been used where the listener cannot escape (for example, listening to a sound truck blare,²³⁵ listening to picketers yelling,²³⁶ or receiving sexually explicit mailings²³⁷), but not necessarily where the Internet or cable is voluntarily channeled into the home.²³⁸ The ability to avoid prolonged exposure seems to be the key.²³⁹ Short exposures that allow one to make a decision whether to keep listening or looking, such as averting one's eye from Cohen's jacket,²⁴⁰ an offensive billboard, or an abortion protest sign, seem to be considered an acceptable cost of free speech. The longer and unavoidable²⁴¹ doses seem more problematic to the Supreme Court.

234. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding content-neutral restriction on targeted picketing of a single residence); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) (vendor has no constitutional right to send unwanted material into another's home) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (finding riders on public buses were a captive audience for purposes of political advertising).

235. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (upholding residential ban on sound trucks).

236. See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 772-73 (1994) ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

237. See *Rowan*, 397 U.S. at 737-38 (upholding Post Office regulation that allowed individuals to limit receipt of sexually explicit materials). *Rowan* appears to be more a case where the individual is simply taking steps to avoid being a captive audience, just as one can refuse to go to the park and hear speakers that one would consider offensive. There is no duty to listen, and indeed the only right involved here is the right to speak. If no one wants to listen, that is not a First Amendment problem.

238. *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) can be distinguished because there the FCC's ban on the playing George Carlin's monologue, considered "indecent," was justified under intermediate scrutiny applicable to radio and television broadcasting.

239. See *Hill v. Colorado*, 120 S.Ct. 2480, 2489 (2000) ("But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."); see also *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (finding the inability of residents of housing project to avoid Ku Klux Klan's sign when coming and going from their homes infringed upon their residential privacy).

240. The Supreme Court noted that offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

241. The home is seen as the last refuge and therefore more likely to be the site of unavoidable contacts, although the argument could logically be extended to the workplace, and as it was in *Hill*, and to other facilities where one is confined.

Nevertheless, the general rule is that the burden is on the listener to avoid offensive speech.²⁴² Surely if the young children walking by Cohen could be exposed to his phonetically-friendly “Fuck the Draft” jacket, many of the arguments for protecting other drivers and roadside viewers from potentially-offensive vanity plates fall away. Some may consider images and phrases on picket signs, billboards, t-shirts, residential and commercial signs, and art exhibits offensive, but that would not justify a government ban on that speech.

Several decisions concerning offensive language on the Internet confirm that the Supreme Court is not willing to buy into larger restrictions on speech generally because the listener happens upon things offensive in places where she does not want or expect them, even if the computer terminal is in the home. The Internet may be distinguished from the vanity plate situation, however, because the user needs to seek out the site and there are ways to keep the majority of children off the offensive web pages.²⁴³

Until recently, the Supreme Court has rarely opened the door to allowing the government to restrict speech based on inadvertent or undesired contact with a person who is out in the public.²⁴⁴ In the recent case of *Hill v. Colorado*,²⁴⁵ however, the Supreme Court took a step in that direction. Colorado passed a law prohibiting persons from approaching within eight feet of

242. See *Reno v. ACLU*, 521 U.S. 844 (1997) (burden is on the Internet user to install protective software to avoid unwanted images). In *Cohen* the Court stated:

Given the subtlety and complexity of the factors involved, if Cohen’s “speech” was otherwise entitled to constitutional protection, we do not think the fact that some unwilling “listeners” in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant’s conduct did in fact object to it, and where that portion of the statute upon which Cohen’s conviction rests evinces no concern, wither on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all “offensive conduct” that disturbs “any neighborhood or person.”

Cohen, 403 U.S. at 22.

243. See *id.*

244. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), which specifically involved broadcast media and a lower level of scrutiny. Cf. *Lehman v. Shaker Heights*, 418 U.S. 298, 307 (1974) (finding captive audience on government-operated bus).

245. See *Hill v. Colorado*, 120 S.Ct. 2480 (2000).

any individual—without her consent—who was within one hundred feet of a health care facility entrance, in order to display a sign, distribute leaflets or handbills, or engage in oral protest, education, or counseling. Abortion protestors challenged the restriction because it substantially inhibited their activities outside abortion clinics. The Supreme Court majority found, however, that the law was content-neutral.²⁴⁶ It also held that avoiding unwanted communication in this situation could be a government interest satisfying the *O'Brien* intermediate scrutiny standard that applies to content-neutral laws.²⁴⁷

One of the problems with the *Hill* case is that the Court found content-neutrality where the statute used the pejorative word “protest” and explicitly referenced “counseling,” which is the term used for the speech that protestors outside abortion clinics attempt to engage in with the patients of the clinic.²⁴⁸ There is no attempt to include or exclude all speech within a certain zone of the clinic, but a very explicit attempt to target a particular type of speech. It is an example of the Court facing the prospect of the strict scrutiny standard, and disingenuously avoiding this formidable roadblock by going out of bounds.

In finding a “right of every person to be let alone” even while in a public forum, the Court emphasized that in the context of medical facilities, “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.”²⁴⁹ The *Hill* majority distinguished Cohen’s situation

246. The Court reasoned that:

First, it is not a “regulation of speech.” Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted “because of disagreement with the message it conveys.” This conclusion is supported not just by the Colorado courts’ interpretation of legislative history, but more importantly by the State Supreme Court’s unequivocal holding that the statute’s “restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech.” Third, the State’s interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators’ speech. As we have repeatedly explained, government regulation of expressive activity is “content-neutral” if it is justified without reference to the content of regulated speech.

Id. at 2491 (citations omitted) (quoting *Lehman*, 418 U.S. at 298).

247. See *United States v. O’Brien*, 391 U.S. 367 (1968).

248. See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

249. *Hill v. Colorado*, 120 S.Ct. 2480, 2490 (2000) (citing *Lehman*, 418 U.S. 298).

because unwilling viewers could avert their eyes from the jacket.²⁵⁰ Persons traveling to a particular medical facility might not be able to avert their eyes because the speech is directly in their pathway.

Vigorously criticized by the dissenters in *Hill*, the rationale of the majority cuts back on the *Cohen* principle precisely because it allows expression to be controlled by listeners and breathes life into the “heckler’s veto doctrine.”²⁵¹ If the government is allowed to suppress speech, especially in a public forum, on the theory that some people might not want to hear it, then much speech is subject to suppression.²⁵²

In the context of license plates, most government regulations are content-based and viewpoint-based because they are explicitly based on the “offensiveness” or “indecentcy” of the plates. *Hill* may be limited to the case in which the regulation is claimed to be content-neutral, although the method of arriving at content neutrality in *Hill* was questionable.²⁵³ *Hill* may also be limited to the case where the speaker physically approaches the potential listener to convey the message personally, rather than the case where the listener happens upon the speaker, as in the case of vanity plates.

If not so limited, and *Hill* is applicable even in the case of a content-based law, there are circumstances in which license plates can hold an audience captive—for example, at stop signs, at red lights, and in traffic jams. It is probably an even more compelling case that drivers cannot avert their eyes from the car in front of them or be occupied by avoiding things in their line of sight while driving. On the other hand, a large number of advertisements, political signs, and expressive activity would be off-limits if the “captivity” principle was unleashed upon streets and highways. Not only are bumper stickers on vehicles fair game, but also advertisements on vehicles that can be as captivating as license plates if stopped in

250. *See id.*

251. *See id.* at 2507 (“Suffice it to say that if protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter.”) (Scalia, J., dissenting).

252. Justice Scalia, in dissent, noted that the “right to be let alone” as conceived by Justice Brandeis and relied upon by the majority in *Hill*, related to a right against the government. In other words, the speaker had a right to be “let alone,” free from government intrusion and regulation in a public forum. *See Hill*, 120 S.Ct. at 2508 (Scalia, J., dissenting).

253. *See* discussion *supra* accompanying note 248.

traffic. It may be easier, in fact, to avert your eyes or children's eyes from a small license plate, than a large, colorful billboard that looms near your path and is designed to be an attractive nuisance. All of these examples, of course, are also different from *Hill* because *Hill* involves a physical approach by a human being. This approach would probably be considered more intrusive by most people because it forces a public reaction to the speech (signaling a desire for no further contact or walking away), whereas, even if difficult, one can avert one's eyes from a plate without any need to react further in public.

2. Imprimatur of the State

A second possible governmental interest is to prevent placing the imprimatur of the state on offensive language on a license plate. The plate is associated with the state because the state name, and possibly even the state motto or logo, appear on the plate.²⁵⁴ If the government is the speaker, its desire to avoid speech that has sexual or racial connotations may be supported by a desire not to engage in race and gender discrimination. Is the government entitled, however, to disassociate from viewpoints with which it disagrees when it chooses to open a forum for private speech?²⁵⁵ More specifically, should the government be constitutionally prohibited from associating with or promoting racial themes, because such speech could be viewed as discriminatory under the equal protection clause?²⁵⁶

254. See *Froslid v. Hults*, 248 N.Y.S.2d 676 (1964), *appeal dismissed*, 199 N.E.2d 166 (N.Y. 1964) (finding although license plate's purpose is to identify the car owner, it also serves the purpose of advertising the state and promoting its welfare); Sewell Chan, *District Puts Political Message on the Road*, WASH. POST, Nov. 5, 2000, at C1 (noting the District of Columbia adopted a new slogan for its license plates, "Taxation Without Representation," in order to air its unhappiness with having only a nonvoting delegate in Congress).

255. In the state action case of *Burton v. Wilmington Parking Authority*, the symbiotic relationship between the segregationist coffee shop and the state owned parking garage, as well as the symbolic relationship between them (the state flag waving outside the coffee shop) was enough to label the coffee shop's actions as state action. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

256. The government could not prohibit a racist, sexist, religious, or generally offensive bumper sticker that motorists put on their cars. See *Cohen v. California*, 403 U.S. 15 (1971); *Baker v. Glover*, 776 F. Supp. 1511 (M.D. Ala. 1991) (holding that a profane bumper sticker was protected speech); *Cunningham v. State*, 400 S.E.2d 916 (N.J. 1991) (finding statute prohibiting profane or lewd bumper stickers regulated constitutionally protected speech and was struck down as overbroad and vague); *Fire Fighters Ass'n v. Barry*, 742 F. Supp. 1182 (D.D.C.

Government property is often used as a forum for ideas and debates that many might find offensive. Public parks, for example, are the place where controversial government policies from abortion to wars are vigorously debated. It is doubtful that the government could be given authority to scrutinize speech in its public fora, or on private property, for appropriateness of association with the imprimatur of the government.²⁵⁷ No doubt the government did not wish to sanction the Nazis marching in Forsyth County Georgia (or in Skokie, Illinois²⁵⁸), both because their speech was abhorrent and because the cost of protecting the marchers and the later counter-marchers was extremely expensive.²⁵⁹ Protests involving United States military action, abortion, and Nazis are just a few examples of popular march, meeting, and protest topics held in public fora that draw counter-demonstrators and are likely to offend a large segment of the general population. A countervailing "government right" to refuse to permit these events because of the unseemliness of associating the topic with the government would eviscerate the individual's right under the First Amendment.

Preventing offense based on race or gender may be a special category because the government has an obligation not to discriminate against various protected classes. An example would be a racial slur on a plate or an indirect insult such as the display of the Confederate flag as a logo on the plate. Again, however, the success of the argument that the government cannot allow certain biased speech is dependent upon a

1990) (striking down restriction on bumper stickers in government employee context); *State v. Meyers*, 462 So. 2d 227 (La. Ct. App. 1984) (holding profane sticker protected speech). *But see* *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995) (upholding restriction on bumper stickers on Air Force base).

257. The government would be allowing it, but not endorsing it, just as it must allow groups and individuals to engage in this speech in its parks, sidewalks, or highways. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (finding public streets must be available for parade by racist organization, despite the substantial costs incurred by the taxpayers as a result). In fact, the Supreme Court has suggested that a rule of viewpoint neutrality for a student fee program would prevent "any mistaken impression that the student newspapers speak for the University." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995).

258. *See Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *Collins v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

259. *See Forsyth County*, 505 U.S. at 123.

showing that the government would be viewed as endorsing or supporting the speech.

Recently, the Eighth Circuit addressed this argument in the context of the Ku Klux Klan's application to the "Adopt-A-Highway" program.²⁶⁰ The state argued that allowing the Klan to participate would be akin to entering into a "prohibited" relationship with the Klan. The Eighth Circuit rejected the argument²⁶¹ and found that it would be an impermissible infringement upon the Klan's First Amendment associational freedoms to require them to adopt a non-discriminatory message as a condition of participating in the program.

The Supreme Court has considered variations of the "imprimatur" argument in at least three different contexts: (1) government association with religious speech as a violation of the Establishment Clause; (2) government control of school curriculum; and (3) government control of its symbols.

a. The Establishment Clause Cases

The Supreme Court has not embraced the concept that speech in a public or nonpublic forum could be readily associated with the government, at least in the context of religious speech. In *Lamb's Chapel*,²⁶² for example, school classrooms

260. See *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, *Yarnell v. Cuffley*, 121 S.Ct. 1225 (2001).

261. The state cited *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), but the Eighth Circuit rejected the comparison. In *Cuffley*, the court noted:

In *Burton*, the Supreme Court found state action when a private coffee shop, operating within a publicly owned building, refused service to a black customer. What we have here, however, is more like a State owned coffee shop offering service to a group of customers who want a table for only their white friends. The state action doctrine does not extend so far.

Cuffley, 208 F.3d at 709 (footnote omitted).

262. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (finding that school district's ban on showing film on family with religious values was viewpoint-discriminatory because the Board's policy allowed other family issues to be addressed from non religious viewpoints). The Court rejected the notion that allowing the films to be shown would be impermissible government endorsement of religion:

The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under

were generally available for community activities after school hours. The claim that a religious organization's community event would impermissibly associate the government with the religious organization's viewpoint was rejected under these circumstances. So too in *Capitol Square Review & Advisory Board v. Pinette*,²⁶³ where the Ku Klux Klan wanted to put up a cross in a public square open to various private displays, a plurality dismissed the argument that the government would be seen as endorsing religion. In *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁶⁴ the Supreme Court found that government funding of a state university student newspaper with a religious viewpoint was not an endorsement of religion.

In the context of religious symbols and Establishment Clause violations, at least four members of the Court have advocated a per se rule that, in the context of a public forum, there is no likelihood of attributing private speech to the government.²⁶⁵ Several of the other justices have adopted a standard in which the Court analyzes whether either a reasonable or a "reasonably informed" observer would associate the speech with the government.²⁶⁶

The choice between a per se rule and a reasonable viewer standard may not make a difference in the license plate context. Most viewers of vanity plates know they are the individual driver's "vanity" plates and probably would not mistakenly confuse the speech with the government's speech. They may be angry that the government allows the speech and may associate the government with a secondary endorsement by not preventing the speech. Nevertheless, it is unlikely that the reasonable observer would think that the vanity plate contains the government's message.²⁶⁷ In any event, any claims involving

these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Id. at 395.

263. 515 U.S. 753 (1995).

264. 515 U.S. 819 (1995).

265. See *Capitol Square Review & Advisory Bd.*, 515 U.S. at 753.

266. See *id.* at 755 (O'Connor, J., concurring).

267. See *Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring) (noting in the context of the state university funding various student publications, that "[g]iven this wide array of nonreligious, anti-religious and competing religious

an association with the government might also fail to meet strict scrutiny because there is a more narrowly tailored alternative to addressing the problem of perceived government endorsement—a clear disclaimer on the plate, such as “Driver Vanity Plate.”²⁶⁸

b. The School Situation

The “imprimatur” argument has been successful in the school speech area. In *Hazelwood School District v. Kuhlmeier*,²⁶⁹ the Supreme Court indicated that the government might regulate speech that bears the “imprimatur” of the government, at least in a school setting as long as the regulation is reasonably related to a legitimate pedagogical interest.²⁷⁰

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the *public might reasonably perceive to bear the imprimatur of the school*. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.²⁷¹

Thus, in *Hazelwood*, the Supreme Court approved the idea that a “school may in its capacity as publisher of a school

viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical. This is not the harder case where religious speech threatens to dominate the forum.”)

268. See *Capitol Square Review & Advisory Bd.*, 515 U.S. at 769. (“If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such. That would be a content-neutral ‘manner’ restriction that is assuredly constitutional.”).

269. 484 U.S. 260 (1988).

270. See *id.* at 270–73.

271. *Id.* at 270–71 (emphasis added).

newspaper or producer of a school play 'disassociate itself' . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."²⁷²

Hazelwood, at this point, is limited to school-sponsored speech and the government's role in education, which involves inculcating values.²⁷³ *Hazelwood*, in effect, holds that the school curriculum (high school and below) is government speech, entitling the government to regulatory power comparable to that granted over the federally-funded family planning services in *Rust v. Sullivan*.²⁷⁴ It would not apply to student speech on campus that did not bear the imprimatur of the school or was not a part of the school curriculum.²⁷⁵

In the school cases, the Supreme Court is dealing with the government as owner of the property and as educator. Thus, "school-sponsored" activities such as school plays or newspapers are treated as if the speech is the government's—as in the *Rust* case. This obviously limits free speech principles and gives the government more control over the speech and curriculum. If the courts were to view the plates as government speech,²⁷⁶ then this situation becomes more analogous.

c. *The Government Symbol Argument*

An offshoot of the "imprimatur argument" is the argument that the government has an interest in preventing "abuse and

272. *Id.* at 271 (citation omitted).

273. *See id.*

274. *See Rust v. Sullivan*, 500 U.S. 173 (1991); discussion *supra* Part III.A.

275. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (addressing student wearing armband in middle school absent school showing of substantial and material disruption); *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (addressing regulation of underground newspaper). The *Papish* court noted,

[w]e think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.

Id.

276. *See* discussion *supra* Part III.A.

degradation” of a state symbol.²⁷⁷ Finding such an interest “compelling,” the California Court of Appeal in *Katz v. Dep’t of Motor Vehicles* upheld a California statute that denied combinations of letters or numbers “offensive to good taste and decency.”²⁷⁸ The court found that while the First Amendment interest was minimal, the state had a compelling interest in “protecting from degradation a mechanical identification symbol.”²⁷⁹

The “state symbol” argument, however, was rejected by the United States Supreme Court in *Texas v. Johnson*²⁸⁰ with regard to burning the national flag, a symbol considerably more venerated in our national history than a license plate. Although not yet expressly overruled, *Katz* is no longer good law on this point.

3. Protection of Children

Protection of children can be a compelling interest and several Supreme Court cases have made this point.²⁸¹ Nevertheless, the context of those cases would suggest that the compelling interest would depend upon the particular combination of letters and numbers used on the vanity plate. For example, the interest would be marginal for the “FROG” plate because it would be hard for many adults to see the harm, and children are most likely to think the driver is a fan of the *Frog and Toad* series of children’s books. There really seems no compelling interest generally in protecting children from seeing “FROG” or “I PRAY” on a vanity plate.

277. See *Katz v. Dep’t of Motor Vehicles*, 108 Cal. Rptr. 424, 427–28 (1973) (“While the licensee may have both possession and title of the license plates, the plates are also an official mechanism of the state performing the vital governmental function of vehicle identification.”).

278. *Id.* at 426 *passim*.

279. *Id.* at 428. The court went on to say that:

The state has the right to protect the legitimacy, credibility, and reliability of its symbols and emblems because of the substantial impact the symbols may have on public attitudes and behavior. The effect that symbols and symbolic settings have in encouraging public acceptance and compliance with socially determined policies is well known.

Id. (citations omitted).

280. 491 U.S. 397, 414 (1989).

281. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (finding protection of children from exploitation in the production of pornography for adults is a compelling interest); *Reno v. ACLU*, 521 U.S. 844 (1997).

Moreover, this approach seems inconsistent with *Cohen* because Paul Cohen was allowed to walk around wearing a jacket that most six-year-olds could read and want to understand, and that most ten-year-olds would understand. The problem is not that the interest in protecting children is not compelling; the problem is that the means are not narrowly tailored with the result that adult viewers are overly restricted from viewing speech that they have a constitutional right to view.

For example, in *Sable Communications of California, Inc. v. FCC*, the harm alleged in permitting access to indecent messages ("dial-a-porn") on the telephone was acknowledged as very important.²⁸² Yet, the interest in protecting children did not justify the complete restriction of 900 numbers because the limitation was overinclusive and unconstitutionally limited adult speech to that speech fit for children only.²⁸³ The Court found that there were other alternatives to protecting children—methods that would still allow adult access. Similarly, in *ACLU v. Reno*, children's access to indecency on the Internet could be limited without a total ban by the use of other potential screening devices.²⁸⁴

The difference in this case, however, may be that no such comparable screening devices exist. It would not be possible to limit the reading of the plates to adults only. The question would become whether the interest in avoiding exposure of some of the plates to children is compelling enough to justify the restriction. In *FCC v. Pacifica Foundation*,²⁸⁵ where George Carlin's "seven dirty words" broadcast was the subject of a radio station censure, the level of scrutiny was intermediate because it was a regulation of the broadcast media. This special circumstance means that the level of government interest need only be "important," as opposed to "compelling."

282. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

283. See *id.* at 126; see also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (striking down ban on unsolicited advertisements of condoms because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox").

284. See *ACLU v. Reno*, 521 U.S. 844, 874 (1997) ("[The Communication Decency Act's indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

285. 438 U.S. 726, 748-49 (1978).

The Court stated, in any event, that a complete ban could not be justified. Rather, it was more of a case of a “pig in the parlor.”²⁸⁶ It is harder to make the case that certain vanity plates are out of place, given that the parlor is the public streets and highways, already littered with offensive private advertisements, graffiti, and bumper stickers often containing violent images and sexual innuendo. The problem is that there are no screening devices for the many potentially offensive images that children are exposed to on the public streets, as the Court recognized in *Cohen*. Therefore, it would be difficult to make the case that viewers, including children, should not just avert their heads one more time, given that such advertisements and billboards are calculated to draw even more attention to them than vanity plates.²⁸⁷

Moreover, the defense that the car owner has alternative avenues of expression would not be relevant.²⁸⁸ That consideration only becomes relevant if the regulation is content-neutral, intermediate scrutiny is applied, and the court considers whether there are “ample alternative means of communication.”²⁸⁹ Of course, there are alternatives for getting the message across—the most obvious being a bumper sticker—but the Supreme Court has never accepted that as an adequate justification for a content-based regulation.²⁹⁰

286. See *id.* at 750 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)); see also *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 67 (1973) (using the example of “a man and woman locked in a sexual embrace at high noon in Times Square”).

287. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.”).

288. See *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 541 (1980) (“[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.”); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (finding alternate venue for play irrelevant when restriction was content-based).

289. *Hill v. Colorado*, 120 S.Ct. 2480, 2486 (2000).

290. See *Reno v. ACLU*, 521 U.S. 844 (1997). The Court found that: The Government’s position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafleting on the streets *regardless* of their content, we explained that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

4. Prevention of "Road Rage"

A fourth alternative suggested in one of the lower court cases was the prevention of "road rage" by those exposed to the offensive plate.²⁹¹ This argument is another variation of view-point-based, listener reaction governing the permissibility of the speech—an argument rejected for anything short of the elusive "fighting words" concept.²⁹² Nothing in any of the statutes suggests that road rage is the underlying reason for the restriction. If it were, the statutes would be over and under inclusive in achieving that purpose because "offensive" and "indecent" plates would each have a varying level of inspiration of road rage. One person's sore point may not necessarily be another person's trigger point—also illustrating the inevitable inconsistency of filtering speech based on listener reaction. Moreover, as entitlement to being protected from offense grows, more speech may be found offensive.

In any case, even if the interest in preventing road rage is viewed as compelling, less restrictive alternatives, such as punishing those with poor impulse control on the roads, would seem to make banning vanity license plates fail strict scrutiny.

5. Failing Strict Scrutiny

None of these possible government interests would meet the standard of strict scrutiny. Although some are compelling in some circumstances (for example, children in the case of sexually explicit speech), none of the interests justifies the broad-based restrictions reflected in the state statutes and regulations.²⁹³ In most cases, even assuming a compelling interest, more narrowly tailored means to achieve that interest are available. Several of these interests do not serve to meet even the "reasonableness" standard applicable to regulations of

Id. at 880 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)).

291. See *Lewis v. Wilson*, 89 F. Supp. 2d 1082 (E.D. Mo. 2000); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding that ban on nudity at drive-in theaters in order to decrease potential for causing accidents because of driver distraction was over and under inclusive).

292. The plates do not seem to qualify for "fighting words" status because they are not "directed to the person of the hearer" or, in other words, are not "face to face" communication. *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

293. See *supra* note 8.

nonpublic fora because the captive audience and road rage interests are inherently viewpoint-based in this context.

VI. THE VAGUENESS AND OVERBREADTH DOCTRINES

Two doctrines that could potentially come into play in challenges to vanity plate statutes are vagueness and overbreadth. Both provide potential bases for striking down particular state statutes. This section will only briefly outline their applicability because it is beyond the scope of the article, depending in part on the specific language of the statute or regulation.

The vagueness doctrine allows a court to strike down statutory language if persons of common intelligence must guess at the meaning and would differ as to its application.²⁹⁴ The evil of vagueness in statutes is twofold under the First Amendment: (1) it chills speech because if one has to guess at the meaning of the prohibition, persons of caution will refrain from engaging in protected speech,²⁹⁵ and (2) it allows discriminatory enforcement of a statute because the vagueness creates "unbridled discretion" in administration.²⁹⁶

Many of the state vanity plate statutes do not define offensiveness, and it is often left to the bureaucratic machinery of the state to make these seemingly arbitrary decisions.²⁹⁷ Nor do the statutes limit offensiveness to what might provide compelling interests, for example, material inappropriate for children or material likely to trigger road rage.

The potential for arbitrary and selective discrimination²⁹⁸ is real in the area of vanity plates. Standardless discretion pervades the process.²⁹⁹ Many of the statutes use the terms

294. See *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

295. See *Reno v. ACLU*, 521 U.S. 844 (1997).

296. See *Coates*, 402 U.S. at 611.

297. See *supra* notes 8–40 and accompanying text.

298. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (noting that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application").

299. See discussion *supra* notes 8–40 and accompanying text; see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 294 (1981) (noting "offensive speech" category is "notoriously vague. Vagueness probably cannot be completely eliminated in any area of law, but that is no excuse for failing to recognize degrees of vagueness").

"indecent" or "offensive" and provide little direction, leaving it up to the vagaries of committees, complainants, and bureaucracies to determine what is offensive and what is not.³⁰⁰

Two recent Supreme Court cases have discussed vagueness challenges. The Supreme Court in *NEA v. Finley* held that a "decency" clause posed no "realistic danger" of viewpoint discrimination, rejecting a facial challenge to the statute.³⁰¹ In *Reno v. ACLU*, on the other hand, the Court held that the Communication Decency Act's prohibition of "indecent" speech was unconstitutionally vague.³⁰² *Reno*, however, involved a criminal statute while the vanity plate provisions provide no criminal penalties or civil fines. They simply provide that requests may be denied or plates revoked if they are offensive or indecent. For that reason, a court may be unwilling to use the vagueness doctrine.

The overbreadth doctrine is designed to deal with the problem of a statute that proscribes a substantial amount of protected speech in relation to that speech which can be constitutionally proscribed.³⁰³ In other words, a challenger would need to show substantial overbreadth.³⁰⁴ The success of an overbreadth challenge will depend on how a court resolves the issues discussed above. For example, if the court decides that the plates are a nonpublic forum and the limit is reasonableness and viewpoint neutrality, an overbreadth challenge will probably not be successful. Rather, the court will probably defer to a case-by-case determination of whether viewpoint discrimination has occurred. On the other hand, if a court finds that the plates are not government property, and strict scrutiny applies, an overbreadth challenge is far more likely to be successful.

CONCLUSION

Vanity plates qualify as protected expression under the First Amendment. Indeed, plate requests are rejected and

300. See *supra* notes 8–40 and accompanying text.

301. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998); discussion *supra* notes 221–229.

302. See *Reno v. ACLU*, 521 U.S. 844 (1997).

303. See *City of Houston v. Hill*, 482 U.S. 451 (1987).

304. See *Broaderick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

plates revoked because of the message conveyed to the viewer. There is little doubt that most plate owners are paying the extra money to convey a message to the public about themselves. There is little likelihood that the government will be able to establish that the plates are “government speech” or that the functional role of the plates should eclipse their expressive character.

The government ban on “offensive” or “indecent” vanity plates is a content-based and viewpoint-based abridgment of speech. The government’s best case is to argue that the plates are a limited public forum. If they are, the government may regulate content, but such regulation must be reasonable and viewpoint-neutral. The worst-case scenarios for the government are that the plates are public fora, the restrictions are viewpoint-based, or the plates are the property of the car owners. In these circumstances, strict scrutiny would have to be met. If car owners test the issue, many might win, although the grounds might vary, depending upon the particular statute and particular plate request.

The easiest but most fiscally unattractive decision would be to close the forum.³⁰⁵ A less draconian solution would be to define the limits more tightly, thus accepting only name and place designations on the plates, rather than opening up the universe of speech that is currently available within the space limits of the plates.

The case of vanity plates also provides an insight into First Amendment doctrine specifically, and legal doctrine generally. Courts can, and have, taken many paths on their way to resolving the issues. Doctrines can be extended or blocked off by the creation of a small deviation here or a new trail there to end up at the desired result. After all, who wants to see a license plate displaying “ARYAN” or a racial slur, and who wants their seven-year-old children to see a plate with “FUCKU” on it?

In assuring that these incidents do not occur, a court could, for example, channel the decision in these directions: (1) the

305. One county took this approach with regard to its Adopt-A-Road program when the Ku Klux Klan attempted to adopt a portion of highway. See Tom Pelton, *Klan Bid to Join Adopt-A-Road Leads to Closing: Arundel Executive is Strongly Opposed: What Good Does This Do?*, BALTIMORE SUN, Mar. 6, 1999, at 1A.

plates are not speech, but vehicle identification mechanisms;³⁰⁶ (2) the government is speaking, not the car owner;³⁰⁷ (3) the government is not inviting expressive activities on the plates and has not created a limited public forum (or any forum at all);³⁰⁸ (4) the interests of the captive audience in other cars justifies the government regulation under the applicable standard;³⁰⁹ or (5) the regulations are not viewpoint-based because “decency” and “offensiveness” are only factors that are taken into account in deciding whether to grant a plate request.³¹⁰ The Supreme Court has created a number of unsafe detours in this area, and they may look attractive as shortcuts to the result desired even when they distort First Amendment doctrine. One can lose sight of why we cherish free speech as one considers whether to let car owners put “FROG” or “WINE” on their vanity plate.

Unfortunately, these rationalizations become habit-forming and we might lose the main trail as we expand questionable doctrines to deal with unpleasant speech. The more speech that is covered by the *Rust* rationale, for example, the more the government can use its considerable fiscal power to leverage restraints on speech. If the government cannot even articulate a coherent message that it is sending, then claiming the plates are government speech is extending *Rust* into uncharted, dangerous territory. Taking audience reaction into account means that no unpopular speech will be safe from censorship. In each of these instances, under the stress of trying to reach particular results, dangerous doctrines are expanded.

The First Amendment has protected pornographers, flag burners, Nazis, and racists. By allowing these unpopular

306. See *Kahn v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993).

307. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531 (2000).

308. The Supreme Court has not been quick to view government property as a public forum, and its definition has been restrictive. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (finding airport is not a public forum because not traditionally set aside for expressive activities nor was there a government intent to make it a public forum). Recently, however, in the case of religious speech, the Court loosened up and found a limited public forum in the subsidies granted student organizations by a public university. Whether this concept will find wider use outside the religious speech area is still questionable. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

309. See *Hill v. Colorado*, 120 S.Ct. 2480 (2000).

310. See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

speakers, we protect the speech of those who stand up for civil rights, debate the justices and injustices of various wars, and continue to push for a vigorous national debate on abortion, the death penalty, and every other controversial topic of our day. We cannot expect the First Amendment to be an effective shield when we need it for protection, if we have allowed it to be battered, broken, and abused when it protects speech we do not like. The First Amendment is an insurance policy against government repression. We pay for it all the time—in large and small ways—by tolerating the racist, the pornographer, and the generally offensive speaker.

The Supreme Court was correct when it let Cohen wear that jacket.³¹¹ If we allow government to censor out the offensive, the government's drift net will sweep broadly over our speech. One need look no further than the operation of vanity plate restrictions to see the government's ability to wield its power as censor in unexpected and disturbing ways. When the courts consider whether the censorship of vanity plates is consistent with the First Amendment, they should maintain fidelity to the values expressed in the *Cohen* opinion. So, if someone wants a plate that says "GOVTSUX," let her have it. Who knows, it might even have been a popular plate among a few of the signers of the Declaration of Independence.

311. See *Cohen v. California*, 403 U.S. 15 (1971). See discussion *supra* notes 1–5 and accompanying text.

