Florida Law Review

Volume 53 | Issue 3 Article 1

July 2001

Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates

Leslie Gielow Jacobs

Florida Law Review
Founded 1948

Formerly
University of Florida Law Review

VOLUME 53 | JULY 2001 | NUMBER 3

FREE SPEECH AND THE LIMITS OF LEGISLATIVE DISCRETION: THE EXAMPLE OF SPECIALTY LICENSE PLATES

*Leslie Gielow Jacobs**

* Professor of Law, University of the Pacific, McGeorge School of Law. B.A., 1982, Wesleyan University; J.D., 1985, University of Michigan.

I. INTRODUCTION

It has been a while since license plates were a constitutional topic. Twenty-odd years ago it was New Hampshire's "Live Free or Die" plate that was in the spotlight.[1] The Maynards, Jehovah's Witnesses who disagreed with the motto's message, successfully argued that the state violated their free speech rights when it required them to display the motto on their cars.[2] According to the Supreme Court, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[3] Although established in the context of a four-word motto that was inches tall at best, this free speech precedent has grown and branched far beyond this limited type of expression.[4]

Now, license plates have again become the source of a free speech controversy. The constitutional angle, however, has shifted. The argument is no longer that a state forces individuals to use their private property as

1. *See* Wooley v. Maynard, 430 U.S. 705, 707 (1977) (New Hampshire required that non-commercial vehicles bear license plates embossed with the state motto, "Live Free or Die," and made it a misdemeanor to "knowingly obscure . . . the figures or letters on any number plate.") (quoting N.H. REV. STAT. ANN. §§ 263:1, 262:27-c (Supp. 1975)).

2. *Id.* at 707, 717.

3. *Id.* at 715.

4. The constitutional principles that condemn government efforts to compel expression stem from the early cases of *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating pledge of allegiance and flag salute requirements) and *Wooley*, 430 U.S. at 717. The contexts in which this doctrine applies now include media compelled access requirements, *e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4 (1986), compelled participation in parades, *e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557, 559 (1995), compelled contributions to unions, *e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977), and compelled contributions to marketing associations, *e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 460 (1997).

"mobile billboard[s]"[5] for messages with which they disagree. Rather, the focus is on state "specialty license plate" programs that allow individual drivers to choose to buy a plate that advertises a particular organization's name, logo, or motto.[6] The current constitutional issue is whether the First Amendment permits,[7] or in fact requires,[8] a state to provide its citizens with this option.

Two plates, available in several states, raise both sides of the current controversy. The "Choose Life" plate, authorized by state legislatures to be produced and distributed in both Florida[9] and Louisiana,[10] presents one side of the controversy. While both states offer a range of other license plate choices,[11] pro-choice groups sued, arguing that, with the "Choose Life" plate, the government unconstitutionally aligned itself with a controversial political message.[12] A federal district court in Florida rejected

---

5. *Wooley*, 430 U.S. at 715.

6. Under specialty license plate programs, groups or organizations can apply, pursuant to established procedures, for license plates that feature some or all of the following: the group's name or initials, its logo, or its motto. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997) (explaining that specialty plates "may take the form of either: a 'non-logo' plate, bearing a special tag number and the name, initials, or abbreviation of the name of the organization; or 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") (citing MD. CODE ANN., Transp. II § 13-619(g)(1)(i-ii) (1992 & Supp. 1996)).

7. *See* Henderson v. Stalder, 112 F. Supp. 2d 589, 595-600 (E.D. La. 2000) (finding that the Constitution does not permit states to issue "Choose Life" specialty plate).

8. *See Glendening*, 954 F. Supp. at 1105 (finding that the Constitution does not permit states to refuse to issue specialty plates with confederate flag logos).

9. The Florida "Choose Life" plates bear the motto along with a crayon drawing of two smiling children. The proceeds from the plates are split between the state and organizations that counsel women to choose adoption and provide for their material needs when they do. The Florida legislature initially authorized the plates' issuance in 1998, but then-governor Lawton Chiles vetoed the measure. The legislature authorized the issuance again in 1999, after Jeb Bush became governor. He signed the bill into law. Cristin Kellogg, *Pro-life Floridians Fight for Right to Drive Home a Point; NOW Stalls "Choose Life" Plates*, WASH. TIMES, Mar. 8, 2000, at A2. Several lawsuits followed. Pursuant to one of them, a state court judge issued a preliminary injunction prohibiting issuance of the plates. After an appellate court ruled that the case should be moved to a different jurisdiction, the state began to issue the plates. John Pacenti & Antigone Barton, *Florida Selling Tags Despite Court Tangle*, PALM BEACH POST, Aug. 12, 2000, at 1A.

10. Louisiana's "Choose Life" plate bears the motto along with a stork with a baby in a sling hanging from its beak. The legislature authorized issuance of the plate by statute. *See* LA. REV. STAT. ANN. § 47:463.61 (West 2000). Pursuant to a constitutional challenge, a federal district court issued a preliminary injunction prohibiting production of the plates. *Henderson*, 112 F. Supp. 2d at 602.

11. At the time of the lawsuit challenging the denial of the confederate flag logo plate, Maryland issued specialty plates to 236 organizations. *Some "Free State,"* STUART NEWS, Mar. 12, 1997, at A8 [hereinafter *Some "Free State"*]. At the time of its lawsuit, Florida had 51 specialty plates. Kellogg, *supra* note 9, at A2.

12. *See* Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at

the argument,[13] while a federal district court in Louisiana accepted it as the basis for granting a preliminary injunction forbidding the plates' distribution.[14] According to the Louisiana court, the Constitution forbids state legislatures from making the "Choose Life" plates available to their citizens because they want to promote the pro-life message.[15]

The Confederate flag logo specialty plate sought by the Sons of Confederate Veterans (SCV) in several states represents the other side of the controversy.[16] While some states offer drivers the option of purchasing the specialty plates,[17] others have recalled[18] or refused to authorize[19] plates with the flag logo because it is perceived by other citizens as offensive.[20] A federal district court in Maryland invalidated the Motor Vehicle Administration's recall of the flag logo plates, holding that the state could not constitutionally "[advance] the viewpoint of those offended by the flag and [discourage] the viewpoint of those proud of it."[21] Another federal court invalidated the Virginia legislature's refusal to authorize the flag logo plate, accepting[22] the plaintiffs' claim that the Constitution requires

---

*2-3 (M.D. Fla. Dec. 22, 1999); *Henderson*, 112 F. Supp. at 591.

13. *Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *21 (dismissing case as not ripe, but suggesting that the substantive arguments were meritless).

14. *Henderson*, 112 F. Supp. 2d at 602.

15. *Id.* at 598 (asserting that the state may "appropriate [] funds to promote adoption and discourage abortion" but "once [it] creates a forum where viewpoints are expressed, it must be viewpoint neutral").

16. The Sons of Confederate Veterans (SCV) has sought Confederate flag tags in Alabama, North Carolina, Georgia, Tennessee, Maryland, Virginia and West Virginia. *See infra* notes 129-201 and accompanying text.

17. Confederate flag plates for the group are available in Alabama, North Carolina, Georgia, Tennessee and Maryland. *Sons of Confederate Veterans Get South Carolina Battle Flag Tags*, CHATTANOOGA TIMES, Dec. 20, 1999, at B2 [hereinafter *SCV South Carolina*].

18. A federal district court invalidated Maryland's attempt to recall the plates. Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1105 (D. Md. 1997).

19. *See* Rex Bowman, *Suit Seeks Rebel Flag License Plate: Free Speech Issue Is Cited in Case Filed in Federal Court*, RICHMOND TIMES-DISPATCH, July 24, 1999, at B5.

20. *See, e.g.*, *Glendening*, 954 F. Supp. at 1100 (stating that Maryland plates were recalled because of "apparent negative racial connotations of the logo design displayed on the plate"); Bowman, *supra* note 19, at B5 ("[F]lagless SCV license plate came about after black lawmakers in the house of Delegates reminded colleagues that the Rebel flag, popular among hate groups, offends many blacks who see it as a symbol of past racial hatred."); John Commins, *McAfee Plans Race for 13th House Term*, CHATTANOOGA TIMES, Jan. 17, 2000, at B2 ("[B]ill to honor Sons of Confederate Veterans with specialty license plates was stalled in House Calendar Committee. Members of the General Assembly's Black Caucus complained that the plates featured a logo displaying the Confederate flag.").

21. *Glendening*, 954 F. Supp. at 1104-05.

22. Sons of Confederate Veterans, Inc. v. Holcomb, No. 7:99CV005301, 2001 U.S. Dist. LEXIS 538 (W.D. Va. Jan. 18, 2001).

the state to make the flag logo plate available to those drivers who want to publicize its message.[23]

Like the earlier New Hampshire license plate case,[24] the current license plate controversy is ostensibly cabined by its context–a complex political diatribe simply cannot fit on the limited space devoted to "speech" on any specialty license plate. Again, however, the free speech implications extend beyond the confines of the license plate context. At issue more generally is a government's authority to be selective when it subsidizes private speakers. This is an issue unresolved by the Supreme Court, which has in some cases validated the government's authority to be selective[25] and in others limited it,[26] without thoroughly explaining the constitutional principles that guide its judgments.[27] The license plate controversy thus provides an opportunity to develop these principles in a limited context, from which resolution of the government's authority to pick and choose among private speakers in a variety of other contexts can grow.

Part I describes the current specialty license plate controversy. It describes the legislative approval process used in most states, and more specifically details the legal challenges to states' issuance of "Choose Life" plates and refusal to issue plates with the Confederate flag. Part II sets out the constitutional background against which the specialty plate controversies take place, noting that government officials both among and within states differ as to whether, according to the existing categories in constitutional doctrine, their programs constitute a type of "government speech" or rather constitute private speech "forums." Part III examines the structure of the current specialty plate programs in light of free speech values and the restrictions on the government's ability to be "selective" among private speakers. Part III demonstrates that specialty plate programs are private speech forums rather than nonforum government/private speech interactions, for which a greater degree of governmental discretion to be selective is allowed. As private speech forums, Part III argues that most of the current specialty plate programs violate the Constitution. Specifically, the range of legislative discretion to enact or reject legislation is fundamentally inconsistent with the limits on discretion that apply to an administrator of a speech forum. Part IV explains how states can structure and administer a constitutional specialty plate program by moving it away

23. *Id.*; Bowman, *supra* note 19, at B5 ("[T]he state can't bar speech solely because it's unpopular or offensive.").

24. *See supra* notes 1-5 and accompanying text.

25. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998) (finding selectivity permissible in context of arts funding).

26. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 844-45 (1995) (finding selectivity impermissible in context of student publication funding).

27. *See id.*; *see also Finley*, 524 U.S. at 583-84.

from the legislature to an entity that can apply clear, non-discriminatory access standards in a consistent way that can be subjected to meaningful judicial review.

II. THE SPECIALTY PLATE CONTROVERSY

A. *The Specialty License Plate Approval Process*

Specialty license plates acknowledge a group or cause on the portion of the plate not devoted to the letter/number identifying configuration.[28] Drivers typically pay an extra fee for the plates,[29] which either goes to a state-designed cause or is split between the state and the group or cause acknowledged on the plate.[30] Although available in some states before the late 1980's,[31] the trend towards adopting such programs surged after 1987, when Florida issued a plate commemorating the space shuttle Challenger.[32] Since its issuance, the Challenger plate has generated more that thirty million dollars for space-related scholarships and research.[33] Now, more than forty states have specialty license plate programs,[34] with some states offering well over a hundred choices.[35]

Groups that seek specialty plates are generally motivated both by their money-making potential and the recognition that they bring to the advertised cause.[36] Even if it does not reach the tens of millions generated

---

28. This distinguishes specialty license plates from so-called "vanity" license plates, on which drivers can choose their letter/number configuration. Henderson v. Stalder, 112 F. Supp. 2d 589, 597 n.5 (E.D. La. 2000).

29. FLA. STAT. § 320.08056 (2000) (listing fees for specialty plates of fifteen to twenty-five dollars); *State Grabs Half of Funds Raised by Specialty License Plates*, COPLEY NEWS SERVICE, Nov. 2, 1999 (stating that California drivers pay from twenty to fifty dollars per year for specialty plates) [hereinafter *State Grabs Half*].

30. *See, e.g.*, *State Grabs Half*, *supra* note 29 ("Half of the money paid for 'special interest' license plates doesn't benefit the intended causes" but instead "goes to DMV for overhead or to a separate fund for other environmental projects.").

31. *See, e.g.*, *Ark. Putting Brakes on Specialty Vehicle Tags*, COM. APPEAL, Apr. 21, 1997, at B3 ("Specialty tags came to Arkansas in the 1970s.") [hereinafter *Ark. Putting Breaks*].

32. Carlos Sanchez, *Texas Plate Varieties to Reach 100 This Year*, FORT WORTH STAR-TELEGRAM, Aug. 11, 1997, at 8.

33. *Ark. Putting Brakes*, *supra* note 31, at B3.

34. *NPR Morning Edition: License Plate Speech Controversy* (NPR radio broadcast, Apr. 30, 1998) (Transcript No. 98043014-210) ("Forty-three states have specialty license plates.") (statement of Cheryl Devall).

35. *See, e.g.*, Ledyard King, *Bill Proposes a "Choose Life" License Plate*, VIRGINIAN-PILOT, Jan. 18, 1999, at B5 (stating that Virginia offers "roughly 150 specialty plates"); William Weir, *Special Interests Are Being Given License to Fill*, HARTFORD COURANT, June 7, 1999, at A3 ("New York's DMV Web site lists almost 200 different special interest plates.").

36. *See, e.g.*, Suzanne Hoholik, *CASA Plates to Aid Abused Children*, SAN ANTONIO EXPRESS-NEWS, Oct. 27, 1998, at 1B (stating that child abuse license plate campaign's purpose has

by some of the most popular plates, funding from the plates can literally "save the day" for many causes.[37] Groups view the plates as a means to "spread the message" to members of the public who are unaware of it,[38] and interpret the purchase of plates as an expression of support from the public.[39] Similarly, individuals who buy the plates do so both to help fund the identified organization or cause, and to publicly express their ideological support for it.[40] According to a spokesperson for 3M, the company that developed the reflective sheeting that allows for the manufacture of the plate graphics, specialty plates are "kind of a win-win deal. People only spend the extra money if they want to."[41]

All states have minimum requirements that groups must meet to apply for specialty plates. These requirements usually relate to the expected profitability of the plate. In Florida, for example, organizations must submit a scientific sample survey indicating that at least 15,000 motor vehicle owners intend to purchase the plate,[42] an application fee of up to $60,000 to defray the state's plate-related expenses,[43] and a short-term and long-term marketing plan and financial analysis outlining anticipated revenues and planned expenditures.[44] Applicants for specialty plates can fail at this point in the process by not meeting the profitability guarantee requirements.[45]

"two goals: to raise money and to increase awareness of child abuse").

37. *See, e.g.*, Margo Harakas, *Some Might Say It's a License to Print Money, but Florida's 51 Specialty Plates Have Raised Almost $157 Million for Good Causes . . .*, SUN-SENTINEL, May 30, 2000, at 1D ("[Florida's] State of the Arts plate . . . has pumped more than $270,000 into Broward County's planned artists' housing project."); Roberta Scruggs, *Loon Plates Save the Day: Maine Parks Have Cashed In*, PORTLAND PRESS HERALD, Aug. 10, 1997, at 12D ("The loon plate arrived to save the day in what many people consider the darkest hour of Maine's park system.").

38. *See, e.g.*, Adriana Colindres, *Bill Signed for New Breast Cancer Awareness Plates*, STATE J.-REG., Aug. 1, 1998, at 6 (explaining that breast cancer awareness plate is "going to spread the message about mammograms") (quoting an interested citizen).

39. Scruggs, *supra* note 37, at 12D ("'The [state] employees feel supported by the people of Maine [who purchase the loon plate]. . . . They're giddy. It's been a wonderful thing.'") (quoting a state official).

40. *See, e.g.*, Hoholik, *supra* note 36, at 1B (asserting that a new Texas child abuse plate "will let motorists display their concern about child abuse—and do something about it").

41. Harakas, *supra* note 37, at 1D.

42. FLA. STAT. § 320.08053(1)(b) (2000).

43. *Id.* § 320.08053(1)(c).

44. *Id.* § 320.08053 (1)(d); *see also* Robert B. Gunnison, *State's Drivers May Have Too Much on Their Plates*, S.F. CHRON., June 13, 1999, at 3/Z1 ("[Specialty] plates need to reach a 5,000 -order threshold before the state can issue them."); *SCV South Carolina*, *supra* note 17, at B2 (explaining that South Carolina requires groups to pay a $4,000 fee to cover initial production costs or 400 prepaid applications).

45. *See, e.g.*, Gunnison, *supra* note 44, at 3/Z1 ("[California specialty plates] that never saw the light of day were plates for the Monterey Bay Marine Sanctuary, the Coachella Valley Mountain Conservancy, the Gene Chappie Heritage Network, the American Heritage Rodeo Foundation and

Most states also require that specialty plate applications that meet the minimum requirements be approved in their own pieces of legislation, meaning that both houses of the legislature must pass them and the governor must sign them into law.[46] Thus, applications for specialty plates may also fail at one of the numerous stages in the legislative process.[47] Unlike in the minimum guidelines noted above, there are rarely articulated standards to guide elected officials' judgments.[48] To the extent that they offer explanations for approving or disapproving special plate applications, their explanations relate generally to their perceptions of the public interest and whether the proposed specialty plate would serve it.[49]

As with any other law, a decision on a specialty plate application is subject to the vagaries of the legislative process. Whether a particular specialty plate makes it through the gauntlet depends most fundamentally upon the relative strengths and interplay of the political forces in favor of and opposed to the application.[50] So, for example, in Arkansas the legislature refused to authorize specialty plates for the Knights of Columbus because of fears that other groups, such as the Ku Klux Klan, would want them, too.[51] In California, several years ago, some "well-placed telephone calls" by Nancy Reagan got a Ronald Reagan Library plate approved despite a purported ban on all specialty plate approvals.[52]

---

plates for cars owned by firefighters."); Harakas, *supra* note 37, at 1D (quoting Florida motor vehicle department spokesperson who stated that application requirements assure that plates are "not authorized willy-nilly").

46. *See, e.g.*, S. 1329, 1999-2000 Leg., Reg. Sess. (Cal. 2000) (eliminating requirement that specialty plates be approved by legislature and instead requiring direct application to Department of Motor Vehicles); Colindres, *supra* note 38, at 6 (describing specialty plate "signed into law" by Illinois governor); Hoholik, *supra* note 36, at 1B ("To offer specialty plates, an agency or university must secure a state lawmaker as a sponsor and win approval from the Legislature.").

47. *See, e.g.*, Michael Gardner, *Boy Scout License Plate Splits Lawmakers Over Bias Issue*, COPLEY NEWS SERV., Mar. 14, 2000 ("Tied in political knots by the Boy Scouts, a Senate panel sidestepped a showdown Tuesday by approving conflicting bills on the issuance of special fund-raising license plates."); *Organ Donor License Plate Honoring Payton Moves in Senate*, STATENET CAPITOL J.-ILL., Mar. 27, 2000 (stating that, although Senate panel approved organ donor specialty plate in honor of Walter Payton, "[t]he legislation faces an uncertain future in the House").

48. *See* Sen. Tom Lee, *Controversy Over "Choose" License Plate Misses Whole Point of Choice*, PALM BEACH POST, May 19, 1998, at 15A (stating that in Florida, "the Senate has imposed nine policy questions to ensure that the license plate serves a broad public purpose").

49. *See, e.g., id.*

50. *See, e.g.*, Dan Walters, *A Legislature Unhampered By Rules*, SAN DIEGO UNION-TRIB., Aug. 11, 1998, at B-6:1 (describing how, despite a ban on passage of new specialty license plate applications, another transportation bill was "hijacked" and an AIDS research specialty license plate authorization was written in and passed by the legislature).

51. *Ark. Putting Brakes*, *supra* note 31, at B3 ("Allowing one group but not another to get its own tag could lead to a lawsuit.").

52. Carl Ingram, *Senator Hopes to Decelerate Move to Specialty License Plates*, L.A. TIMES, Mar. 26, 2000, at A24.

More recently in that state, the Boy Scouts had the legislature "tied in political knots" as a Senate committee both adopted a broad anti-bias policy for issuing specialty plates and authorized a plate for the Scouts even though the group's membership policy violates the provision.[53] According to one side, anyone supporting the anti-discrimination measure was "voting against the Boy Scouts."[54] On the other side stood the Senate's President Pro Tempore, a "San Francisco Democrat [who] represents a large gay population" and was poised to "use his considerable power to derail the Boy Scout bill."[55] Even before the Boy Scout dispute arose, the anti-discrimination rules had been trimmed to remove a reference to gender discrimination in order "to take care of the Girl Scouts," who also wanted specialty plates.[56] Finally, some states may allow religious symbols, such as crosses, on specialty plates,[57] while others may deem them too controversial. Explained one Alabama legislator of the requirement that a white church steeple be removed from a proposed Martin Luther King, Jr. plate, "We've got to be sure what we do here doesn't open us up to court suits."[58]

B. *The Current Controversies*

1. "Choose Life"

The "Choose Life" license plate is the brainchild, so to speak, of Marion County Commissioner Randy Harris, who conceived the idea in 1996 while stuck in Ocala, Florida traffic.[59] In 1997, Harris founded Choose Life, Inc., a nonprofit organization designed to "work with interested citizens within Florida and other states to create a specialty license plate with the slogan 'Choose Life,' the proceeds of which would be used to facilitate and encourage adoption as a positive choice for women with unplanned pregnancies."[60] At the time of its application, Florida law required the group to raise a $30,000 application fee and obtain

53. Gardner, *supra* note 47.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See, e.g., Some "Free State," supra* note 11, at A8 ("Christian crosses [are] the centerpiece of some other [Maryland Motor Vehicle Association]–approved logos.").

58. *Regional News Digest*, CHATTANOOGA TIMES, Apr. 30, 2000, at B3 (quoting Rep. Jack Venable).

59. *Choose Life, Inc.: About Us, at* http://www.choose-life.org/aboutus.html.

60. *Choose Life, Inc.: Our Purpose, at* http://www.choose-life.org/purpose.html.

10,000 signatures.[61] It took the group only 3½ weeks to do so.[62] State Senator Tom Lee sponsored the bill creating the plate in the Florida Legislature, where it passed both houses in early 1998.[63] Then-Governor Lawton Chiles vetoed the bill, however, stating, "Simply because a particular political message is able to garner a majority of votes in the Florida Legislature does not mean that an official State of Florida license plate is the proper forum for debate on this—or any other—political issue."[64]

Later that year, on the campaign trail, gubernatorial candidate Jeb Bush stated that he would sign such legislation if elected.[65] After his election, Choose Life, Inc. again pressed its specialty plate application. Both houses of the legislature passed the legislation in 1999, and in that same year the new Governor Bush signed it into law.[66] On the authorized plate, the words "Choose Life" appear in childish crayon scrawl across the top, between the month and year stickers. A similarly colorful crayon-like sketch of smiling boy and girl faces, bent affectionately together, appears in the right-hand third of the plate's surface, the same size vertically as the plate's identifying letter/number configuration.[67] The extra charge for the plates is $20 per year, with proceeds designated according to sales by county.[68] The counties then must distribute the money to not-for-profit agencies that counsel and meet the needs of pregnant women who are committed to placing their children for adoption.[69] The legislation disqualifies organizations that provide abortion information, in addition to counseling and assisting women who choose adoption, from receiving funding.[70] The National Organization for Women (NOW), along with others, brought suit challenging the constitutionality of the state's action.[71]

---

61. FLA. STAT. § 320.08053(1)(b)-(c)(1997). The current requirement is a $60,000 application fee and 15,000 signatures. FLA. STAT. § 320.08053(1)(b)-(c)(2000).

62. Kellogg, *supra* note 9, at A2.

63. *Id.*

64. Press Release, ACLU, Florida ACLU Calls on Gov. Jeb Bush to Veto Two Unconstitutional Bills (May 7, 1999), http://www.aclu.org/news/1999/n050799a.html [hereinafter ACLU Press Release].

65. *CNN Talkback Live: "Choose Life" License Plate Causes Controversy in Florida* (CNN television broadcast, Nov. 29, 1999) (Transcript No. 99112900V14) [hereinafter *Talkback Live*].

66. Kellogg, *supra* note 9, at A2.

67. *See Choose Life License Plate, at* http://www.hsmv.state.fl.us/specialtytags/tagchoose.html.

68. *See id.*

69. FLA. STAT. § 320.08058 (2000).

70. *Talkback Live*, *supra* note 65.

71. NOW brought three different lawsuits challenging the constitutionality of the state's approval of the plate. Cristin Kellogg, *Pro-life Floridians Fight for Right to Drive Home a Point; NOW Stalls "Choose Life" Plates*, WASH. TIMES, Mar. 8, 2000, at A2 ("To date, NOW has mounted three lawsuits to keep Florida from being the first state in the country to sport the two-

The crux of the free speech claim against the state[72] is that the plate represents an unconstitutional government choice to support an anti-abortion message.[73] The government's response has several aspects. First, although Choose Life, Inc., is backed by anti-abortion groups such as Florida Right to Life,[74] and amendments to change the wording to "Choose Adoption" were defeated several times in the legislature,[75] the plates' supporters consistently deny that the specialty plate sends an anti-abortion message.[76] The law's initial author contends that the license plate "has nothing to do with a woman's right to choose an abortion."[77] States the Choose Life spokesperson, "We are not in the pro-life/pro-choice debate. This is a pro-adoption plate."[78] According to Governor Bush when asked about the plate after signing it into law, "It's a pretty tag, and it says 'Choose Life,' and it's for adoption. If people want to politicize that, they'll politicize anything."[79]

A second strain of the argument supporting the constitutionality of the "Choose Life" plates is that it is but one of many Florida specialty plates that bear a variety of different messages. Although many of these plates signify affiliation with particular state schools or support for professional sports teams,[80] others contain messages, such as advocating support for environmental causes or protecting endangered species,[81] which are as

---

word slogan above its car bumpers. . . . [T]wo of the lawsuits have been dismissed or defeated.").

72. After the initial free speech clause challenges failed, *see* Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *21 (M.D. Fla. Dec. 22, 1999), NOW brought another suit, arguing that the plates also violate the establishment clause because the money that they bring in primarily aids religious organizations. *Foes of "Choose Life" Plate Ask Court to Recall 13,000*, ST. PETERSBURG TIMES, Mar. 2, 2001, at 5B ("Abortion rights advocates asked a judge Thursday to recall a 'Choose Life' auto tag, saying the state has issued a tag with a biblical message quoted by anti-abortion activists.").

73. *Talkback Live*, *supra* note 65 ("It's a bill that very specifically talks about abortion and really is a state-sanctioned campaign against the right to choose abortion.") (statement of Elizabeth Toledo of NOW).

74. *All Things Considered* (NPR radio broadcast Aug. 22, 2000) (stating that Choose Life, Inc. "has the backing of anti-abortion groups like Florida Right to Life and conservative Christian groups statewide") (statement of Philip Davis) [hereinafter *All Things Considered*].

75. *Talkback Live*, *supra* note 65.

76. *See, e.g., id.* ("Well, see, I don't look at it as the state 'taking a side.' I look at it as the state allowing individuals that would like to purchase a plate that does help adoptions it [sic] to be able to do that.") (statement of Tom Gallagher, Florida Education Commissioner); *see also* Kellogg, *supra* note 9, at A2 ("The plates are not 'anti-' anything.") (statement of House bill sponsor Rep. Bev Kilmer).

77. Lee, *supra* note 48, at 15A.

78. *All Things Considered*, *supra* note 74 (statement of Russ Amerling).

79. Kellogg, *supra* note 9, at A2.

80. *See Specialty License Plates Index*, *at* http://www.hsmv.state.fl.us/specialtytags /specialindex. html (listing 14 university plates and 11 professional sports team plates).

81. *Id.* (Environmental cause plates include: "Conserve Wildlife," "Everglades River of

"political" and "controversial" as "Choose Life."[82] That the state facilitates a wide variety of groups and messages and that individual drivers have free choice to decide to pay the extra fee to support the organization or message renders state approval of any particular plate constitutional.[83] Pursuant to this strain of argument, the appropriate response of citizens who do not like the "Choose Life" message is not a lawsuit, but is to seek recognition of their own group and message through the specialty plate process.[84] At the same time, however, in response to concerns that a completely wide-open approval process could put undesirable messages on the state's roadways, legislators emphasize safeguards in the authorization procedure. According to the senator who sponsored the "Choose Life" plate, "legislative criteria" that ensure that a plate serves a broad public purpose "protect Floridians from those who might attempt to use the specialty license plate statute to advertise a negative fringe idea."[85]

The third strain of the argument in support of the constitutionality of the "Choose Life" plate emphasizes the discretion inherent in the legislative process. Under this line of argument, the creation of a particular specialty plate is a legislative act that requires no further constitutional justification than that enough votes existed to pass it.[86] That other

---

Grass," "Indian River Lagoon," "Large Mouth Bass," "Manatee," "Panther," "Protect Wild Dolphins," "Sea Turtle," "Tampa Bay Estuary," and "State Wildflower." Miscellaneous cause plates include: "Agriculture," "Boy Scouts," "Challenger," "Florida Arts," "Florida Educational," "Florida Salutes Veterans," "Florida Sheriffs Youth Ranches," "Florida Special Olympics," "Girl Scouts," "Invest in Children," "Keep Kids Drug Free," "Share the Road," "Political Athletic League," "U.S. Olympic," and "U.S. Marine Corps").

82. *See Talkback Live*, *supra* note 65 ("Well, you know, I look at it, there are people that are very interested in saving manatees, and I will tell you there is an other [sic] side that politically [sic]. Some of the boat manufacturers and boat owners don't like the idea that they have to go at a very slow no-wake speed to protect manatees. They want to run their boats as fast as they can. It's a highly political issue. So it's as political as anything else.") (statement of Tom Gallagher, Florida Education Commissioner).

83. *See* ACLU Press Release, *supra* note 64 (arguing that the state can choose to allow political slogans on license plates, but that "once that is done the Constitution does not permit the State to discriminate in the future on the basis of viewpoint").

84. *Talkback Live*, *supra* note 65 ("They want to give and talk about using abortion as a method of birth control, which I think is not a good thing to be promoting, but they have the right to go to the legislature and ask to do that. And they could get the money from it.") (statement of Tom Gallagher, Florida Education Commissioner).

85. Lee, *supra* note 48, at 15A; *see also Talkback Live*, *supra* note 65 (stating that the entire approval process provides assurance "on having a reasonable group").

86. *Talkback Live*, *supra* note 65 (Florida has the "Choose Life" specialty plate "because they had the votes to have a tag to help fund adoptions as an alternative. I don't see a problem with that.") (statement of Tom Gallagher, Florida Education Commissioner).

organizations apply and "simply don't make it through the process"[87] is explicable as an appropriate result of the democratic system.

Shortly after the legislature authorized the "Choose Life" specialty plates, the state ordered the manufacture of 10,000 of the plates, intending to distribute them as soon as they became available.[88] In one of the lawsuits challenging the state's action, a state judge preliminarily enjoined the distribution of the plates.[89] But after the appellate court held that the case should be transferred to a different jurisdiction, the state determined that "the status of the law is that there is no legal impediment to the sale of the [plates]."[90] As the plates were being sold, a state circuit court judge continued to consider the plantiffs' claims.[91]

Initial sales of the "Choose Life" specialty plate have been brisk. The state sold 750 plates in the first week that it was offered,[92] and in the first twenty weeks sales of the plate generated $200,000.[93] Choose Life, Inc. is actively advertising the availability of the plates,[94] reminding drivers that they need not wait until their renewal date to get the plates and offering a packet of reproducible flyers for those who want to "spread the word."[95] It also plans to place billboards around the state publicizing the availability of the specialty plates and encouraging Floridians to "take a STAND for Life."[96] It seeks sponsors of "pro-life billboards" to collaborate in the effort.[97]

Choose Life, Inc. seeks to extend the specialty license plate effort beyond Florida. It claims to be in communication with groups and individuals in thirty-five states that are interested in beginning the process and notes that license plate bills have been before legislatures of eleven additional states in the past year.[98] In Virginia, a bill with the same crayon

87. *Id.* (statement of Del. Richard Black, responding to whether legislature would have to grant the KKK a specialty tag).

88. *Judge Delays Sale of Choose Life Tags*, STUART NEWS, Feb. 9, 2000, at B5 (explaining that the state had ordered plates and planned to begin distributing them in March).

89. *See id.* (explaining that a judge blocked distribution of Florida's new "Choose Life" license plates while she decided whether they amount to "a political statement against abortion").

90. *All Things Considered*, *supra* note 74 (statement of Robert Sanchez, Florida State Highway Dep't).

91. *Choose Life Update*, *at* http://www.choose-life.org/newsletter.html [hereinafter *Choose Life Update*] (NOW v. State of Florida & Dep't of Transp., Case No. CV 001953, before Circuit Judge Nikki Ann Clarke).

92. *All Things Considered*, *supra* note 74.

93. *Choose Life Update*, *supra* note 91.

94. *Id.* ("We have begun an extensive statewide grassroots advertising effort to spread the word about the new Choose Life license plate.").

95. *Id.*

96. *Id.*

97. *Id.*

98. Douglas Belkin, *"Choose Life" Car Tags Stirring Up Debate Over Anti-Abortion Efforts*,

drawing graphics as Florida passed the House and the Senate, but became fatally stalled on the issue of wording.[99] The bill passed the House after being changed from "Choose Life" to "Choose Adoption,"[100] although its sponsor hoped to change the wording back once the plate won Senate approval.[101] The Senate Committee, however, wanted to change the word "choose" as well.[102] According to the House sponsor's legislative assistant, "Some of the people in the Senate were nervous because other House members were making the argument that if there is a pro-life tag then there could be a pro-abortion tag."[103] When faced with the prospect of losing both words, the bill's sponsor removed it from consideration, vowing to introduce it again.[104]

In only one other state, Louisiana, has the specialty plate authorization been signed into law. Says an organizer of that "Choose Life" license plate campaign, "It's easy to get these things done in Louisiana because we have a very pro-life legislature."[105] The bill in fact passed both houses of the legislature unanimously.[106] In addition to the "Choose Life" motto, the Louisiana plate features a baby wrapped in a blanket dangling from the beak of the state bird, the brown pelican.[107] The extra charge for the plate is $25 per year, which, as in Florida, is to go to organizations that provide "counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child."[108] And, as in Florida, organizations "involved in counseling for, or referrals to abortion clinics,

---

CHATTANOOGA TIMES, July 23, 2000, at A15 ("Bills authorizing 'Choose Life' license plates have been proposed in at least 10 states, said Russ Amerling, vice president of the organization."); *Choose Life Update*, *supra* note 91 ("This year Choose Life license plates went before the Legislatures of California, Texas, South Carolina, Pennsylvania, Minnesota, West Virginia, Mississippi, North Carolina, Louisiana, Alabama and Ohio."); Robert Whereatt, *The Week Ahead*, STAR TRIBUNE, Apr. 15, 2001, at 5B (Minnesota considers "Choose Life" plate).

99. Belkin, *supra* note 98, at A15 ("In Virginia, state delegate Richard Black sponsored a bill using Florida's 'Choose Life' design.").

100. *Talkback Live*, *supra* note 65 ("[W]e had to accept a modification to get it out of the House of Delegates.") (statement of Del. Richard Black).

101. *Id.* ("[W]e had hoped to get it through the House of Delegates and hopefully to modify it back at a later time.") (statement of Del. Richard Black).

102. *Id.* (stating that the Senate committee "simply could not accept the word 'choose'") (statement of Del. Richard Black).

103. Kellogg, *supra* note 9, at A2 (quoting Steve Whitener, legislative assistant to Del. Richard Black).

104. Belkin, *supra* note 98, at A15 ("The Senate didn't like the word life, and they didn't like the word choose. They changed it to something like family friendly, so I had it stricken.") (quoting Del. Richard Black).

105. *Id.* (quoting Peg Kenny).

106. *See* Steve Ritea, *Anti-Abortion License Plate Drawing Fire*, TIMES-PICAYUNE, July 19, 2000, at A1 (stating that sponsor of specialty plate bill watched it pass unanimously).

107. *Id.*

108. *Id.*

providing medical abortion-related procedures, or pro-abortion advertising" are disqualified from receiving funding.[109] Organizations that receive money from the "Choose Life" fund within the state treasury will be chosen by the "Choose Life Advisory Council," which, like the fund, is created by the plate-authorizing legislation. The Council will include the president or designee of the American Family Association, the Louisiana Family Forum and Concerned Women of America, as well as other members chosen by them.[110]

The New York-based Center for Reproductive Law and Policy brought suit on behalf of local residents and others,[111] challenging the constitutionality of the plates. Like the Florida plaintiffs, they raised both free speech and establishment clause claims.[112] On August 29, 2000, a federal district court issued a preliminary injunction directing the state to halt production of the "Choose Life" plate,[113] finding that the plantiffs were likely to succeed on the merits of their free speech claim.[114]

Like the Florida plaintiffs, the Louisiana plaintiffs argued that, by authorizing the "Choose Life" specialty plate, the state unconstitutionally supported one point of view on a controversial public issue.[115] Louisiana's response differed in emphasis from Florida's. Rather than arguing about whether the plate "takes a side" on a controversial issue, Louisiana officials largely concede that the message expresses a particular viewpoint.[116] The Louisiana representative who sponsored the legislation frankly acknowledged that the plate's message is anti-abortion.[117] And, although the state argued that the availability of many specialty plates rendered the "Choose Life" plate constitutional, it primarily emphasized that the plate's message is valid because it is a reflection of the state's own

---

109. *Id.*

110. Henderson v. Stalder, 112 F. Supp. 2d 589, 592 (E.D. La. 2000), stay denied 2000 WL 1875987 (E.D. La. 2000).

111. Id. at 592 n.2; *Judge Temporarily Blocks "Choose Life" License Plates*, CHATTANOOGA TIMES, Aug. 30, 2000, at A2 (explaining that suit was brought on behalf of New Orleans residents Russell J. Henderson, Doreen Keeler, Rabbi Robert H. Loewy, and the Greater New Orleans Section of the National Council of Jewish Women).

112. *Henderson*, 112 F. Supp. 2d at 591.

113. *Id.* at 592.

114. *Id.* at 596.

115. *Id.* at 593; Joe Gyan, Jr., *Attorney Argues Against State's Specialty Plate*, THE ADVOCATE, Aug. 24, 2000, at 1B (setting forth plaintiffs' attorney's argument that specialty plates approved by Louisiana legislature "[i]n general . . . don't express a viewpoint," but, with the "Choose Life" plate, the legislature has "gone a step further").

116. *Henderson*, 112 F. Supp. 2d at 598 ("[D]efendants have made clear by their argument that there is no intent to be viewpoint neutral.").

117. Ritea, supra note 106, at A1 (stating that the plate is appropriate for Louisiana because the state "is, traditionally, a very anti-abortion state") (quoting Rep. Shirley Bowler).

convictions.[118] According to the state, specialty license plates do not create a forum for private speech.[119] Instead, every specialty plate, because it is authorized "through [the state's] democratic process of legislative enactments," contains an "official statutory [message] by the state itself," which the state "makes . . . available to those who choose an alternative state message instead of the one on the basic license plate."[120] As government speech, specialty plate authorizations are not subject to the rule that prohibits viewpoint discrimination among private viewpoints.[121] Rather, argues Louisiana, the state may, "pursuant to democratic processes, . . . [express] a preference for normal childbirth."[122]

The district court in Florida dismissed the plate challengers' free speech claim as not ripe, because the plaintiffs had not applied for a pro-choice license plate.[123] It also found that the plaintiffs lacked standing because the specialty program and the "Choose Life" plate authorization at issue created opportunities for some to speak without limiting others' speech in any way.[124] The district court in Louisiana rejected both of these arguments.[125] According to that court, "[b]y the very act of injecting 'the State's position which has been legislatively sanctioned' into a forum, First Amendment injury occurs."[126] And, "[o]nce a forum has been created which allows viewpoint discrimination, it is unconstitutional from the moment the discriminatory forum is created."[127] Therefore, no pro-choice plate application was necessary for plaintiffs to bring their challenge.[128]

2. Confederate Flag Plates

The Confederate flag specialty plate dispute began in Maryland. Unlike most states, which require legislative approval of specialty plates, Maryland allows its Motor Vehicle Administration (MVA) to issue

118. *Henderson*, 112 F. Supp. 2d at 593-95.

119. *Id.* at 595.

120. *Id.* (quoting Defendants' Memorandum in Opposition).

121. *Id.*

122. *Id.*

123. Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *21 (M.D. Fla. Dec. 22, 1999).

124. *Id.* at *20.

125. *Henderson*, 112 F. Supp. 2d at 600-01.

126. *Id.* at 601.

127. *Id.*

128. Id. ("Once free speech has been abridged in such a manner, there is no case law supporting the proposition that those individuals whose speech has been restrained in this particular forum must wait, a week, a month, or a year to have an opportunity to express an opposing viewpoint in that forum."); Gyan, *supra* note 115, at 1B (noting that a plaintiffs' attorney conceded that clients had not applied for a pro-choice plate but argued "that it would be 'futile' to get Louisiana lawmakers to vote for such a plate").

specialty plates to non-profit organizations that meet the qualification guidelines.[129] Over 350 specialty license plates, either with an organization's name and logos or with the name only, are available in Maryland.[130] Organizations that have such plates include

> alumni and alumnae groups, volunteer fire departments, veterans' groups (e.g., Vietnam Veterans of America), . . . business groups and unions, churches and religiously affiliated groups (e.g., B'nai B'rith, Grace Baptist Church, and the Muslim American Community), political parties (both the Maryland Republican and Democrat parties and the Libertarian Party), and cause-advocating interest groups (e.g., the National Rifle Association).[131]

Organizations generally can choose whether to apply for "name-only" or "logo" specialty plates, with the latter costing slightly more.[132] Before the Confederate flag logo controversy, the MVA had denied logo plates to two organizations, the Royal Order of Jesters, which wanted a naked Buddha, and the Anne Arundel County Professional Firefighters, which wanted the letters "FU."[133] These organizations obtained name-only plates instead.[134]

In June 1995, forty-two members of the SCV applied for a specialty plate.[135] The SCV is a non-profit organization of men who can demonstrate that an ancestor served honorably for the Confederacy in the Civil War.[136] The SCV is a historical and educational organization dedicated to "preserving and explaining Confederate heritage in proper historical perspective," which "publicly condemns racism and all hate groups."[137] In December 1996, the MVA issued seventy-eight plates with the SCV's

---

129. MD. CODE ANN., Transp. II § 13-619 (2000).

130. Marina Sarris, *MVA Won't Challenge Judge's Ruling on Tags: Group Allowed to Keep Confederate-Logo Plates*, BALTIMORE SUN, Mar. 27, 1997, at 2B (noting that 358 groups have special organizational plates) [hereinafter *MVA Won't Challenge*]; Marina Sarris, *MVA to Revoke License Tags Bearing Confederate Flags: Complaints Led to Agency Action Against Plates*, BALTIMORE SUN, Jan. 3, 1997, at 1A (noting that 215 organizations have logo plates and 128 have name-only plates) [hereinafter *MVA to Revoke*].

131. William J. Mertens, *Battle Over the Battle Flag*, LEGAL TIMES, Apr. 14, 1997, at 35.

132. *MVA to Revoke*, *supra* note 130, at 1A (noting that name-only plates cost $12, while logo plates cost $15).

133. *Id.*

134. *Id.*

135. Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997).

136. *Id.*

137. Curtis A. Carter, *Confederate Flag and Free Speech*, COURIER-J., Mar. 25, 1997, at 11A.

name and logo,[138] which for over 100 years has included the Confederate flag.[139] On the plate, the flag occupied approximately a two-inch square.[140]

It was after issuance of the plates that members of the legislature became involved.[141] The legislature's Black Caucus joined with the state's NAACP to ask the MVA to recall the plates.[142] The MVA did so, explaining that its decision was "based on numerous, substantial complaints . . . about the apparent negative racial connotations of the logo design displayed on the plate."[143] It offered, however, to consider another SCV application proposing "logo artwork with an alternative design that is not perceived as racist."[144] According to the MVA Administrator, who is an African-American, "I personally do not find the logo or the Confederate battle flag objectionable, but that's not the issue. There are a large number of Maryland citizens who find it objectionable, and we are a state agency, so it's our responsibility to be sensitive to the concerns of the public."[145] Said Governor Parris N. Glendening, supporting the MVA's recall decision, "The Confederate flag has taken on a symbolism over the years that many of us reject."[146]

The SCV sued, arguing that the MVA's recall violated its free speech rights.[147] In "the near record time of 33 days,"[148] the case went from complaint to a permanent injunction order issued without hearing.[149] The court held that the MVA recall of the SCV plates was unconstitutional viewpoint discrimination, "advanc[ing] the viewpoint of those offended by the flag and discourag[ing] the viewpoint of those proud of it."[150] The

---

138. *Glendening*, 954 F. Supp. at 1100.

139. *Id.*

140. Bonna M. de la Cruz, *Senators OK Rebel License Tag*, TENNESSEAN, May 18, 1999, at 1A (noting that Tennessee bill used Maryland plate as a model, which included the two-inch flag, and that, according to the bill's sponsor, Sen. Bobby Carter, "You can't hardly see it.").

141. *Some "Free State," supra* note 11, at A8 ("A state senator accused Maryland of sanctioning a 'racist symbol.'").

142. *See* Tom Stuckey, *Confederate Symbol on License Plates Brings Protests in Maryland*, AUSTIN AMER.-STATESMAN, Dec. 28, 1996, at A4 ("Maryland doesn't need to go backwards with this Jim Crow mess.") (quoting Sen. Larry Young, chairman of the Legislative Black Caucus); *id.* ("'We in the NAACP are surprised and disappointed that a state agency would cooperate in perpetuating such symbols as this one.'") (quoting Hanley Norment, president of the state chapter of the NAACP).

143. *Glendening*, 954 F. Supp. at 1100 (quoting Pls' Mem. In Supp. Ex. 11).

144. *Id.* at 1101 (quoting Pls' Mem. In Supp. Ex. 11).

145. *MVA to Revoke*, *supra* note 130, at 1A.

146. *Id.*

147. Carter, *supra* note 137, at 11A.

148. *Id.* (stating that the case was "clear-cut" according to SCV member).

149. *Glendening*, 954 F. Supp. at 1099 ("In view of the thorough briefing, no hearing is necessary under the Rules of this Court."); *id.* at 1101 ("Defendants have requested that the Court forego ruling on the preliminary injunction motion and reach the merits of the issues.").

150. *Id.* at 1104.

MVA decided not to appeal the district court's decision.[151] The Confederate battle flag specialty plates remain available in Maryland.[152] For a period of time, approval of any further applications was delayed while the MVA and the legislature considered changes to the specialty plate program. A House of Delegates committee, however, killed a bill that would have abolished specialty plates, which, as one reporter noted, "are popular among some politically connected university alumni, veteran and fraternal groups."[153]

At around the same time as the Maryland controversy, SCV also applied for a specialty plate in North Carolina. There, the Division of Motor Vehicles (DMV) initially refused the SCV's application after determining that it was not a "civic club" within the meaning of the legislature's authorization.[154] The SCV filed suit in state court, where the trial judge held that the SCV met the statutory criteria and directed the DMV to issue the plates.[155] The appellate court affirmed, on state statutory grounds.[156] It reversed the trial court's award of attorney fees to the SCV, however, noting that DMV's positions were not "mere excuses for arbitrary behavior."[157] As to the state's authority to deny the SCV a specialty plate on other grounds, the court noted, "Whether the display of the Confederate flag on state-issued license plates represents sound public policy is not an issue presented to this Court in this case. That is an issue for our General Assembly."[158] It cautioned, however, that "allowing some organizations which fall within [the statutory] criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restriction against content-based restraints on free speech."[159]

SCV specialty plates, including the Confederate flag logo, are also available in a number of other states, including Alabama and Georgia.[160] In South Carolina, the SCV was the first to qualify for a specialty plate under a new procedure, which moved the application decisions from the

---

151. *MVA Won't Challenge*, *supra* note 130, at 2B.

152. *Id.*

153. Marina Sarris, *Ruling Allowing Confederate Plates Won't Be Challenged*, HOUSTON CHRON., Mar. 28, 1997, at 11.

154. N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207, 209 (N.C. Ct. App. 1998) ("The Commissioner reached this decision after comparing the purposes and activities of SCV with 'the statutory language and examples of qualifying civic organizations.'").

155. *Id.*

156. *Id.* at 211 ("[A]s SCV-NCD meets the four criteria enumerated by our General Assembly, . . . SCV-NCD qualifies for special registration plates.").

157. *Id.* at 212.

158. *Id.* at 209 n.1.

159. *Id.*

160. *SCV South Carolina*, *supra* note 17, at B2.

legislature to the Department of Public Safety.[161] The new law allows any nonprofit group to create specialty plates by submitting a $4,000 fee or 400 prepaid applications.[162]

Other states have refused to approve the SCV plates, or have approved them without the flag logo.[163] In two of these states, Virginia[164] and Tennessee,[165] the SCV has responded with federal litigation. The SCV applied for a specialty plate in Virginia in 1998. The bill was held over until the next legislative session, and the SCV spent this time lobbying legislators.[166] When the House Transportation Committee considered the measure, over 100 SCV members attended. The committee heard testimony from the SCV's state commander, as well as several African-Americans who told of their pride in the Confederate cause of "states' rights and tariffs" and its flag symbol.[167] It then approved the SCV plate bill by a 21-2 vote.[168] The one African-American legislator who voted in favor of the bill, Del. William P. Robinson, the committee's chair and longtime leader of the Assembly's Black Caucus,[169] explained that he "feared the state might be sued for discrimination if the request was denied" and the General Assembly could not "be saddled with a lawsuit."[170]

The transportation committee then sent the bill to the House of Delegates. Before the vote, however, Robinson called for and conducted an "unprecedented"[171] additional hearing before the Transportation Committee "to give the public a chance to speak at a forum during the

---

161. *Id.*

162. *Id.*

163. Todd Jackson, *Confederate Group to Sue State Over License Plate Design*, ROANOKE TIMES, May 6, 1999, at B1.

164. *Id.*

165. Lawrence Buser, *Confederate Sons Defend Position on Car Tags in Lawsuit Against Tenn.*, COM. APPEAL, Sept. 18, 1999, at A12.

166. Pamela Stallsmith, *Plates Would Honor Confederate Veterans: Issue to be Among First to Face 1999 Session of General Assembly*, RICHMOND TIMES-DISPATCH, Jan. 5, 1999, at B1.

167. Linda McNatt, *"Sons" Say Flag a Sign of Pride, Not Prejudice; Confederate Groups Want Rebel Flag to Fly Again–On License Plates*, VIRGINIAN-PILOT, Jan. 18, 1999, at B1; Pamela Stallsmith, *Black Rebels' Kin Plead for Specialty Plate; Some Find Flag Racially Offensive*, RICHMOND TIMES-DISPATCH, Jan. 22, 1999, at A12.

168. Todd Jackson, *Group Hoists Rebel Flag in New Fight; Civil Rights Disputes Drive Debate About License Plates*, ROANOKE TIMES, Jan. 21, 1999, at A1.

169. Two other African-American committee members were absent at the time of the vote. Donald P. Baker, *Confederate Plate Effort Enlists Two Black Men*, WASH. POST, Jan. 22, 1999, at B1. Del. William P. Robinson, who voted for the bill in committee, later explained that he voted for it "at that time," and indicated that he was not prepared to say how he would vote in the General Assembly. *Id.*

170. Jackson, *supra* note 168, at A1.

171. Stallsmith, *supra* note 167, at A12.

legislative session that would attract more media attention."[172] Again, SCV members predominated in the audience, and the same African-American spokespersons supported the bill.[173] The state's NAACP director testified against it, arguing that the flag "represents intimidation, terror, lynching and has been [appropriated] by hate groups and white supremacy groups."[174]

The House of Delegates, too, heard testimony in favor of and opposed to the SCV's license plate application. It was the "spellbinding speech" of Del. Jerrauld C. Jones, head of the state's Legislative Black Caucus, that "compelled" a legislative compromise approving the plate but without the flag logo.[175] He told of riding the bus as a six-year-old past a Ku Klux Klan rally, where he saw the Confederate flag waving next to a burning cross. "You could smell the fear on this bus," he said.[176]

The SCV enlisted the aid of the Rutherford Institute to sue the state, demanding that it issue the plate with the flag logo.[177] During the legislative process, the SCV had rejected the compromise suggestion that the group use an alternate Confederate symbol such as the Great Seal or the first Confederate flag.[178] To give up its trademarked symbol, the group argued, would be "admitting it was racist or something to be ashamed of and we're not going to do that."[179] Instead, the plates would provide "an opportunity to re-educate others about the flag's heritage and history," as well as "an opportunity to polish the image of the[] beloved flag, tarnished by misunderstanding."[180] Similarly, when the legislature approved the plate without the logo, SCV members refused to buy it. "Why would we want a tag without our logo?" the head of the Virginia SCV asked.[181] "A tag without that logo is just a plain tag."[182]

In its lawsuit, the SCV contended, as it did in Maryland, that Virginia's specialty plate program is a public forum for private speech, in which the government cannot censor an application simply because members of the

172. Baker, *supra* note 169, at B1.

173. *Id.*

174. Stallsmith, *supra* note 167, at A12.

175. Holly A. Heyser & Mike Knepler, *Jones Expected to Run for Lieutenant Governor*, VIRGINIAN-PILOT, Aug. 8, 2000, at A16.

176. *Id.*

177. Todd Jackson, *Confederate Group to Sue Over License Plate Design: They Want to Include Battle Flag of Army of Northern Virginia*, ROANOKE TIMES, May 6, 1999, at B1.

178. Stallsmith, *supra* note 166, at B1.

179. *Id.*

180. McNatt, *supra* note 167, at B1.

181. Rex Bowman, *State Asking Judge to Dismiss Rebel Flag Suit*, RICHMOND TIMES-DISPATCH, Oct. 13, 1999, at B5.

182. Bowman, *supra* note 19, at B5.

public find it offensive.[183] The state countered that the specialty plate program "does not create an automatic entitlement" to a plate.[184] Rather, what appears on license plates is a "form of 'government speech,' that the state can control."[185] The district court ruled in favor of the SCV, finding specialty plates to be private speech and denial of the Confederate flag logo to be impermissible viewpoint discrimination.[186]

Around the time of the Virginia application, the SCV also applied for a specialty plate in Tennessee. There, the state Senate voted 28-2 to approve it.[187] The two "no" votes came from Sen. Steve Cohen, who commented that, "[i]t's insensitive to African-Americans," and Sen. Thelma Harper, the only African-American senator who voted on the measure.[188] After Senate approval, the bill moved to the House.[189] In that body, the Calendar Committee killed it, after several African-American legislators objected to the Confederate flag appearing on state license plates.[190]

The SCV again filed a federal lawsuit, making the same arguments as it did in Virginia.[191] Like the Virginia legislature, the Tennessee legislature has approved applications from a wide range of organizations for specialty plates.[192] Any group with at least 500 members willing to purchase the plates can petition the legislature for specialty plate approval.[193] Based upon the apparently open application and approval process,[194] the SCV argued that state officials have "unlawfully drawn distinctions" in failing to approve the group's specialty plate application.[195]

---

183. Rex Bowman, *Group Urges Fast Action on Plate: Asks Judge to Skip Trial, Order DMV to Make Flag Tags*, RICHMOND TIMES-DISPATCH, Aug. 5, 2000, at B8.

184. Bowman, *supra* note 181, at B5.

185. Bowman, *supra* note 183, at B8.

186. Sons of Confederate Veterans, Inc. v. Holcomb, No. 7:99CV00530, 2001 U.S. Dist. LEXIS 538, at *5-21 (W.D. Va. Jan. 18, 2001); Craig Timberg, *Virginia Loses Suit on License Plates; Commemorative Tags to Portray Confederate Logo*, WASH. POST, Jan. 19, 2001, at B1.

187. de la Cruz, *supra* note 140, at 1A.

188. *Id.* ("'You know the kinds of attitudes those have proclaimed and the kinds of attitudes they've expressed toward certain groups,' Harper said. 'It was better to vote "no."'").

189. Tom Humphrey, *Sundquist Assails "Neanderthal Thinking"; Says Reform Opposition May Lose Seats*, KNOXVILLE NEWS-SENTINEL, Oct. 15, 1999, at A3.

190. *Id.*

191. Buser, *supra* note 165, at A12.

192. *Id.*

193. *Id.*

194. Commins, *supra* note 20, at B2. ("[A]s far as he knows, the Sons of Confederate Veterans plate was the only specialty plate that has not been approved by the legislature.") (quoting Rep. Steve McDaniel, sponsor of the SCV plate application).

195. Buser, *supra* note 165, at A12.

In addition to specialty plates for organizations, the Tennessee legislature approves and makes available cause-related plates as well.[196] The legislature is now considering a bill to create an "I have a dream" plate with the quote and an image of Dr. Martin Luther King, Jr.[197] Profits from the plates would be earmarked for the National Civil Rights Museum, formerly the Lorraine Motel, in Memphis, where King was slain in 1968.[198] The bill's sponsor is Sen. Steve Cohen,[199] who voted against the SCV application.[200] "The license plates will allow Tennesseans to show their support of the positive and uplifting ideals Dr. King expressed and will provide a voluntary means of funding educational programs," Cohen explained.[201]

III. THE CONSTITUTIONAL CATEGORIES

A. *Government Speech and the Democratic Process*

The Constitution permits the government to "speak for itself."[202] Governments indeed do so in many ways.[203] Government officials speak, government agencies inform and advise, government commissions publish reports, and legislatures hold hearings and enact and defend legislation that embodies particular public policies. These types of government speech are necessarily "selective" among a range of viewpoints on controversial issues of public concern—they identify and advocate the "government's position" without giving equal time or access to competing points of view.[204]

---

196. Commins, *supra* note 20, at B2.

197. *Id.*

198. *Id.*

199. *Id.*

200. de la Cruz, *supra* note 140, at 1A.

201. Commins, *supra* note 20, at B2.

202. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (indicating that "the government can speak for itself," and when it does so, the constitutionality of its action is "evaluated on [that] premise" rather than on the premise that it is regulating private speech). *See generally* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS (1983); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

203. *See, e.g.*, YUDOF, *supra* note 202, at 13 ("The modes and types of government discourse include... direct access to the broadcast media, mass distribution of documents, speeches and other activities of political leaders reported in the private media, the gathering and dissemination of statistics and research results, advertising, preparation and dissemination of official reports, activities of government public-relations offices, dissemination of official records of government proceedings, press conferences, public schooling, military training, and so on.").

204. *See* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992) ("[N]on-neutral government support of speech is often necessary in running a democratic government.").

Through these expressions, the government often seeks not only to inform, but also to persuade listeners to adopt the government's position.[205] Sometimes the government directs these efforts outside of its boundaries to pursue presumably shared interests of its constituents. The National Endowment for Democracy, established by Congress to encourage other countries to adopt democratic principles, is such an example.[206] More often, however, the government directs such efforts towards its own citizens, attempting to convince them to eat or avoid certain foods,[207] to get vaccinated,[208] to stop smoking,[209] or to "Just Say No" to drugs.[210]

The government's authority to speak, whether to inform, educate or persuade, stems from the political process. The government may speak to "promote its own policies or to advance a particular idea" because "it is, in the end, accountable to the electorate via the political process for its advocacy."[211] Not only does the political system established in the Constitution justify government speech, it arguably demands it. If governments are to perform the many varied functions that they now perform, they simply must be able to communicate.[212] Because the process of governing involves constant decisionmaking on controversial public issues, governments' communications will relate to these topics.

That a particular issue is subject to current, heated, public debate does not disqualify the government from "taking sides." Specifically, the government can, through the political processes, decide to favor childbirth

---

205. *See, e.g.*, YUDOF, *supra* note 202, at 14 ("[T]here are a variety of ways government may attempt to influence behavior in accordance with its legitimate authority.").

206. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) (noting that, when Congress established the Endowment, "it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

207. *See* Rosie Mestel, *The Food Pyramid: Does It Miss the Point?*, L.A. TIMES, Sept. 1, 2000, at A1 (explaining that the government published "first dietary guidelines" in 1980, "which are the basis for government nutrition and education programs today").

208. *See* David G. Savage, *Measles Epidemic Quelled, Officials Say*, L.A. TIMES, Aug. 21, 1992, at A22 (explaining that vaccination campaign reduced incidence of measles).

209. *See* Ian Trontz, *Teens Tackle Smoking Among Peers*, PALM BEACH POST, Mar. 29, 1998, at 11B ("About 600 students from across the state will design an advertising campaign to stop children from smoking. Money from Florida's $11.3 billion tobacco settlement will pay for the program.").

210. *See* Jennings Parrott, *First Family Stresses Three Little Words: Just Say No*, L.A. TIMES, May 21, 1986, at 1-2 ("During a White House Ceremony after Congress proclaimed 'Just Say No Week,' [President] Reagan praised the First Lady" for "her campaign for young people to 'just say no' to drugs.").

211. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

212. *See, e.g.*, Shiffrin, *supra* note 202, at 606 ("If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs, government must be able to communicate.").

over abortion.[213] It can then, through its own speech, attempt to persuade pregnant women to choose the government-favored option.[214] Presumably, a government can decide to advocate the opposite view as well. Similarly, the government can decide either to use or not to use a particular symbol, and can consider, in making its decision, whether members of the public perceive the symbol to be "offensive" or "racist." The controversy over the use of the Confederate flag by several southern state governments illustrates this process. On the one hand, the Constitution does not forbid a government from choosing to fly the flag over its capitol.[215] On the other hand, neither does it invalidate a government's decision to remove the flag because many citizens object to its apparent meaning.[216] With respect to both of these controversies, the principle of political accountability allows the government to choose and advocate a particular viewpoint.

B. *Private Speech Forums and Minority Speech Protections*

The First Amendment's guarantee of "freedom of speech"[217] protects private speakers from government actions that suppress their points of view.[218] The core value protected by the free speech guarantee is "the free flow of ideas and opinions on matters of public interest and concern."[219] Free private speech is central to the legitimacy of democratic government, which rests on the faith that citizens choose the rulers, and thus the rules, that structure their actions.[220] The prime threat to this value of free private speech is a powerful government that acts as a censor, distorting the content of public debate.[221] From these tenets comes the core free speech

---

213. Casey v. Planned Parenthood of S.E. Pa., 505 U.S. 833, 872 (1992).

214. *Id.* at 883 (stating that government can require physicians to inform pregnant women of government-produced literature that provides information about fetal development, but which requirement is for the purpose of persuading women to choose childbirth over abortion).

215. NAACP v. Hunt, 891 F.2d 1555, 1561-62 (11th Cir. 1990).

216. *Cf. Georgia Senate Approves Bill for New Flag*, N.Y. TIMES, Jan. 31, 2001, A12 (noting that Georgia approved new flag that minimizes Confederate flag, which will fly on Feb. 1).

217. U.S. CONST. amend. I ("Congress shall make no law... abridging freedom of speech.").

218. The free speech guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

219. Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

220. *See, e.g.*, Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 153 (1996) ("A democratic government derives its legitimacy from the fact that it is considered responsive to its citizens.... We would rightly regard a government that treated its citizens as mere instrumentalities of the state—'closed-circuit recipients of only that which the state chooses to communicate,'—as totalitarian rather than democratic.") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

221. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978) ("Especially where... the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

clause principle that the government may not selectively regulate private speech "based on hostility—or favoritism—towards the underlying message."[222] It must instead tolerate "offensive" private speech[223] and cannot favor particular types of speech that it determines to be in the public interest.[224]

These protections against discriminatory regulation of private speech outside the governmental domain extend also to instances in which the government uses its property or resources to create a speech "forum."[225] "Forum doctrine"[226] stems from the concept of the traditional public forum, which includes government property such as streets,[227] parks,[228] and sidewalks,[229] which have "by long tradition or by government fiat" been "devoted to assembly and debate."[230] Despite government ownership, the objective characteristics of this property[231]—and thus its importance to the Constitution's commitment to free expression[232]—"require the government to accommodate private speakers."[233] This required accommodation means that, absent a compelling purpose, the government cannot discriminate

222. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

223. *See, e.g.*, 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."); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

224. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

225. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (using a "'forum based' approach" to "[assess] restrictions that the government seeks to place on the use of its property").

226. *See id.* at 678 (employing a "'forum based' approach").

227. *See id.* (noting that "streets and parks" are traditional public forums) (quoting Hague v. Comm'n for Indus Org., 307 U.S. 496, 515 (1939)); Frisby v. Shultz, 487 U.S. 474, 481 (1988) (holding residential street to be public forum); Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983) (listing "streets and parks" as examples of traditional public forums).

228. *Perry Educ. Ass'n*, 460 U.S. at 45; Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (park area surrounding state capitol building).

229. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) (sidewalk outside embassy); United States v. Grace, 461 U.S. 171, 177 (1983) (sidewalk outside Supreme Court building).

230. *Perry Educ. Ass'n*, 460 U.S. at 45.

231. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) ("Traditional public fora are defined by the objective characteristics of the property.").

232. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (2d ed. 1988) ("The designation 'public forum' serves as shorthand for the recognition that a particular context represents an important channel of communication in the system of free expression.").

233. *Forbes*, 523 U.S. at 678.

among speakers seeking access according to the content of their messages.[234]

Beyond traditional public forums, which exist regardless of government intent,[235] the government can, by granting access to private speakers, transform its property into speech forums.[236] Although the government is not required to provide such access or financial aid to private speakers, when it chooses to do so the "forum" principles limit its discretion to pick and choose among speakers. The government retains the most discretion to choose among speakers in nonpublic forums.[237] In such forums it does not grant "general access," but rather "does no more than reserve eligibility

234. *See, e.g., id.* at 677 ("The government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.'") (quoting Cornelius v. NAACP Deg. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) ("[R]egulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny.").

235. *Forbes*, 523 U.S. at 678 ("[T]raditional public fora are open for expressive activity regardless of the government's intent.").

236. *Id.* (stating that the government creates a speech forum when it makes access to government property or funding available "to a certain class of speakers").

237. Beyond the traditional public forum, the Court has identified two other types of forums: "[T]he public forum created by government designation, and the nonpublic forum." *Id.* at 677 (quoting *Cornelius*, 473 U.S. at 802). The Court distinguishes the two by whether the government grants "general" or "selective" access to private speakers. *Id.* at 679. Where the government "makes its property generally available to a certain class of speakers," it creates a designated public forum. *Id.* When the government then "excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677. By contrast, when the government grants "selective access" to its property, it creates a nonpublic forum. *Id.* at 679. In a nonpublic forum, the exclusion of a speaker "must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Id.* at 682. Although these rules appear different, they are really the same. The Court has held that the government may "limit" a designated public forum according to criteria that are not viewpoint-based. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983). So, the only real constraint on the government's ability to "designate" a "forum" is the same that applies when it grants access to a nonpublic forum–it cannot engage in viewpoint discrimination. Justice Blackmun recognized this early on. *See Cornelius*, 473 U.S. at 825-27 (Blackmun, J., dissenting). More recently, the Court has implicitly recognized this lack of distinction. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (characterizing funding mechanism as a limited public forum, but applying rules of the nonpublic forum–exclusions must be "reasonable in light of the purpose served by the forum" and may not discriminate against speech on the basis of its viewpoint) (quoting *Cornelius*, 473 U.S. at 806). Lower courts have done so explicitly. *See* Gentala v. City of Tuscan, 213 F. 3d 1055, 1062 n.4 (9th Cir. 2000) ("[T]he distinction between a limited public forum and a nonpublic forum is a semantic distinction without an analytic difference."); DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999) (characterizing the Supreme Court's terminology as "us[ing] the term 'limited public forum' to refer to a type of nonpublic forum"); Warren v. Fairfax County, 196 F.3d 186, 194 n.8 (4th Cir. 1999) (en banc) (agreeing with Justice Blackmun's observation in *Cornelius* that the "limited public forum [is] analytically indistinct from a nonpublic forum").

for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it."[238] Still, forum doctrine limits the grounds for permission decisions in such nonpublic forums.[239] The government can be "selective" according to a speaker's topic or status.[240] It cannot, however, discriminate among speakers for the purpose of favoring or suppressing a particular point of view.[241]

This prohibition on government viewpoint discrimination is so strong that it exists even in circumstances where the government aids private speakers in a context that may not be a forum at all.[242] According to the Court, "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'"[243] Thus, in the context of a "highly selective grant program,"[244] in which "absolute neutrality is simply 'inconceivable,'"[245] the Constitution would likely still forbid the government "to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints."[246]

C. *Specialty Plate Programs and the Problem of Placement*

Specialty plate programs do not fit well within either the "government speech" or "private speech forum" categories, both because of the differences among programs and the different aspects within particular programs. As to the differences among programs, it is first necessary to

238. *Forbes*, 523 U.S. at 679.

239. *See id.* at 682 ("[N]onpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.'") (quoting *Lee*, 505 U.S. at 682 (O'Connor, J., concurring)).

240. *See, e.g., id.* at 682 (holding that government may exclude candidate from debate "because he had generated no appreciable public interest"); *Rosenberger*, 515 U.S. at 829 ("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."); *Perry Educ. Ass'n*, 460 U.S. at 49 (holding that exclusion of speaker "based on status" is permissible).

241. *See, e.g., Forbes*, 523 U.S. at 682. "The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* at 677-78 (quoting *Cornelius*, 473 U.S. at 800).

242. *Id.* at 677 (stating that, beyond traditional and designated public forums, "[o]ther government properties are either nonpublic fora or not fora at all").

243. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (quoting Regan v. Taxation Without Representation, 461 U.S. 540, 550 (1983)).

244. *Id.* at 585 ("[I]t would be 'impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression.'") (quoting Finley v. Nat'l Endowment for the Arts, 100 F.3d 671, 685 (9th Cir. 1996), *rev'd* 524 U.S. 569 (1998) (Kleinfeld, J., dissenting)).

245. *Id.* at 585-86 (quoting Advocates for the Arts v. Thomson, 532 F.2d 792, 795-96 (1st Cir. 1976)).

246. *Id.* at 587 (stating that if the National Endowment for Arts were to do this, "then we would confront a different case").

distinguish programs under which the legislature approves applications from those under which an administrative agency makes the decisions. It is the former that are at issue in the current specialty plate challenges. The latter was at issue in the one decision that has become final.[247]

The less common situation—where a state agency approves specialty plate applications pursuant to legislative guidelines—is the easier one to classify under the existing framework. In such a program, the legislature, by establishing the program and setting out guidelines for applications, evinces an intent to open a particular piece of government property for private speech.[248] The program created is thus properly classified as a forum.[249] Because the area available on a license plate has certainly not traditionally been available for private speech, the program creates a nonpublic forum.[250] Under the existing framework, the question then becomes whether the access rules—both those mandated by the legislature and those imposed by the agency—are reasonable in light of the forum and viewpoint neutral.[251]

The more common situation—where the legislature establishes a specialty license plate program and retains for itself the discretion to approve particular applications—is harder to classify. On the one hand, application criteria are typically undefined by subject matter or viewpoint and invite the participation of private speakers. These features suggest that the legislature has created a private speech forum. On the other hand, the current controversies illustrate quite clearly that legislative approval of particular applications depends not only on meeting the ministerial application requirements, but also on presenting a message that the legislature deems substantively appropriate. This substantive review, pursuant to which the legislators act as legislators, "pushing" particular applications quickly through the process[252] while "killing" others[253] and

247. *See* Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997).

248. *See id.* (noting that statute allows Maryland Motor Vehicle Administration to issue specialty plates to "qualifying" non-profit organizations, and that these qualifications include that at least twenty-five members of the organization agree to pay the extra fee for the plates).

249. *Id.* at 1102-03 (assuming that the specialty license plate program is a forum, but not deciding which type because the prohibition against viewpoint discrimination applies to them all).

250. *See supra* note 237 (noting that there is no analytical difference between a limited and a nonpublic forum).

251. *Glendening*, 954 F. Supp. at 1102 ("'[C]ontrol over . . . a nonpublic forum [must be] reasonable in light of the purpose served by the forum and viewpoint neutral.'") (quoting Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. 788, 806 (1985)).

252. *See, e.g.*, Belkin, *supra* note 98, at A15 (noting that executive vice president of Indiana's Right To Life organization said, after "Choose Life" plate bill stalled, that "he would attempt to push the bill through again").

253. *Id.* ("In Indiana, the [Choose Life] plate was attached to a bill approving veterans of foreign wars plates but was killed when plates supporting the AFL-CIO and United Auto Workers

openly relying on majority preferences for approving or rejecting particular applications, suggests that the government is doing more than neutrally managing a private speech forum. The degree of government involvement in the selection process suggests that the government itself is talking.

In addition to the objective features of the specialty plate programs, government officials' explanations and arguments in defense of the programs evidence confusion as to whether the programs constitute private or public expression. According to one Louisiana legislator, the "Choose Life" specialty plate is "no different from a bumper sticker."[254] The wide range of specialty plates available may indicate that the plate is not a "state endorsement of any certain viewpoint."[255] While the assistant state attorney general, arguing on behalf of the state in the legal challenge, agreed that the availability of bumper stickers was relevant to the constitutional inquiry, his point was that such "alternative methods" for private speakers to express their views meant that the specialty plate program did not create a "forum for private speech."[256]

In Florida, Governor Lawton Chiles vetoed the "Choose Life" plate bill when it was first passed, stating that "[s]imply because a particular message is able to garner a majority of votes in the Florida Legislature" does not mean that it should appear on "an official State of Florida license plate."[257] When the bill was later passed again and signed into law by Governor Jeb Bush, the state argued that the plate was appropriate specifically because its sponsors "had the votes."[258] In Virginia, the one black legislator who voted in favor of the Confederate flag plates in committee explained that his vote was based on his fear that "the state might be sued for discrimination if the request was denied."[259] Another black legislator, however, through a "spellbinding speech about racism," successfully convinced the House of Delegates to excise the flag logo from the plate.[260]

The characterization of the specialty plate programs by different states and judges has varied, too. Florida successfully convinced a federal district

---

were added to the bill, said Roger Tennyson, the executive vice president of Indiana's Right To Life organization."); Humphrey, *supra* note 189, at A3 (stating that Tennessee Confederate flag plate bill "was killed in the House Calendar Committee after several black legislators objected to the idea of the state sanctioning a plate featuring a Confederate flag").

254. Ritea, supra note 106, at A1 (comment of Rep. Melinda Schwegmann).

255. *Id.* ("Louisiana has 104 specialty plates—labeled with everything from 'Preserve the Wild Turkey' to 'Louisiana State University.'").

256. Gyan, *supra* note 115, at 1B.

257. ACLU Press Release, *supra* note 64.

258. *Talkback Live*, *supra* note 65 (statement of Tom Gallagher, Florida Education Commissioner).

259. Jackson, *supra* note 168, at A1.

260. Heyser & Knepler, *supra* note 175, at A16.

court judge to dismiss the plaintiffs' challenge as not ripe, based on plaintiffs' failure to apply for a pro-choice license plate.[261] The court also found that the plaintiffs lacked standing to challenge the bill creating the "Choose Life" plate because the wide variety of specialty plates available means that "in no way does [the "Choose Life" plate] prevent anyone's speech."[262] Both of these reasons implicitly characterize Florida's specialty plate program as a forum. By contrast, in Virginia the state argued that the specialty plate program does not create a forum, but is a form of government speech.[263] The court, however, characterized the specialty plate program as a forum.[264] In Louisiana, the federal district court accepted the state's argument that the "Choose Life" plate "articulat[es] a viewpoint legislatively chosen and embraced by the State,"[265] but used that finding to determine that "the State fails in its responsibility to provide a viewpoint-neutral forum."[266]

IV. LEGISLATION AND THE LIMITS OF "SELECTIVITY" AMONG PRIVATE SPEAKERS

The crucial question that the distinction between government speech and private speech forums addresses is the degree of selectivity that the government can exercise when granting aid, in the form of property access or funding, to private speakers. Specifically, a government can discriminate according to viewpoint in its own speech, whereas it cannot do so when it chooses among private speakers. Because the distinctions drawn in the approval process are either openly[267] or very likely viewpoint-based,[268] characterization of the programs is crucial to their constitutionality.

---

261. Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *14-20 (M.D. Fla. Dec. 22, 1999).

262. *Id.* at *20.

263. Bowman, *supra* note 183, at B8.

264. SCV v. Holcomb, No. 7:99CV00530, 2001 U.S. Dist. LEXIS 538, at *23.

265. Henderson v. Stalder, 112 F. Supp. 2d 589, 596 (E.D. La. 2000).

266. *Id.* at 599.

267. Government decision makers acknowledge that they denied license plate access to the Confederate flag logo because of its "hostile and racially derogatory" message. Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1103 (D. Md. 1997). Message-based discrimination is viewpoint discrimination. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

268. It is less clear why the "Choose Life" plates were approved than why the Confederate flag plates were denied. In Louisiana, the government argued that it approves of the message. *Henderson*, 112 F. Supp. 2d at 595. In Florida, challengers argued that an attempt to get an alternative message on a plate would be "fruitless." Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *17 (M.D. Fla. Dec. 22, 1999). The legislative process at least leaves wide discretion for viewpoint discrimination to operate.

The specialty license plate programs at issue present both sides of this selectivity question. One claim is that specialty license plate programs are forms of government speech. In this case, the government would have broad discretion to be selective among private applicants. Obviously, it is advantageous for a government that wants to be selective to claim private speech as its own. The question is whether and when the Constitution limits the government's ability to do this.

If government cannot effectively claim the protections of government speech for specialty plate programs, then they are private speech forums. In such forums, limits on the government's selectivity apply. The question then is whether the existing programs located in the legislature do, or can, meet the Constitution's viewpoint neutrality requirement.

A. *Specialty License Plate Programs as "Not a Forum at All"*

Not all government property on which private speakers can speak constitutes a forum. Some government aid, in the form of access or funding, does not constitute a "for[um] at all."[269] Where the government does not create a forum, it can be more selective in choosing the recipients of its largesse.[270] In a number of recent cases, the Supreme Court has upheld government selectivity among private speakers beyond the boundaries of the forum restrictions.[271] It is thus necessary to determine the boundaries of these categories where greater selectivity is permissible and to determine whether the specialty plate programs at issue fit within them.

1. Government Agents

To the extent that "government" can speak, it must be able to speak through agents.[272] Government officials are government agents,[273] as are government bodies.[274] Beyond government employees and entities, the

269. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

270. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.").

271. *Finley*, 524 U.S. at 587-88 ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (stating that government may "selectively fund" speech of government agents); *Forbes*, 523 U.S. at 674 (noting that government's exercise of "editorial discretion" is not subject to restrictions of forum doctrine).

272. *See, e.g.*, Cole, *supra* note 204, at 702 ("Because 'government' as such cannot speak, the only way it can express its views is by paying human beings to do so.").

273. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("[E]lected officials . . . espouse [the government's] position.").

274. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (stating that when "the University is speaking," it has the discretion of the government to "make content-based

government may "[enlist] private entities to convey its own message."[275] Like "government" generally, these agents must be able to choose among viewpoints to explain and advocate the "government's" position.[276] Because their speech is traceable to the government, its legitimacy depends upon the political accountability that supports government speech and justifies viewpoint discrimination within it.[277]

The Supreme Court condoned government control of its private agents' speech in *Rust v. Sullivan*.[278] That case involved a challenge to Department of Health and Human Services regulations implementing Title X of the Public Health Service Act.[279] The Act authorized the Department to fund "preventive"[280] family planning services, meaning that those where "abortion is a method of family planning" are excluded.[281] The Department's regulations prohibited Title X grantees from providing "counseling . . . or . . . referral for abortion"[282] and from engaging in activities that "encourage, promote or advocate abortion as a method of family planning."[283] Plaintiffs, Title X grantee organizations and doctors suing on behalf of themselves and their patients, argued that the regulations "impermissibly discriminat[ed] based on viewpoint" by favoring private speakers who advocated childbirth over those who advocated abortion.[284]

The Court responded that Title X grantees were government agents during the time that they worked under the auspices of the project.[285] As such, the government could appropriately prohibit them "from engaging in activities outside of the project's scope."[286] Such a prohibition was "not a

---

choices").

275. *Id.*

276. *Id.* ("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.").

277. *Southworth*, 529 U.S. at 235 ("When the government speaks [as an organizational body or through its agents], 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.").

278. 500 U.S. 173, 203 (1991).

279. *Id.* at 178.

280. *Id.* at 178-79 (stating that abortion exclusion "was intended to ensure that Title X funds would 'be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities'") (quoting H.R. CONF. REP. NO. 91-1667, at 8 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5068, 5081-82).

281. *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6 (1991)).

282. *Id.* (citing 42 C.F.R. § 59.8(a)(1) (1989)).

283. *Id.* at 180 (citing 42 C.F.R. § 59.10(a) (1989)).

284. *Id.* at 194.

285. *Id.* at 198.

286. *Id.* at 194.

case of the Government 'suppressing a dangerous idea,'"[287] but rather was akin to its funding a National Endowment for Democracy, which Congress could constitutionally require to promote one political philosophy over others.[288]

Not everyone aided by the government to speak, however, is a government agent. The public forum cases,[289] and particularly the extension of the public forum doctrine into "funding forums,"[290] confirm this. The mere fact that the government provides property access or financial assistance to private speakers is not enough to justify government viewpoint discrimination among them.[291] It is thus necessary to identify what additional factors make a private speaker a government agent.

Because political accountability is what justifies viewpoint discrimination by government agents, it is crucial that the government acknowledge a government agent's speech as its own.[292] Whether the acknowledgment in *Rust* was sufficient is questionable, given the common expectation by patients entering medical clinics that the speech of doctors in the clinics is not subject to government control.[293] Nevertheless, the democratic pedigree and public visibility of the statutory directive, and the doctors' ability to make clear that their speech is government-controlled,[294]

---

287. *Id.*

288. *Id.* (citing 22 U.S.C. § 4411(b) (1989)).

289. *Id.*: at 199-200 ("[T]he existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in [traditional public forums].").

290. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233-35 (2000) ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. . . . Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995) (finding that school's adherence to a rule of viewpoint neutrality in administering its student fee program to fund student speech would prevent "any mistaken impression that the student newspapers speak for the University").

291. *Rust*, 500 U.S. at 199-200 ("This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression.").

292. *See Southworth*, 529 U.S. at 229 ("The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself.").

293. *See* Post, *supra* note 220, at 174 & n.128 (distinguishing situation in *Rust* "where physicians routinely exercise independent judgment, [and so] patients come to expect and rely upon that judgment" from alternate scenario of government-created "special clinics in which all concerned were clear that what appeared at first blush to be 'physicians' were actually merely state employees, fully subject to [government control of their speech]").

294. *Rust*, 500 U.S. at 200 ("The doctor is always free to make clear that advice regarding

are at least arguably sufficient for the government to claim funded doctors' speech as its own.

But a mere claim by the government that particular private speech is its own cannot be enough.[295] The claim must be plausible in the context of the entire access or funding program.[296] The government's policy and practice of administering access to the subsidy is relevant,[297] as is the public's perception of the public or private nature of the expression.[298] Within a particular program, the government cannot pick and choose among speakers to call its agents.[299] The claim must be uniform throughout the subsidy program.[300] Moreover, a government agent must be pursuing a particular government policy identified within the scope of the authorized program.[301] Although the government policy can be speech-related, so as to explain or promote particular behavior or values,[302] it cannot be so broadly defined that it boils down to a policy to promote a range of private expression. A specialty license plate program is a government decision to create a private speech forum, not to promote speech by government agents.[303]

---

abortion is simply beyond the scope of the program.").

295. In the forum inquiry, the Court looks beyond the government's assertion of a right to choose among private speakers to determine whether, given the characteristics of the forum, it in fact has the right to do so. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (stating that television commissioner did not have "unfettered power to exclude any candidate it wished").

296. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (examining "the lawful boundaries" to a funding program that the government "has itself set").

297. *See Forbes*, 523 U.S. at 677 ("The Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.") (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)); AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 10 (1st Cir. 1994) ("[T]he Court also has stated that the government's intent must be gleaned from its policy and practice with respect to the property at issue."); *see also* Grace Bible Fellowship, Inc. v. Me. Sch. Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir. 1991) (stating that, in forum designation inquiry, "actual practice speaks louder than words").

298. *Forbes*, 523 U.S. at 675 (characterizing candidate debate as private speech forum in part because of "implicit representation of the broadcaster . . . that the views expressed were those of the candidates [and] not its own").

299. *See Rosenberger*, 515 U.S. at 833-34 (finding that, when the government "create[s] a program to encourage private speech," it cannot "discriminate based on the viewpoint of the private persons whose speech it facilitates").

300. *See id.* at 833 (noting that the government in *Rust* "used private speakers to transmit specific information pertaining to its own programs").

301. *Id.* ("We recognized [in *Rust*] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

302. Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) ("[G]overnment may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'") (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

303. *See Forbes*, 523 U.S. at 675 (finding that candidate debate was a private speech forum

The factors noted above indicate that neither the groups that obtain the right to specialty plate recognition nor the individuals who purchase the plates are government agents. Specialty plate programs broadly invite applications from any group able to gather enough public support to suggest that the proposed plate would be profitable.[304] The plates are generally understood by purchasers and viewers to be private speech.[305] The inconsistent groups and messages on the plates in any particular state defy an attempt by state governments to claim all specialty plate speech as their own.[306] Consequently, the only government policy that officials can claim to be pursuing is allowing private speakers with identities or messages consistent with public values to advertise those values with public assistance.[307] Such a broad designation of government policy is not a legitimate government agent designation.

2. Government Editorial Judgments

The government also avoids the viewpoint discrimination restrictions of forum doctrine when it exercises editorial discretion. Although the government action "involve[s] the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."[308] Because the decisions of the governmental editors are themselves speech, claims of viewpoint discrimination are inconsistent with their very nature.[309] Specifically in the context of public broadcasters, "[t]o comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints."[310] While some editors may abuse the power to discriminate

---

because "[t]he very purpose of the debate was to allow the candidates to express their views with minimal intrusion by the broadcaster").

304. *See, e.g., Talkback Live, supra* note 65 ("[A] legislator has the right to put in a bill to have any kind of a tag they want as long as they get the signatures required and put up the deposit.") (statement of Tom Gallagher, Florida Education Commissioner).

305. *See, e.g.*, Ritea, *supra* note 106, at A1 ("We have license plates that support animals, universities, Ducks Unlimited and I don't know what all. . . . It simply means if someone believes in a cause, they're willing to pay the money for the license plates.") (quoting Rep. Melinda Schwegmann).

306. *See, e.g., Talkback Live, supra* note 65 ("Some people might think that the Florida State University tag and the University of Florida tag could be pretty political, because when they plat [sic] that game which they played a couple of weeks ago, it became pretty political.") (statement of Tom Gallagher, Florida Education Commissioner).

307. Lee, *supra* note 48, at 15A ("[T]he Legislature has, by statute, given the citizens of Florida the right to petition the state for a license plate. . . . Additionally, the Senate has imposed nine policy questions to ensure that the license plate serves a broad public purpose.").

308. *Forbes*, 523 U.S. at 674.

309. *Id.* ("[A] broadcaster by its nature will facilitate the expression of some viewpoints instead of others.").

310. *Id.*

among viewpoints, "calculated risks of abuse are taken in order to preserve higher values."[311] Chief among these values is the exercise of the "widest journalistic freedom."[312] A threat to this value is "the risk of an enlargement of Government control over the content of broadcast discussion of public issues," were equal access rules to apply.[313] Making courts the arbiters of such equal access claims "could obstruct the legitimate purposes of television broadcasters," which is to determine "the treatment of public issues" and to remain "accountable" for their choices.[314]

Specialty license plate programs are not unified government speech acts — such as a public broadcaster's programming,[315] a government entity's report or newsletter,[316] or even a government-sponsored parade[317]—to which the protections of editorial discretion might appropriately apply. In each of these instances, rather than consisting "of individual, unrelated segments that happen to be transmitted together for individual selection by [private individuals]," each individual unit of communication "is understood to contribute something to a common theme."[318] By contrast, legislators generally do not view themselves as "editors" when they approve the particular "mix" of specialty license plates available for purchase,[319] and members of the public, while perhaps objecting to a

311. *Id.* (quoting CBS v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973)).

312. *Id.*

313. *CBS*, 412 U.S. at 125.

314. *Forbes*, 523 U.S. at 674-75 (citing *CBS*, 412 U.S. at 124).

315. Turner Broad. Sys. v. FCC, 512 U.S. 622, 636 (1994) ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics and in a wide variety of formats.'") (quoting City of L.A. v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986)).

316. *Cf.* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (holding that newsletter whose "contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes . . . receives the full protection of the First Amendment").

317. *Cf.* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 577 (1995) ("[I]n the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.").

318. *Id.* at 576 (explaining why private parade cannot be forced to accept unwanted marching unit).

319. Ritea, *supra* note 106, at A1 ("We have license plates that support animals, universities, Ducks Unlimited and I don't know what all. It simply means if someone believes in a cause, they're willing to pay the money for the license plates.") (quoting Rep. Melinda Schwegmann); *Talkback Live*, *supra* note 65 ("[W]hen we did the Cabinet meeting the other day, we did [a specialty plate] for bicyclists. You have one for salt water fishermen. And so there's a variety, about 48 different organizations, including the Challenger, that basically are there to raise money for different organizations and different things.") (statement of Tom Gallagher, Florida Education Commissioner).

particular plate's message, do not understand the compilation of plates approved to express an overall "message" or "theme."[320] Rather, both legislators and the public generally understand specialty plate programs to make a range of plate messages available to private individuals who can choose whether to purchase one, display it, and thereby claim it as their own. Because specialty plates are primarily understood as separate acts of individual expression rather than as a combined whole of government expression, the "higher value" of protecting the government's editorial discretion to pick and choose among plate applicants does not exist in this context.

3. Competitive Quality Judgments

The constraints of forum doctrine do not apply with full force when the government aids private speakers pursuant to a program established to identify and promote "excellence."[321] This "inherently content-based . . . threshold" distinguishes the program from those where the Government "indiscriminately 'encourage[s] a diversity of views from private speakers.'"[322] In the latter, a court can require that access criteria be viewpoint-neutral, whereas in the former "absolute neutrality is simply 'inconceivable.'"[323]

The Supreme Court approved potentially viewpoint-based criteria in the context of a facial challenge to "highly selective" National Endowment for the Arts (NEA) funding.[324] In *National Endowment for the Arts v. Finley*,[325] the Court found that, because the Government was acting as "patron" rather than as "sovereign," the free speech clause constraints on its discretion were less stringent.[326] The Court emphasized that "[t]he NEA's mandate to make aesthetic judgments" set its task apart from that

320. ACLU Press Release, supra note 64 (arguing that approval of "Choose Life" plate is inappropriate because it concerns "the most divisive public issue in our state today," and is "quite different from traditional specialty tags which support projects such as universities, the environment, the arts, endangered species and education").

321. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998) (finding that "excellence" threshold of National Endowment for the Arts "sets it apart" from noncompetitive subsidies).

322. Id. (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)).

323. *Id.* at 585 (quoting Advocates for the Arts v. Thomson, 532 F.2d 792, 796 (1st Cir. 1976)).

324. *Id.*

325. 524 U.S. 569 (1998).

326. *Id.* at 587-89 ("[A]lthough the First Amendment 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. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision [of standards] are not constitutionally severe.").

of other government actors charged with making "comparatively objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or [to] the second class mailing privileges available to 'all newspapers and other periodical publications.'"[327]

The question is how far the government's ability to make "quality" or "excellence"-based judgments extends. In particular, the government's primary argument for selecting among specialty plate messages is that it has the right, and the obligation, to approve those plates that are consistent with public values.[328] This "quality" measure mirrors the standard approved in Finley.[329] Thus, its legitimacy depends upon whether specialty plate programs can be characterized as the same sort of government-as-patron program approved in *Finley*.

Crucial to *Finley's* approval of such a quality judgments program is that it has boundaries.[330] These boundaries distinguish such a program from a private speech forum, where the rule against viewpoint discrimination applies with full force.[331] It is thus necessary to determine what these boundaries are. That the government can discriminate more freely in administering a quality judgments program suggests that, as with government editorial judgments, "risks of abuse" are tolerated in order to serve "higher values."[332] In the context of government editorial judgments, the primary higher values served are adding the unique voice of the government editor to the marketplace of ideas,[333] and thereby augmenting

---

327. *Id.* at 586 (quoting Hannegan v. Esquire, Inc., 327 U.S. 146, 148 n.1 (1946)) (citations omitted).

328. *See, e.g.*, Heyser & Knepler, *supra* note 175, at A16 ("[Legislator's] spellbinding speech about racism compelled the House of Delegates to remove the Confederate flag from a proposed license plate."); Lee, *supra* note 48, at 15A (stating that Senate's "nine policy questions . . . ensure that the license plate serves a broad public purpose" and protects against approval of plates that "advertise a negative fringe idea").

329. *Finley*, 524 U.S. at 576 (noting that statute directs NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public") (quoting 20 U.S.C. § 954(d)(1) (1965)) (alteration in original).

330. The extent of the government's ability to engage in explicit viewpoint discrimination, even in a quality judgments program, is unclear after *Finley*. Although approving the "decency and respect" criteria for arts funding, the Court also mentioned as relevant to its decision that the challenge was facial, rather than as applied, *id.* at 580, that the criteria were "hortatory" rather than mandatory, *id.*, and that there was no evidence that the NEA would "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," *id.* at 587.

331. *See id.* at 586 (distinguishing NEA quality judgments program from the "limited public forum" created by a university when it decides to subsidize the speech of "all student organizations that [are] 'related to [its] educational purpose'") (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 824 (1995)).

332. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998) (quoting CBS v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973)).

333. *See id.* at 675 (stating that "exercise of journalistic discretion" is "speech activity" with

rather than constricting the speech available for public consumption. Determining when these same values are served with respect to government quality judgments marks the boundaries of this type of forum.

Government speech—alone or produced through interaction with private individuals or entities—is a free speech clause value when the prerequisites for legitimate government speech are met. The primary prerequisite is government accountability for its role in shaping the speech that enters the marketplace of ideas.[334] Accountability comes most fundamentally from visibility.[335] In the context of a quality judgments program, this means that the government can claim the discretion that attaches to it only when it acknowledges responsibility for making quality judgments.[336] A related requirement of accountability is the consistency of the government's articulated intent with its practice.[337] To claim the discretion of a quality judgment program, the government must acknowledge responsibility for making quality judgments with respect to all of the private speakers subsidized by the program.

These requirements thus far, however, allow the government broad leeway to articulate and apply a "consistent with public values" access rule to almost any government-provided speech opportunity. This ability to subvert the private speech forum neutral access rules suggests that something more is required for the government to create and administer a legitimate quality judgments forum.[338] In *Finley*, the Court emphasized that identifying and promoting "excellent" expression was the primary purpose of the program,[339] and that the NEA held a "mandate" to make these

---

which courts should not interfere).

334. *Id.* at 675 ("[C]ontrol over the treatment of public issues" is properly situated with "licensees who are accountable for broadcast performance") (quoting *CBS*, 412 U.S. at 124); *see also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, . . . it is, in the end, accountable to the electorate and the political process for its advocacy.").

335. *See, e.g.*, Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 49 (2000) ("[C]lear identification of speech as the government's enhances accountability by permitting the citizens to know what positions the government has taken and to reject them, if necessary, at election time.").

336. *See Southworth*, 529 U.S. at 229 (finding that, where government is "responsible for [speech's] content," the Court will evaluate it as government speech).

337. *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.").

338. *Id.* at 832 (rejecting university's argument that its "substantial discretion in determining how to allocate scarce resources to accomplish its educational mission" justified choosing between religious and nonreligious publications in allocating student publication funding).

339. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998) (noting that establishment of NEA represents a "national policy of support for the . . . arts in the United States," and criteria for grants include "artistic and cultural significance" and "professional excellence")

aesthetic judgments.[340] Rather than being idiosyncratic to the program under review, these boundary-establishing elements are essential to the legitimacy of a government quality judgments program.

The first requirement—that the government program be primarily directed to promoting "excellent" expression—ensures accountability of the government's decision to enter and influence the marketplace of ideas. This means that the program must be established with a primary expressive goal clearly visible. While in other free speech contexts, that the government aims only incidentally at speech helps to validate its action,[341] the opposite is true when the government seeks to enter the speech market. "Incidental" quality-based speech judgments pose the great danger that they may be made unaccountably.

The second requirement—that a government entity have a "mandate" to make quality-based judgments—ensures accountability of the decision to vest the responsibility for making quality-based judgments in a particular entity. The visibility of the vestiture helps to ensure that the entity charged with making the quality judgments has some expertise to do so. That the entity has particular expertise reduces the risk of abuse of the discretion to discriminate.

Moreover, the Court emphasized in *Finley* that the NEA grants were not only "selective," but were also "competitive."[342] Scarcity alone does not justify discrimination that may be viewpoint-related.[343] Because of the purpose of the program, the need to make competitive decisions among applicants does justify such discrimination.[344] "Competitive" decisions in the context of a quality judgments program mean that qualified applicants are selected from a significantly larger pool.[345] This type of competitive selection process is essential to the legitimacy of a quality judgments program for several reasons. One is that such competitive decisions are necessary to ensure the prestige, and thus credibility, of the "excellent"

(quoting 20 U.S.C. §§ 953(b), 954(c)(1) (1965)).

340. *Id.* at 586.

341. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (holding that incidental restriction of speech is subject to less demanding review than government action aimed at speech directly).

342. *Finley*, 524 U.S. at 585 ("The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants. . . .'") (quoting Advocates for the Arts v. Thomson 532 F.2d 792, 795 (1st Cir. 1976).

343. *Rosenberger*, 515 U.S. at 835 ("The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.").

344. *Finley*, 524 U.S. at 587-88 ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.").

345. *Id.* at 585 ("The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects.").

designation. If the government is to be able to claim the discretion of a speaker in making its quality based judgments, it must do more than rubber stamp applications. Its voice must make a meaningful statement. That a program is competitive in this way also provides a crucial political process guarantee against the risk of invidious viewpoint discrimination. That many do not receive the benefit helps ensure accountability of quality decisions because the disadvantaged group includes politically powerful sources.[346] Where only a few are "selected out" the great danger exists that purported "quality"-based judgments mask viewpoint discrimination in what is otherwise an open forum.

Finally, another factor that supported the government-as-patron designation in *Finley* was that the government was spending money.[347] In other contexts, the government's spending of money justifies discrimination among recipients that would violate the Constitution if done in the context of regulation.[348] In addition, accountability may be heightened when the government spends money because funds are a limited resource, and so decisions about how to spend them are highly visible.[349] Although not dispositive when it is present, the factor of government spending is quite important when it is absent; for example, when the government program makes money rather than spends it. Not only does the lack of government spending make discrimination less visible, it also suggests that promoting "excellent" expression is not really the government's primary goal.[350]

These factors indicate that specialty license plate programs do not constitute legitimate quality judgments programs where "risky"

---

346. *Cf.* Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) ("[There] is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

347. *Finley*, 524 U.S. at 588 ("Congress has wide latitude to set spending priorities.").

348. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (stating that subsidy out of state's general fund can favor in-state residents); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93-94 (1984) (stating that, where state acts as market participant, it can favor its own residents).

349. *See Healy*, 512 U.S. at 211-12 (Scalia, J., concurring) (noting, but not relying upon, a possible "important economic reality: A State is less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing, nonprotectionist, purposes").

350. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 682 (1992) (stating that status of airports as "commercial establishments funded by users fees and designed to make a regulated profit" and their need to "provide services attractive to the marketplace" means that "it cannot fairly be said that an airport terminal has as a principal purpose promoting 'the free exchange of ideas'").

government discretion is justified by "higher values."[351] First, although some governments claim responsibility for some quality judgments about the content of specialty plates, they arguably do not claim responsibility for all. Second, even if the programs are viewed as generally granting access to plates "consistent with public values," the accountability guarantees are not met. Specialty plate programs do not state a primary purpose to promote "quality" expression. Third, to the extent that they state a "consistent with public values" purpose, decisionmaking authority is vested in the legislature, which has no particular expertise to determine what constitutes "excellent" expression. Fourth, and quite importantly, specialty plate programs "select out" rather than "select in," creating the great danger of viewpoint discrimination. Finally, through these programs the governments make money rather than spend it. The accountability that attaches to government spending programs thus does not apply. For all of these reasons, specialty license plate programs do not constitute legitimate quality judgments programs where relaxed Free Speech Clause restraints apply.

B. *Specialty License Plate Programs as Private Speech Forums*

The more obvious characterization of specialty license plate programs is as private speech forums. While the speech occurs on a government-issued identifying mechanism and is limited by the space made available, its content is both advertised by the government and understood by the public as privately uttered. The wide range of plates made available and the fact that messages may contradict each other further confirm that the government has opened a previously unavailable speech opportunity to a class of private speakers. Courts reviewing the programs have characterized them as private speech forums.[352] If the specialty license plate programs are private speech forums, then "selectivity" limits apply.

---

351. *See Finley*, 524 U.S. at 583-84 (rejecting as "unlikely" respondents' claim that the NEA criteria "are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination"); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998) (noting that "risks of abuse" are tolerated to preserve "value" of editorial discretion).

352. Sons of Confederate Veterans, Inc. v. Holcomb, Case No. 7:99CV00530, 2001 U.S. Dist. LEXIS 538, at *5-13; Henderson v. Stalder, 112 F. Supp. 2d 589, 596 (E.D. La. 2000) (rejecting state's argument that specialty plate program does not create a forum for speech); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1102 (D. Md. 1997) (applying forum rule of viewpoint neutrality without deciding the type of forum). *But see* Higgins v. Driver & Motor Vehicles Serv. Branch, 170 Ore. App. 542, 2000 Ore. App. LEXIS 1751 (Or. Ct. App. 2000) (en banc) ("We believe that the proper course is to view the communication that occurs on state license plates, including, custom [vanity] plates, as state communication rather than as communication by the plate holders or a combination of both.").

1. Viewpoint Discrimination

In administering a private speech forum, the government may not discriminate according to viewpoint. The government does this when it permits speakers with some, but not all, viewpoints on a particular topic access to the forum.[353] Viewpoint neutral grounds for exclusion may relate to a speaker's popularity; for example, defining a "class" of speakers according to their elected or potentially electable status.[354] It is not permissible, however, for the government to evaluate viewpoints apart from the status or subject matter definitions of the forum.[355]

The current specialty license plate controversies present different viewpoint discrimination dangers. As one court has already held, denying specialty plate access to the SCV logo because of the Confederate flag's message is viewpoint discrimination.[356] That state officials reacted to public opposition does not change this determination.[357] Thus, with respect to the Confederate flag plate, the governments' defenses of their specialty plate programs depend upon characterizing them as something other than private speech forums.

The "Choose Life" specialty plate controversies, at least in the states that have approved the plate,[358] do not so clearly demonstrate viewpoint discrimination. While legislators acknowledge that they approved the plate because they approved of its message, in none of these states has a plate with a competing viewpoint been proposed and denied.[359] The wide range of plates available can support an inference of viewpoint neutrality,

---

353. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

354. *Forbes*, 523 U.S. at 682 (finding that candidate was properly excluded from debate "not because of his viewpoint but because he had generated no appreciable public interest"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (finding that rival union was properly excluded "based on the status" of not being the employees' elected representative).

355. *Rosenberger*, 515 U.S. at 832 (finding that it was impermissible to deny funding to otherwise qualified student group because of its "religious perspective").

356. *Glendening*, 954 F. Supp. at 1103-04 (stating that viewpoint discrimination in Maryland's SCV plate recall was "plain beyond dispute").

357. *Id.* at 1104 ("A desire to stem listeners' reactions to speech is simply not a viewpoint-neutral basis for regulation.").

358. Even where state legislatures have refused to approve the "Choose Life" plate, their reasons less clearly demonstrate viewpoint discrimination than in states denying plate access to the Confederate flag. *See Talkback Live*, *supra* note 65 (stating that Virginia proposal changed from "Choose Life" to "Choose Adoption," then stalled when the Senate Committee wanted to change the word "Choose" as well).

359. *See* Henderson v. Stalder, 112 F. Supp. 2d 589, 600 (E.D. La. 2000) (noting, but rejecting as defeating justiciability, defendants' argument that "plaintiffs have not alleged that they have actually gone through the process of obtaining a prestige plate"); Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *21 (M.D. Fla. Dec. 22, 1999) ("Since Plaintiffs have failed to even apply for the development of a specialty license plate which espouses their views under the Florida speciality [sic] plate statutory scheme, their claim is not ripe.").

making it dubious to determine that the decision to approve a particular plate constitutes viewpoint discrimination.[360] So, with respect to the "Choose Life" plate, a government's defense of its specialty plate program as a private speech forum is facially plausible until the legislature denies approval to a plate with a competing point of view.

Even when the administration of specialty plate programs is facially plausible because of lack of evidence of viewpoint discrimination in approval or disapproval decisions, the question remains whether the program's structure meets the requirements of the Constitution. In particular, the lack of evidence with respect to the grounds for approval and disapproval decisions stems from the wide discretion that the legislature has to craft the law as coalitions of legislators see fit. The basic question that must be addressed with respect to all of the specialty license plate programs at issue is whether the Constitution permits the legislature to create and administer a private speech forum.

2. The Separation of Powers Limit on a Legislature's Administration of a Private Speech Forum

The question at the heart of the specialty plate controversies is the government's discretion to be "selective" in granting speech opportunities to private speakers. That a specialty plate program is characterized as a private speech forum means that constitutional limits on the government's ability to be selective in choosing among private speakers apply. Courts usually enforce these selectivity limits against the executive officials who administer most private speech forums, requiring clear access standards[361] and uniform application of them.[362] This is a familiar form of judicial review. Where the forum administrator is the legislature, however, such review is more problematic. Specifically, requiring guidelines, reasons and

360. *See Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *21 ("[The statute approving the "Choose Life" plate] grants an opportunity for speech, but in no way does it prevent anyone's speech. No one is forced to carry the Choose Life license plate on his car. Florida motorists currently have thirty (30) other specialty plates and two (2) other regular license plates to choose from."). *But see Henderson*, 112 F. Supp. 2d at 601 ("By the very act of injecting 'the State's position which has been legislatively sanctioned' into a forum, First Amendment injury occurs.").

361. *See, e.g.*, AIDS Action Comm. of Mass, Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994) (finding transit authority's access policy so "vague and broad" that it leads to an unconstitutional "appearance of viewpoint discrimination" in its application); Air Line Pilots Assn., Int'l v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1154 n.5 (7th Cir. 1995) (stating that "taste and morality [are] standards too vague to be enforced" in administering a private speech forum).

362. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 803-04 (1985) (looking at both "practice" and "policy" to determine nature of private speech forum); *Air Line Pilots*, 45 F.3d at 1153 (stating that "factual inquiry into consistent policy and practice is necessary" to determine boundaries of a private speech forum).

uniformity with respect to pieces of legislation is in dramatic tension with the legislature's constitutionally mandated range of discretion.

Legislation is the most "selective" of government activities. Legislators can constitutionally vote for or against proposed legislation for good reason, poor reason or no reason at all.[363] They are answerable to their constituents for their individual votes rather than to heightened constitutional standards of equal treatment.[364] Legislators have this discretion because the political process protections of the Constitution are the primary guarantee of the fairness of the policy-based decision.[365] The political process protections are sufficient because the government's actions are visible, and so the government actors responsible are accountable for their decisions.[366]

By contrast, the Constitution's forum rules limit the government's ability to be "selective" as to the speakers who can gain access to the public property at issue. Most fundamentally, the Constitution imposes the equal treatment standard of viewpoint neutrality on the government when it chooses among private speakers. This standard applies because, in the context of making individual speech selection decisions, the political process is an inadequate constitutional protection. In fact, not only is it inadequate, it is constitutionally perverse. The free speech guarantee protects minority speech, while the political process reflects majority will.[367]

The fundamental inconsistency of legislative selectivity and the limits of selectivity in a private speech forum indicate that the legislature cannot constitutionally run one. The ability, and perhaps obligation, of legislators to pass on individual applications as they pass on other pieces of legislation — that is, to act according to "the . . . electorate's

363. *Politics*, THE ADVOCATE, Mar. 29, 1998, at 1B (describing senator who said that although "he normally votes against special license plates," he will vote in favor of the Girl Scouts' application because "I can't vote against mother, apple pie, Girl Scouts and the president of the Senate [who sponsored the legislation and jokingly offered Girl Scout cookies as an inducement].").

364. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981) (explaining that rational basis review applies to Equal Protection Clause challenge to economic legislation).

365. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 245 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.").

366. *Cf.* New York v. United States, 505 U.S. 144, 168 (1992) (stating that Congress must encourage state action so that "state governments remain responsive to the local electorate's preferences [and] state officials remain accountable to the people").

367. *See* Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 120 S. Ct. 1346, 1357 (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.").

preferences"[368]—means that viewpoint considerations will almost certainly enter into some decisionmaking.[369] The fact that legislators are not constrained by clear, objective standards and so can decide on the basis of viewpoint infects the forum.[370] The knowledge by potential applicants that legislators sponsor and approve legislation undoubtedly chills applicants.[371] These facts make a legislative attempt to run a private speech forum unconstitutional.

A comparison among several of the Confederate flag logo cases illustrates the difference, with respect to judicial review, of executive, as opposed to legislative, administration of a private speech forum. In *Sons of Confederate Veterans, Inc. v. Glendening*, the court noted that the Maryland Legislature, by statute, authorized the Motor Vehicle Administration (MVA) to issue specialty license plates to "qualifying non-profit organizations."[372] The legislature, by statute, also provided the grounds by which an organization could "qualify" for the plates and by which an individual motor vehicle owner could obtain them.[373] Beyond status and payment requirements, the legislature did not provide any grounds for rejecting particular applications. At the time that it recalled the SCV's Confederate flag logo plate, the MVA had not issued more specific regulations with respect to specialty plates. Instead, it relied upon its regulations governing the issuance of personalized or "vanity" license plates. Specifically, it relied upon the regulation that allows the MVA to refuse to issue or recall a plate if "it could be considered objectionable or

368. *Id.*

369. *See* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2276 (2000) ("[S]tudent elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits . . . do[] nothing to protect minority views but rather place[] the students who hold such views at the mercy of the majority.").

370. *See* United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg. Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998) (explaining that, in administering a private speech forum, official's decision to limit access must be "constrained by objective criteria" and not rest on "ambiguous and subjective reasons") (quoting Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996)).

371. *See* Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *10 (M.D. Fla. Dec. 22, 1999) (noting, but rejecting as "legally speculative," "Plaintiffs' suggestion that the current political climate does not augur well for the passage of a pro choice license plate law"); Gyan, *supra* note 115, at 1B (noting that Plaintiffs' attorney argued that "it would be 'futile' to him to get Louisiana lawmakers to vote for [some sort of pro choice plate]").

372. 954 F. Supp. 1099, 1100 (D. Md. 1997).

373. *Id.* ("To qualify for organization plates, a motor vehicle owner must satisfactorily demonstrate that he or she is a member of a nonprofit organization and is in compliance with MVA regulations. In addition, at least twenty-five owners of vehicles in a particular class must apply for the special registration plates, and at least twenty-five such plates must be issued initially. The vehicle owner must also pay a fee of $15 for the special organization registration plates.") (citations omitted).

offensive as a term of bigotry, a term of hostility, an insulting or derogatory term, or a racially degrading term."[374] Because the MVA was required to explain how its actions fit within its statutory mandate and to point to reasons within its broad statutory mandate that channeled its otherwise unconstitutionally broad discretion to choose among speakers, the court could identify the reason for the government action and compare it to the Constitution's free speech guarantee. In that case, the court held that the MVA's reason for recalling the SCV plate was based on unconstitutional viewpoint discrimination.[375]

Similarly, North Carolina courts were able to review and invalidate the state Division of Motor Vehicle's denial of specialty plates to the SCV.[376] In this instance, the challenge did not involve the Constitution's free speech guarantee, but rather statutory interpretation.[377] The DMV Commissioner had denied the SCV's specialty plate application based on her conclusion that the organization did not "meet the statutory criteria for a civic club."[378] The court interpreted the statute, determined its meaning according to the usual tools that determine legislative intent,[379] and held that the DMV had erred in denying the SCV specialty plate application.[380]

By contrast, SCV challenges to legislative action denying its plate applications must be more difficult because of the limits of judicial review. First, statutory boundaries such as those imposed in the North Carolina case will not apply in a meaningful way because courts will presume the legislature to know its own intent where terms are ambiguous, and the legislature has the power to change unambiguous terms to meet new circumstances. Second, and more significantly, courts will have difficulty enforcing constitutional guarantees of equal treatment where the different treatment occurs not within a piece of legislation, but between different

374. *Id.*

375. *Id.* at 1104 ("The Defendants' actions throughout this whole controversy belie any notion that they acted in a viewpoint-neutral manner.").

376. N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207, 209 (N.C. Ct. App. 1998).

377. *Id.* at 209 n.1 ("SCV's emblem strikingly resembles the Confederate flag. We are aware of the sensitivity of many of our citizens to the display of the Confederate flag. Whether the display of the Confederate flag on state-issued license plates represents sound public policy is not an issue presented to this Court in this case. That is an issue for our General Assembly. We are presented only with the issue of whether SCV-NCD has complied with the language of [the statute], and note that allowing some organizations which fall within [the statute's] criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restriction against content-based restraints on free speech.").

378. *Id.* at 209.

379. *Id.* at 210 ("It is a well-established tenet of statutory construction that the intent of the General Assembly controls.").

380. *Id.* at 211 ("[A]s SCV-NCD meets the four criteria enumerated by our General Assembly in [the statute], SCV-NCD qualifies for special registration plates.").

ones. Where the different treatment is not apparent in one legislative action, it is more difficult for a court to identify—and charge the legislature with–unconstitutional discrimination.[381] So, for example, the Florida court reviewing the legislature's approval of the "Choose Life" plate found the authorizing legislation, alone, to prove nothing with respect to the plaintiffs' free speech rights.[382] While denial of an application more directly limits free speech rights, the problem for a court is identifying the reason for the denial as unconstitutional. While statutes usually contain a statement of purpose that can guide a court's inquiry,[383] legislatures do not publish reasons for failing to approve proposed legislation. Individual legislators may state their reasons for failing to vote for a piece of legislation, but courts are loathe to rely on these individual statements as evidence of legislative intent.[384]

The two recent cases involving legislatures' denial of the Confederate flag logo on specialty license plates illustrate these difficulties with discerning legislative intent. In Virginia, the SCV's plate application, after much lobbying and a number of public hearings, made it through the legislative committee to the full legislature.[385] That body approved the plate without the flag logo. Before that body, the head of the legislature's Black Caucus had spoken against the flag logo, arguing that it sent a message of racial hatred. Media accounts linked the two events, giving the "reason" for the logo denial as its racially offensive meaning.[386] But for a court to make this linkage in a constitutional challenge is more problematic, as the court must attribute one legislator's motive to others, and then find that combined motive to be the legislature's purpose. The Supreme Court has cautioned against making this linkage.[387] Although the

381. *Cf.* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994) (stating that, while both an "evenhanded tax" on milk producers and a subsidy from a general fund to in-state producers may be presumed valid despite possible "adverse effects on interstate commerce," combination of the two within one piece of legislation renders it invalid under the dormant commerce clause, which prohibits discrimination by a state against out-of-state economic actors).

382. Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist LEXIS 22503, at *12 (M.D. Fla. Dec. 22, 1999).

383. A legislative statement of purpose, however, is not required. *See* Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) ("To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.").

384. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

385. *See supra* Part I.A.

386. Heyser & Knepler, *supra* note 175, at A16 (stating that the "spellbinding speech" was what "compelled" a legislative compromise approving the SCV plate without the flag logo).

387. *See O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently

district court in Virginia found the "motivation" behind the legislature's action to be unconstitutionally viewpoint-based, it relied on a finding that the legislature "targeted" the Confederate flag logo for disapproval after approving "hundreds" of others.[388] This type of "stark" demonstration of discriminatory purpose,[389] however, will rarely be present to the extent required to hinge a finding of invalid legislative action upon it.[390]

The dispute in Tennessee further illustrates the difficulties with discerning legislative intent. There, the SCV's plate application passed the Senate, but did not make it to the floor of the legislature. Instead, the House Calendar Committee "killed" it. Again, the media linked the procedural move with objections by black lawmakers.[391] For a court to find the legislature to have acted unconstitutionally by making such a move, which does not normally require explanation, would intrude upon the constitutionally guaranteed discretion of the legislature to act, in its processes, according to the interplay of political forces.

The Louisiana court came closest to the mark when it invalidated the state legislature's approval of the "Choose Life" specialty plate on the ground that free speech clause injury occurred because the state injected itself into what was supposed to be a viewpoint neutral speech forum.[392] According to that court, "Once a forum has been created which allows viewpoint discrimination, it is unconstitutional from the moment the discriminatory forum is created."[393] That court hinged its decision, however, on a finding that the state claimed the "Choose Life" message as its own, a position not stated in the authorizing legislation and which a number of legislators and the state's governor publicly disputed. If it is the

---

high for us to eschew guesswork. We decline to void [legislation] which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

388. SCV v. Holcomb, No. 7:99CV00530, 2001 U.S. Dist. LEXIS 538, at *14 (W.D. Va. Jan. 18, 2001).

389. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

390. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) ("We do not assume unconstitutional legislative intent even when statutes produce harmful results.") (citing Washington v. Davis, 426 U.S. 229, 246 (1976)); Hunt v. Cromartie, 2001 U.S. LEXIS 3206, at *14 (Apr. 18, 2000) (burden in Plantiffs to show that race motivated the legislature in drawing voting districts is a "demanding one") (quoting Miller v. Johnson, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring)); Miller v. Johnson, 515 U.S. 900, 914 (1995) ("In the absence of a pattern as stark as those in *Yick Wo* [all Chinese applications denied] or *Gomillion*, impact alone is not determinative and the court must look to other evidence of race-based decisionmaking.") (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977)); *Gomillion*, 364 U.S. at 341 (serpent-shaped voting district with dramatic racial impact provides "mathematical demonstration" of discriminatory purpose); Shaw v. Reno, 509 U.S. 630, 646-47 (1993) (objective evidence may demonstrate discriminatory legislative purpose in "exceptional cases").

391. Humphrey, *supra* note 189, at A3.

392. Henderson v. Stalder, 112 F. Supp. 2d 589, 600 (E.D. La. 2000).

393. *Id.* at 601.

government's purpose to own the message that is constitutionally determinative, then the legislature could simply re-pass the authorizing statute with a careful statement disassociating itself from the message. The legislature's ability to do this, and thus immunize itself from meaningful judicial review, illustrates the more fundamental constitutional problem with the forum–that the legislature is administering it. It is the legislature's "unbridled discretion" to enact or reject particular pieces of legislation that is fundamentally inconsistent with what must be constitutionally channeled discretion "to permit or deny expressive activity" within a private speech forum.[394]

V. STRUCTURING A CONSTITUTIONAL SPECIALTY LICENSE PLATE PROGRAM

Most current specialty license plate programs violate the Constitution because the legislative approval process encourages viewpoint discrimination in a private speech forum. Although the legislature must lose some control over the content of specialty license plates in order to make a program constitutional, the government more broadly need not abdicate all authority over the appearance of the state's license plates when it decides to run a specialty plate program. By following a few guidelines, a state can establish and administer a constitutional specialty license plate program.

A. *Remove Approval of Individual Applications from the Legislature*

Like choosing which individuals will be subject to particular rules and prohibitions, choosing the speakers who may gain access to a private speech forum is properly an executive function. This separation of powers is necessary to ensure that a forum, which must be viewpoint neutral, is in fact so in application. The legislature must constitutionally delegate individual decisionmaking authority in a private speech forum to some entity outside the legislature so that the forum access decisions can be subject to meaningful judicial review.[395]

Most important is that the legislature already have a specialty plate approval process administered by a body outside the legislature, such as the state's department of motor vehicles.[396] Some states have recently

394. *Id.* (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56 (1988)).

395. *Cf.* INS v. Chadha, 462 U.S. 919, 954 n.16 (1983) ("Executive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.").

396. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997) (noting that the Maryland decisionmaking authority is vested in the Motor Vehicle

changed procedures[397] or are considering doing so.[398] The decisionmaking authority can approve individual specialty plate applications pursuant to either general[399] or more detailed statutory authorization.[400] In either situation, the decisionmaker will understand that both the authorizing legislation and the constitutional equal access guarantees bound its discretion, and that in response to a challenge it must provide reasons for an access decision that demonstrate that it observed these boundaries.

B. *Establish Clear, Non-Viewpoint Discriminatory Access Standards*

Access to a private speech forum must be reasonable and not viewpoint discriminatory. Reasonableness refers to the compatibility of private speech with the other uses of the forum.[401] Because of the limited space on a license plate and its primary vehicle identifying function, many access rules will be reasonable. Specifically, states could eliminate specialty license plate programs entirely without constitutional impediment.[402] The primary question, then, is whether an access standard is viewpoint discriminatory on its face, or accords the decisionmaker sufficient discretion that the standard will permit viewpoint discrimination as applied.

If an agency wants to retain the discretion to deny some specialty plate applications, it must promulgate regulations that it can uniformly and consistently apply to all specialty plate applications. Such standards, articulated before an application denial, guard against claims of "unbridled

---

Administration); N.C. Div. of Sons of Confederate Veterans v. Faulkner, 509 S.E.2d 207, 210 (N.C. Ct. App. 1998) (noting that the North Carolina decisionmaking authority is vested in the Division of Motor Vehicles).

397. *SCV South Carolina*, *supra* note 17, at B2 ("A South Carolina license plate bearing the Confederate battle flag will be the first produced under a new procedure for issuing specialty plates, the Department of Public Safety says.").

398. *See* S. 1329, *supra* note 46 (moving specialty plate authorization from the legislature to the Department of Motor Vehicles).

399. *See, e.g.*, *Faulkner*, 509 S.E.2d at 210 (recognizing specialty plates "[i]ssuable to a member of a nationally recognized [tax exempt] civic organization" that provides "at least 3000 applications for that civic club plate").

400. *See* S. 1329, *supra* note 46 (requiring that groups applying for specialty license plates "not discriminate on the basis of race, nationality, religion, political party affiliation or sexual orientation").

401. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.").

402. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683-85 (1992) (finding a solicitation ban in airport reasonable because of "[t]he inconveniences to passengers and the [congestion] burdens on [airport] officials").

discretion"[403] or "post-hoc policy formulation"[404] that may "conceal a bias against the viewpoint advanced by the excluded speakers."[405] The standards, of course, must be facially viewpoint neutral. Some access standards obviously meet this requirement, such as those that require nonprofit status, marketing plans or initial purchase commitments. Other standards stated broadly in terms of "taste," "morality," "politics," or "controversy" on their face permit too much discretion by the decision maker to discriminate according to viewpoint.[406]

Less certain as to their constitutionality are standards between these two extremes. States commonly want to grant license plate access to private speakers, but limit "offensive" types of expression. In the context of vanity plates, where individual drivers choose their unique letter/number configurations, states commonly prohibit configurations that appear as vulgar sexual references, profanity or hate speech.[407] To the extent these limitations are constitutional in the vanity plate context, they are constitutional in the specialty plate context as well.[408] In particular, states can prohibit certain words and references that offend public sensibilities, so long as they do so clearly and consistently.[409] So, for example, Maryland's denial of logo plates with a naked Buddha or the letters "FU"[410] could meet constitutional standards if Maryland had a clear and consistent policy of prohibiting sex depictions or references on license plates.

But, while the vanity plate access standards may apply to specialty plates as well, once the access administration is moved to an administrative

403. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755 (1988).

404. Air line Pilots Ass'n, Int'l v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1153 (7th Cir. 1995) ("The government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message.").

405. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812 (1985).

406. *See, e.g., Air Line Pilots Assn.*, 45 F.3d at 1154 n.5 (holding that factors of "taste," "morality," and "political" factors are "standards too vague to be enforced"); *see also* Leslie Gielow Jacobs, *The Public Sensibilities Forum*, NORTHWESTERN L. REV. (forthcoming 2001) (setting out constitutionally permissible access standards for nonpublic forums, including "vanity" license plate programs).

407. *See, e.g.*, McMahon v. Iowa Dep't of Transp., 522 N.W.2d 51, 55 (Iowa 1994) (holding that state can choose to reject letter combinations that are "sexual in connotation or otherwise offensive"); 761 IOWA ADMIN. CODE 401.6(321)(d) (2001) ("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 into any of these categories.").

408. *See* Jacobs, *supra* note 406 (setting out boundaries of a legitimate "public sensibilities forum," arguing that state vanity license plate programs can fall within it, and articulating permissible public sensibilities standards that limit the risk of invidious viewpoint discrimination).

409. *See id.*

410. *MVA to Revoke*, *supra* note 130, at 1A.

agency that is subject to judicial review, a fundamental difference between the nature of the license plate access makes those standards probably less applicable in the specialty plate context. The difference between the two types of plates is that, while vanity plate messages are often apparently trivial or indecipherable,[411] specialty plates, by their nature, send a message of affiliation with a group or cause. Usually, these messages do not contain specific words that can be identified as offensively sex-related, vulgar or hateful. Instead, public offense comes from dislike or disagreement with the group or cause. This type of viewpoint-related public "offense" cannot justify the government's denying access to a private speech forum.[412]

Consequently, the constitutional applications of the vanity plate standards to specialty plate applications will be few, while the temptation to use the standards to suppress disliked viewpoints will be great. A comparison of vanity and specialty plate messages illustrates their difference. As to vanity plates, it should be constitutional for a state agency to deny an application for a "MOMN8ER" configuration,[413] so long as the policy prohibits hate configurations in general, or specific advocacy of hate, violence or inferiority directed at any type of group of persons.[414] This is different, however, from a state agency prohibiting the SCV from displaying the Confederate flag as part of its trademarked logo. The message of the logo is one of affiliation with a group, not a directed expression of hatred.[415] Absent the use of specifically defined words or images that offend public sensibilities in ways that can be stated generally, so as not to aim at particular viewpoints, the exclusion is unconstitutional.

C. *Administer the Program Consistently*

A decisionmaker must administer a specialty license plate program consistently. As the Court has emphasized, both "the policy and the practice of the government" are relevant to determine the extent to which

411. Elaine Viets, *Vanity, Thy Name Is License Plate*, ST. LOUIS POST-DISPATCH, INC., May 5, 1992, at 3D (listing examples of "incomprehensible vanity license plates").

412. Jacobs, *supra* note 406 (arguing that while specific public sensibilities standards that have a primary application to the mode of expression can be constitutional in the license plates context, general standards that prohibit "offensive" expressions are unconstitutionally vague, leaving administrators too much discretion to discriminate according to viewpoint).

413. Judy Fahys, *State's Tag Team Tries to Keep it Tasteful; DMV Tries to Keep Tags Tasteful*, THE SALT LAKE TRIBUNE, Oct. 17, 1991, at A1 (vanity license plate configuration interpreted to mean "mormon hater" rejected by Utah DMV).

414. *See* Jacobs, *supra* note 406 (arguing that such standards should be constitutional in the context of vanity license plates).

415. See Dimmick v. Quigley, No. C96-3987S1 (N.D. Cal. July 14, 1998) (order granting in part and denying in part defendant's motion for summary judgement), at 9 (distinguishing "HIV POS" vanity plate from those with "inherently offensive" racial slurs).

the government has opened a private speech forum.[416] Lower courts reviewing government agencies' administration of private speech forums have underscored that the access rules that the government can constitutionally enforce are those evidenced by its "consistent policy and practice."[417] So, for example, while an administrator may have the authority to deny access to some "sexually explicit speech and/or patently offensive" speech, it cannot allow access to some speech within that category but deny access to other speech "at least as sexually explicit and/or patently offensive."[418] What is required is the application of "neutral standards . . . quite precisely."[419]

In addition to clear, narrow standards, then, evidence of consistent enforcement will help demonstrate the constitutionality of a specialty plate program. Although record- keeping is not constitutionally required, it can help ensure and demonstrate consistency. With respect to any application denial, a decisionmaker should explain its decisions according to established access guidelines, and should maintain records of previous decisions as precedents to ensure uniform application of the standards.

VI. CONCLUSION

The current legislatively-run specialty plate programs mix two constitutionally inconsistent commands. The first is for legislators to enact laws that reflect the majority interests and values. The second is for them to administer a private speech forum in a way that does not discriminate according to viewpoint. The conflicting mandates render it almost certain that the administration of a private speech forum by the legislature will result in viewpoint discrimination. The legislature's broad discretion to enact or fail to enact laws based upon its perception of the public interest make it almost impossible for courts to determine if the constitutionally prohibited viewpoint discrimination has occurred.

These observations lead to the conclusion that a legislature cannot constitutionally run a private speech forum. Of course states can choose to make specialty license plates available to their citizens. To do so, however, they must remove administration of the program from the legislature. With clear, non-viewpoint discriminatory standards, administered consistently by an entity subject to meaningful judicial review, a specialty license plate program can meet the Constitution's free speech guarantee.

---

416. Cornelius v. NAACP Legal Def. Fund, Inc., 473 U.S. 788, 802 (1985).

417. Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1152 (7th Cir. 1995).

418. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 10 (1st Cir. 1994).

419. *Id.* at 13.